THE CONTOURS OF RELIGIOUS LIBERTY IN SOUTH AFRICA

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The political transformation of South Africa in 1994 from a racist oligarchy to “an open and democratic society based on human dignity, equality and freedom” brought about radical changes in regard to almost every aspect of freedom of religion or belief, inspired to a large extent by principles of international law pertinent to that freedom. The pre-1994 era of South Africa’s political and constitutional history was characterized by, among other things, totalitarian state interference in matters of religion or belief. By proclaiming South Africa to be a Christian state and enforcing certain scruples of a distinct faction of Protestant Christianity upon the entire community, the legislature did not uphold the principle of equal treatment of different religious communities. Religious expression and political opinion in South Africa was furthermore subject to discriminatory state control and censorship.

The current South African Constitution can be described, as far as religion and religious diversity are concerned, as one of profound toleration and accommodation. Generally, it allocates to church institutions the rights in the Bill of Rights to the extent required by the nature of the right and the nature of the church as a juristic person; it guarantees the free exercise of religion; it sanctions freedom of assembly and freedom of association of “everyone”; it protects the right to self-determination of religious communities∗ and makes

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1 S. AFR. CONST. 1996, § 39(1)(a); see also id. §§ 1, 7(1), 36(1).
5 S. AFR. CONST. 1996, § 8(4).
6 Id. § 15(1).
7 Id. § 17.
8 Id. § 18.
9 Id. §§ 31, 235.

The Constitutional Court has on several occasions emphasized the vital importance of religion as a component of South Africa’s constitutional democracy. In *Christian Education South Africa v. Minister of Education*, Justice Sachs had this to say:

There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

The “new South Africa” was committed to abide by international standards of human rights protection. Customary international law, as well as self-executing international agreements, are thus part of the law of the land unless

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10 Id. §§ 181(1)(c), 185–86. See generally Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.
12 *Christian Educ. S. Africa v. Minister of Educ.* 2000 (4) SA 757 (CC) at 779–80 (S. Afr.); see also *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 550 (S. Afr.) (Sachs, J.) (reiterating the above); *Prince v. President, Cape Law Soc’y* 2002 (2) SA 794 (CC) at 848 (S. Afr.) (Sachs, J., dissenting) (noting that “where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile”).
14 Id. § 231(d).
they are inconsistent with the Constitution or an Act of Parliament. The 1996 Constitution furthermore instructs courts of law to prefer an interpretation of legislation that is consistent with international law. When interpreting the constitutional Bill of Rights, courts of law are permitted to consider comparable foreign law, but are compelled to take international law into account. They are evidently precluded from following international law directives that are at odds with constitutionally protected rights.

A statute enacted in 2000 to flesh out the equal protection and non-discrimination provisions of the 1996 Constitution, and “to give effect to the letter and spirit of the Constitution,” states as one of its objectives, “to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.” It states that persons charged with interpreting its provisions “may be mindful of” international law, particularly the two Conventions just mentioned, as well as comparable foreign law.

The essence of international standards relating to freedom of religion or belief was encapsulated in Article 18 of the 1948 Universal Declaration of Human Rights, which provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

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15 Id. § 233.
16 Id. § 39(1)(c).
17 Id. § 39(1)(b).
18 Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 565 (S. Afr.).
19 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s. 2(a) (S. Afr.).
20 Id. s. 2(b).
22 Promotion of Equality and Prevention of Unfair Discrimination Act, s. 3(2)(b).
23 Id. s. 3(2)(c).
The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief\textsuperscript{25} essentially focused on censoring state-imposed constraints amounting to intolerance and discrimination founded upon the religion or belief of individual members of a political community, including children, or of groups of persons within such communities.\textsuperscript{26}

I. EQUAL PROTECTION AND NON-DISCRIMINATION

The 1996 Constitution guarantees equality of everyone before the law and the right to equal protection and benefit of the laws\textsuperscript{27} subject to remedial action "to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."\textsuperscript{28} The Constitution likewise prohibits unfair discrimination, directly or indirectly, by the State, as well as by any other person, based on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, or other similar grounds.\textsuperscript{29}

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination defines "discrimination" as:

\[\text{A}n\text{y distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.}\]

It should be noted that the prohibition of discrimination in the South African Constitution is not confined to the denial or impairment of recognition, enjoyment, or exercise of human rights and fundamental freedoms only, but embraces all instances of unfair discrimination; and it is not confined to


\textsuperscript{26} Id. arts. 2, 3, 4, 5(3).

\textsuperscript{27} S. AFR. CONST. 1996, § 9(1).

\textsuperscript{28} Id. § 9(2).

\textsuperscript{29} Id. § 9(3)-(4); see also Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s. 1, para. (a) (S. Afr.).

\textsuperscript{30} CERD, supra note 21, art. 1; see also CEDAW, supra note 21, art. 1; 1981 U.N. Declaration, supra note 25, art. 2(2); Discrimination (Employment and Occupation) Convention, art. 1(1)(a)-(b), June 25, 1958, 362 U.N.T.S. 31; Convention Against Discrimination in Education, art 1(1), Dec. 14, 1960, 429 U.N.T.S. 93.
distinctions, exclusions, restrictions, or preferences in public life only, but also extends to discrimination in the private sphere of a person’s day-to-day life. “Discrimination” as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act entails:

[A]ny act or omission, including a policy, law, rule, practice, condition or situation, which directly or indirectly—

(a) imposes burdens, obligations or disadvantage on, or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.\(^{31}\)

The grounds mentioned in the Constitution as bases for unlawful discrimination include religion, conscience, or belief.\(^{32}\) The Constitution creates a rebuttable presumption that discrimination based on any of these grounds (or any of the other grounds mentioned by name in the non-discrimination provisions) is unfair.\(^{33}\) A discriminatory distinction, exclusion, restriction, or preference which is unfair may nevertheless be lawful if it is found to be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.\(^{34}\) This raises the question of what exactly is meant by “unfair” in contradistinction to “unreasonable” discrimination.

If discrimination is based on any of the grounds mentioned in the Constitution—including religion, conscience, or belief—it is presumed to be a matter of unfair discrimination;\(^{35}\) and conversely, if differentiations between groups of persons are not based on any of the listed grounds, unfairness must be established.\(^{36}\) Differentiation for purposes of the law based on grounds not mentioned in the Constitution will only be considered unfair if it treats people differently “in a way which impairs their fundamental dignity as human beings.”\(^{37}\) The Promotion of Equality and Prevention of Unfair Discrimination

\(^{31}\) Promotion of Equality and Prevention of Unfair Discrimination Act, s. 1.


\(^{33}\) Id. § 9(5).

\(^{34}\) Id. § 36(1).

\(^{35}\) Prinsloo v. Van der Linde 1997 (3) SA 1012 (CC) at 1025 (S. Afr.); see also Brink v. Kitshoff NO 1996 (4) SA 197 (CC) at 217 (S. Afr.); Pillay v. MEC for Educ. 2006 (6) SA 363 (EC) (S. Afr.) (holding that if discrimination is based on several grounds, unfairness will be presumed if any one of those grounds is listed in the non-discrimination clauses).

\(^{36}\) Khosa v. Minister of Soc. Dev. 2004 (6) SA 505 (CC) at 535 (S. Afr.).

\(^{37}\) Prinsloo, 1997 (3) SA at 1026; see also Hoffman v. S. Afr. Airways 2001 (1) SA 1 (CC) at 16 (S. Afr.); Khosa, 2004 (6) SA at 536. In Harksen v. Lane, the Constitutional Court deviated from its earlier decision in Prinsloo v. Van der Linde. Harksen v. Lane NO. 1998 (1) SA 300 (CC) (S. Afr.). In Harksen, the test for
Act confirmed the special link between fairness and human dignity. Under the Act, something not mentioned in the Constitution would constitute the basis of unfair discrimination if it "(i) causes or perpetuates systematic disadvantage, (ii) undermines human dignity, or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground [listed in the Act]." 38

Once it has been established that the discrimination is "unfair," the further question will emerge as to whether the unfair discrimination is nevertheless reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. In affording substance to the reasonable prong of the limitations provision, South African courts have followed the Canadian case of R. v. Oakes, where Chief Justice Dickson held that the proportionality test inherent in the concept of reasonableness entailed three important components:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the . . . right or freedom, and the objective which has been identified as of "sufficient importance." 39

In the very first judgment of the South African Constitutional Court (proclaiming capital punishment to be unconstitutional), the President of the Court, Arthur Chaskalson, outlined the essential components of the limitations clause in some detail:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on

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38 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s. 1(b); see also id. s. 2(b)(iv) (including amongst the object of the Act, "the prevention of unfair discrimination and protection of human dignity"). Earlier, in Prinsloo v. Van der Linde, the Constitutional Court noted that there might well be other forms of differentiation "which in some way affect persons adversely in a comparable and serious manner" and which for that reason will also be "unfair discrimination." Prinsloo, 1997 (3) SA at 1027.

proportionality . . . . The fact that different rights have different implications for democracy and, in the case of our Constitution, for “an open and democratic society based on freedom and equality,” means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.  

Reasonableness, therefore, entails more than a merely rational connection between the purpose to be served and the invasion of the constitutionally protected right; what is required in the end is “a balancing process within a holistic, value-based and case-oriented framework.” Etienne Mureinik described the new constitutional dispensation as “a bridge away from a culture of authority . . . to a culture of justification” with the Bill of Right as “a compendium of values empowering citizens affected by laws and decisions to


41 Matiso v. Commanding Officer, P.E. Prison 1995 (4) SA 631 (CC) at 659 (S. Afr.); see also Stuart Woolman, Riding the Push-Me Pull-You: Constructing a Test That Reconciles the Conflicting Interests Which Animate the Limitations Clause, 10 S. AFR. J. HUM. RTS. 59, 84–85 (1994) (noting that the reasonableness prong of the Limitations Clause requires that infringement of a fundamental right must “(a) be a means for effecting a substantial and pressing government concern; (b) be designed to impair the right in question as little as reasonably possible; (c) not impose costs on the burdened individual or groups which are not reasonably proportionate to the expressed objective; and (d) not negate the essential content of the right”).

42 Matiso, 1995 (4) SA at 656.
demand justification.”43 Dennis Davis spoke of "the inevitability of value-centred [sic] Constitutional jurisprudence."44

There is a certain anomaly in proclaiming that "unfair discrimination" is founded on the protection of human dignity on the one hand, and that "unfair discrimination" could be constitutionally tenable if the law, act, or situation constituting "unfair discrimination" is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Discrimination that has a negative impact on human dignity (unfair discrimination) can never be justifiable in an open and democratic society based on human dignity, equality, and freedom.

State-imposed laws have not entirely eliminated discrimination based on religion or belief in post-apartheid South Africa. This is evidenced by upholding the common-law (Roman-Dutch) position of denying the status of marriage to all polygamous and potentially polygamous unions, and applying that norm to Muslim and Hindu conjugal alliances.45 The 1993 Interim Constitution indeed authorized legislation that would afford legal recognition to a system of personal and family law adhered to by persons professing a particular religion, and the validity of marriages performed under a system of religious law subject to specified procedures.46 Such legislation was authorized notwithstanding any other provision in the Chapter on Fundamental Rights,47 and would therefore not be affected by considerations of gender equality and non-discrimination. The 1996 Constitution remedied the latter cause for concern by providing that recognition of marriages and systems of personal and family law must be consistent with other provisions of the Constitution.48 It also extended the reach of the envisioned legislation by

43 Etienne Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, 10 S. Afr. J. Hum. Rts. 31, 32 (1994); see also Etienne Mureinik, Beyond a Charter of Luxuries: Economic Rights in the Constitution, 8 S. Afr. J. Hum. Rts. 464, 469–70 (1992) (noting that constitutional review requires "justification of the law" taking on the form of "an appeal to some other right mentioned in the constitution, or to human dignity, or general liberty, or social utility").


47 Id.

authorizing the recognition of marriages concluded under "any tradition," thereby providing for the legalization of polygamous or potentially polygamous unions concluded under African customary law.

In 1998, the South African Parliament enacted legislation that afforded recognition of all existing (African) customary marriages, as well as future customary marriages that comply with the substantive requirements and formalities of the Act. Polygamy is not an obstacle to the recognition of such customary unions as marriages. No such legislation has been enacted to legalize Muslim or Hindu marriages, and this can raise questions of equal protection and non-discrimination. If one accepts the premise that a marriage is essentially a union between one man and one woman, one could perhaps argue that non-recognition of Muslim and Hindu marriages, though amounting to "unfair discrimination," is not unreasonable. However, by having taken sides against this traditional perception of a marriage through the legalization of polygamous African marriages, and also most recently of same-sex marriages, the South African legislature, backed by the Constitutional Court, has discredited this line of reasoning.

Given the discriminatory practices inherent in Islamic and Hindu family law, it would be extremely difficult for the legislature to recognize marriages based on those religious systems that would be consistent with "other provisions of the Constitution." However, the Muslim community might elect to follow a different strategy. An insightful law review article by a Muslim feminist proposed that Muslim personal law be recognized in terms of Section 15(3)(a) of the 1996 Constitution, so that its provisions can be brought into conformity with the Constitution's Bill of Rights as required by Section

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49 Id. § 15(3)(a)(i).
51 Recognition of Customary Marriages Act 120 of 1998 (S. Afr.).
52 In January 2007, Judge Chiman Patel of the Durban High Court refused the application of university lecturer Suchitra Singh to have her unregistered Hindu marriage recognized so that she could get a divorce, holding that non-recognition of her marriage did not offend her dignity and, if it had, could not be regained if a secular decree of divorce was granted (unreported). Singh v. Ramparsad Case No. 564/2002 (DCLD) para. 53 (Jan. 22, 2007) (S. Afr.) (unpublished), available at http://www.osall.org.za/docs/Hotdocs/Singh_v_Ramparsad.pdf.
53 Civil Union Act 17 of 2006 (S. Afr.).
54 Minister of Home Affairs v. Foure 2006 (1) SA 524 (CC) at 569 (S. Afr.).
15(3)(b). Under Islamic law, women are discriminated against, and the new constitutional dispensation in South Africa provides an opportunity to do something about that:

Even though the final Constitution promotes and protects the human rights of women through national machinery, their powers do not extend beyond the Constitution. Gradual social reform within the Muslim community, along with active participation by Muslim women, appear to be the more realistic safeguards and long term solutions for effective improvement to the status of Muslim women.57

South African courts, conscious of their constitutional obligation to develop the common law and customary law with a view to promoting “the spirit, purport and objects of the Bill of Rights,”58 have sought to remedy the discriminatory treatment of Muslim marriages by upholding the consequences of such marriages on the basis of the law of contract. For example, in Ryland v. Edros,59 the Court enforced contractual arrangements pertaining to maintenance and a compensatory gift, which according to Islamic custom attended a Muslim marriage.60 Since the parties in that case were indeed married according to Muslim rites (even though not according to South African law), and since their union was de facto monogamous, the Court could find nothing morally obnoxious in their conjugal relationship. The Court was not called upon to proclaim the marriage valid,61 and expressly confined the binding effect of its judgment to a potentially polygamous union that was in fact monogamous.62

In Amod v. Multilateral Motor Vehicle Accident Fund,63 the Supreme Court of Appeal took the matter one step further by also making the contractual

57 Id. at 205.
59 Ryland v. Edros 1997 (2) SA (CC) at 690 (S. Afr.).
60 Id. at 711; see also S. v. Lawrence 1997 (4) SA 1176 (CC) para. 101 (S. Afr.). The Court overruled an earlier judgment of the Appellate Division of the Supreme Court (as it was then called), where it held that contractual obligations attending an invalid Muslim marriage, as well as consequences intrinsic to the marriage (such as maintenance), were unenforceable. Ismail v. Ismail 1983 (1) SA 1006 (A) at 1019–20 (S. Afr.); see also Docrat v. Bhayat 1932 (1) T.P.D. at 125, 127 (S. Afr.).
61 At least one commentator saw this judgment as possibly a step toward affording legality to potentially polygamous marriages. See I.P. Maithufi, Possible Recognition of Polygamous Marriages, Ryland v. Edros, 1997 (2) SA 690 (C), in 60 TYDSKRIF VIR HEDENDAAGSE ROEMEINS-HOLLANDSE REG 695 (1997).
62 Ryland, 1997 (2) SA (CC) at 707.
63 Amod v. Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (CC) (S. Afr.).
obligations attending a Muslim marriage effective against third parties. The plaintiff in that case claimed damages for loss of support, in terms of the South African third party insurance law, from the person responsible for the death in a car accident of her “husband.” Chief Justice Mahomed noted that:

[The] new ethos [that prevails in contemporary South Africa] is substantially different from the ethos which informed the determination of the boni mores of the community when the cases which decided that “potentially polygamous” marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant’s action.  

Whereas the deceased had a legally enforceable duty to support the plaintiff and since that duty arose from a recognized religious marriage and was a duty which deserves recognition and protection, the plaintiff’s action for damages was upheld. As in the previous cases, the marriage was in this instance also de facto monogamous. The Court would not rule out the possibility that the principle enunciated in the judgment might also apply to de facto polygamous Muslim marriages and expressly left that question open.

The South African Constitution does not only prohibit unfair discrimination by the State, but also addresses discrimination by any other person based on, among other things, religion, conscience, or belief. Discrimination by persons other than the State had to be specified in national legislation. The 2000 Promotion of Equality and Prevention of Unfair Discrimination Act was enacted to give effect to this constitutional directive. The Act essentially focused on discrimination in the private sector based on race, gender, and disability. It outlaws, among other things, female genital mutilation which in some jurisdictions is practiced on religious grounds. It also prohibits “any practice, including traditional, customary or religious practice, which impairs

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64 Id. at 1331.
65 Id. at 1328.
66 Id. at 1331.
67 Id. at 1330.
68 Id.
69 S. AFR. CONST. 1996.
71 Id. §§ 7-9.
72 Id. § 8(b).
the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child."\(^{73}\)

The latter provision may constitute a cause for concern. Many religions discriminate against women by not permitting them to hold high-ranking ecclesiastical offices and/or becoming part of their clergy. Should it be decided that such discriminatory practices impair the dignity of women, a court of law may well be constrained to pronounce them unlawful and indeed unconstitutional.\(^{74}\) Affording to the State a competence to compel church institutions to ordain women (or homosexuals)\(^{75}\) as priests or as part of their clergy could be construed as an unbecoming interference by political authorities in the sovereign sphere of religious institutions, and in violation of the right to self-determination of faith-based communities,\(^{76}\) potentially leading to a most unfortunate confrontation between Church and State.\(^{77}\)

Although the Promotion of Equality and Prevention of Unfair Discrimination Act was contemplated by drafters of the 1996 Constitution "to prevent or prohibit unfair discrimination"\(^{78}\) in the private sphere, some of its provisions also addressed discrimination by the State.\(^{79}\) The reach of the Act within the sphere of state action was recently invoked before the Equity Court (established in terms of the Act). This was in reference to a challenge to the legality of a provision in the code of conduct issued by the governing body of the Durban Girls’ High School in terms of the South African Schools Act,\(^{80}\) prohibiting the wearing of nose studs by Indian/Hindu learners. The Equity Court, applying the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act to a public school, declared the provision in the

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\(^{73}\) Id. § 8(d).

\(^{74}\) Keep in mind that the Promotion of Equality and Prevention of Unfair Discrimination Act was enacted upon instructions of the Constitution to add substance to the principle of non-discrimination in the private sphere. See S. Afr. Const. 1996, § 9(4).

\(^{75}\) See Paul Farlam, Freedom of Religion, Belief and Opinion, in CONSTITUTIONAL LAW OF SOUTH AFRICA 41-1, 41-46 (Mathew Chaskalson et al. eds., 2004).


\(^{77}\) See Van der Vyver, Constitutional Perspectives, supra note 2, at 665–67; Van der Vyver, State-Sponsored Proselytization, supra note 2, at 841–43.


code of conduct, being an instance of discrimination based on religion, null and void.\textsuperscript{81}

II. DEFINING RELIGION

Drafters of international instruments relevant to religion for good reasons preferred to place freedom of religion and freedom of belief in the same basket. Religion is almost impossible to define.\textsuperscript{82} By linking it inseparably to freedom of belief, international law seemingly avoids that dilemma. Since the same protections apply to both, it is not necessary to draw a line between belief structures that qualify as a religion and those that do not.

Placing religion and belief in the same fold may not be altogether desirable. By grouping religion and belief together, limitations which in terms of Article 1(3) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief may be imposed on manifestations of the one will also apply to manifestations of the other.\textsuperscript{83} There may well be circumstances in which, for example, public-safety considerations would warrant limitations upon manifestations of a certain non-religious belief but not on the freedom to manifest a religious belief. Also, distinguishing between religion and belief cannot altogether be avoided in international law. For example, the right to self-determination of a people vests in a religious community, and not in one united by a non-religious belief structure. Implementing that right to self-determination therefore does require an insight into the \textit{essentialia} of "religion" as such.

Since the same entitlements included in freedom of religion also constitute the substance of freedom of belief, and both freedoms are subject to an identical set of limitations, the concept of religion does in a sense qualify the meaning to be attributed to belief. Since freedom of religion is regulated in international human rights instruments in conjunction with freedom of belief, the kind of beliefs that comes within the protection of those instruments must,

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\textsuperscript{81} \textit{Pillay v. M.E.C. for Educ.} 2006 (6) SA 363 (EC) (S. Afr.). The matter is currently before the Constitutional Court. It was rather surprising that the code of conduct was not first challenged on constitutional grounds. The Equity Court noted that it could not consider the constitutionality of the provision since it was challenged under the Promotion of Equality and Prevention of Unfair Discrimination Act. \textit{Id.} para. 38.


\textsuperscript{83} See 1981 U.N. Declaration, \textit{supra} note 25, art. 1(3).
broadly, be of the same kind as, or have something in common with, religious belief. Not every belief, in a word, is included in the protection afforded to religion or belief. It is not merely confidence in the truth of what one knows through the medium of one’s own faculties or in what others testify, allege, guarantee, or promise. The absence of sensorial or scientific verification of what one believes seems to be the link that places religion and belief in the fold of *eiusdem generis*.

The common denominator of religion and belief for purposes of the international law provisions under consideration is therefore acceptance of the existence of something or of a state of affairs, without the backing of sensorial observation, scientific demonstration or rational proof; that is, convictions founded on metaphysical assumptions. In a Zimbabwean case, it was decided that freedom of conscience, on the other hand, “is intended to encompass and protect systems of belief which are not centered on a deity or religiously motivated, but are founded on personal morality.”

South Africa was not afforded the luxury of avoiding a distinct conception of religion. Although the equal protection and non-discrimination provisions in the Constitution also place conscience, belief, and religion under the same umbrella, there are ample instances of laws and practices that are religion-specific, and therefore require a clear understanding, for legal purposes, of the concept of religion as such.

In a case dealing with the old censorship laws of the country, the Appellate Division of the Supreme Court (as it was then called) had to determine when a publication or object would be considered offensive to the religious convictions or feelings of a section of the South African population. The Court decided that “religion” essentially involves the belief in, some kind of commitment to, and the serving of, a Supreme Being or unseen power. Earlier, a governmental commission of inquiry found that the Church of Scientology, being “a religion without God and without reverence for a higher power,” cannot be regarded as a religion or a church.

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84 *In re Chikweche* 1995 (4) SA 284 (ZSC) at 290 (S. Afr.); see also Smith, supra note 76, at 219.
85 S. AFR. CONST. 1996, § 9(3). The Constitution proclaims the right of everyone to “freedom of conscience, religion, thought, belief and opinion.” *Id.* § 15(1).
86 Publications Act 42 of 1974 s. 47(2) (subsequently repealed) (S. Afr.).
87 *Publ’ns Control Bd. v. Gallo (Afr.) Ltd.* 1975 (3) SA 665 (A) at 672 (S. Afr.).
89 *Id.*
More recently, the Transvaal Provincial Division of the High Court was called upon to decide whether an agnostic pupil could rely on the constitutional provision proclaiming that attendance of religious observances in a state or state-aided institution (in this instance the German School in Pretoria) was to be “free and voluntary” to contest a school rule that made attendance of religious instruction mandatory. Judge Kees van Dijkhorst held that “religion” is not a neutral concept but denotes a “system of faith and worship” as “the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship.” He went on to say:

[Religion] cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section [on freedom of religion, belief, and opinion]. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion.

... When therefore s 14(2) of the interim Constitution and s 15(2) of the Constitution permit religious observances, this is a reference to the Jewish, Christian, Moslem, Buddhist and other faiths practising their religion at State and State-aided institutions. Religious observances ... does not mean a practice which neither Jew, Christian, Moslem, Buddhist, Hindu, nor other faiths recognise as such; where the Supreme Being is neither the God of Israel nor the Holy Trinity nor Allah the Merciful etc but a vague nonentity.

The fact that the Court included Buddhism in the list of religions while Buddhism does not believe in, worship, nor recognize a “superhuman controlling power” nor a “personal God or gods” must not pass unnoticed. In another matter involving conscientious objections to serve in the defense force, a South African court found that Theravada Buddhism, although a non-theistic religion, was nevertheless a “recognised religious denomination” within the meaning of the Defense Act. In the Constitutional Court, Justice Albie Sachs

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91 Id.
92 Id.
93 Id.
94 Hartman v. Chairman, Bd. for Religious Objection 1987 (1) SA 922 (O) at 934 (S. Afr.); see also In re Chikweche 1995 (4) SA 284 (ZSC) at 290 (S. Afr.) (holding that Rastafarianism has been accepted “as a religion in the wide and non-technical sense”).
has also had occasion to record that, in his view, "[n]ot all religions are deistic."\textsuperscript{95}

In yet another matter it was said that "[R]eligion involves more than a 'set of beliefs' and may also entail a belief in a supreme being, moral code, rituals, holy days and festivals, worship and prayer, a sacred text or scriptures and the existence of a social structure promoting it."\textsuperscript{96}

This again illustrates the difficulty of producing a definition for religion. Whereas atheism and agnosticism will qualify as a belief, it is doubtful whether non-belief can be said to be either a religion or a belief. However, in a comment on Article 18 of the Covenant on Civil and Political Rights, the Human Rights Committee preferred a wide definition of religion:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief . . . Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.\textsuperscript{97}

III. DENOMINATIONAL SPECIFICITY AND NATIONAL UNIFORMITY

The 1996 Constitution guarantees the right of everyone to "freedom of conscience, religion, thought, belief and opinion."\textsuperscript{98} In a case involving the sale of wine on a Sunday, the Constitutional Court endorsed the following definition of freedom of religion given by Chief Justice Dickson in the Canadian case of \textit{R. v. Big M. Drug Mart Ltd.}:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.\textsuperscript{99}

\textsuperscript{95} \textit{Christian Educ. S. Afr. v. Minister of Educ.} 2000 (4) SA 757 (CC) at 779 n. 43 (S. Afr.).

\textsuperscript{96} \textit{Taylor v. Kurtsteg NO} 2005 (1) SA 362 (W) at 377 (S. Afr.); see van der Schyff, supra note 82, at 290.


The Constitutional Court added that "freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs."\(^{100}\)

Freedom of religion, belief, and opinion raises important questions regarding the relationship between the religious and secular components of a political society and calls for a clear understanding of the distinction between (a) permitting a religious community to uphold within its own domestic sphere principles peculiar to that religious community and (b) imposing on the entire South African community principles upheld on religious grounds by distinct factions within that community.

A. **Accommodating Religious Diversity**

South Africa has come a long way since its Constitution used to assert that the peoples of the country believe in the sovereignty and guidance of Almighty God.\(^{101}\) In the 1996 Constitution, the name of God is only invoked twice: first in the closing phrases of the Preamble, where God is called upon to "protect our people," and the opening lines of the national anthem, "God bless [South] Africa," is repeated in six of the official languages.\(^{102}\) Schedule 2 of the Constitution prescribes the form of the oath or solemn affirmation accompanying the assumption of office by state officials and judges and directs that those preferring to take the oath shall confirm their commitment with the words: "So help me God."\(^{103}\) The provincial Constitution of the Western Cape was, according to its Preamble, enacted "in humble submission to Almighty God."\(^{104}\) The Constitutional Court upheld the constitutionality of this reference to "Almighty God," depicting those words—on the model of American judicial evaluations of references to "God" as a time-honored means of adding solemnity to, for example, a national motto or pledge of allegiance\(^{105}\)—as an instance of "ceremonial deism" that has no effect on the

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\(^{101}\) S. AFR. CONST. 1983, § 2.

\(^{102}\) S. AFR. CONST. 1996, pmbl.

\(^{103}\) S. AFR. CONST. 1996, sched.

\(^{104}\) CONST. OF THE W. CAPE, pmbl.

interpretation of the Constitution or in the respect of the rights of believers or non-believers. Such references to God may be offensive to “Christians, atheists, and persons adhering to a nontheistic religion (such as Buddhism),” but will not necessarily have a substantive impact on the religious neutrality expected of law-creating and law-enforcement agencies of the State.

The Constitution guarantees the right to self-determination of cultural, religious, and linguistic communities. In terms of the International Covenant on Civil and Political Rights, self-determination entails the following principle:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly speaks of “the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.” The South African Constitution captured the gist of these provisions by affording to cultural, religious, and linguistic communities the entitlement “to enjoy their culture, practise their religion and use their language,” and “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

In public education, South Africa remains favorably disposed toward promoting spiritual values in the minds of young people, and does so through the good offices of state institutions. The Constitution expressly proclaims the right of everyone “to establish and maintain, at their own expense, independent

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106 Ex Parte Speaker of the W. Cape Provincial Legislature 1997 (4) SA 795 (CC) at 812 (S. Afr.).
107 See Van der Vyver, Constitutional Perspectives, supra note 2, at 649–50; Van der Vyver, State-Sponsored Proselytization, supra note 2, at 819–22.
108 S. AFR. CONST. 1996, § 31; see also id. § 235.
112 Id. § 31(1)(b).
educational institutions” (including parochial schools), provided only that such institutions do not discriminate on the basis of race, are registered with the State, and uphold standards that are not inferior to those maintained by public educational institutions. 113 It also authorizes “[r]eligious observances . . . at state or state-aided institutions, provided that . . . those observances follow rules made by the appropriate public authorities . . . [and] are conducted on an equitable basis . . . [and] attendance at them is free and voluntary.” 114 Although independent educational institutions cannot as of right insist on State financial support, nothing would preclude the State from subsidizing such institutions. 115

The question of free and voluntary attendance of religious classes and ceremonies in state and state-aided educational institutions was in issue in a case involving the German School in Pretoria. 116 Religious education in the school was initially offered on a parochial basis (mainly Lutheran, but also Catholic), but since 1987, religious instruction was offered in a historical context and no longer from the perspective of any particular denominational confession. 117 Since then, and for that reason, attendance of religion classes became mandatory—and free only to the extent that no one was obliged to go to that school. 118 The plaintiff in the matter, a student in the German School, took issue with the School Association for being compelled to attend the religion classes. 119 The Court found that the constitutional right not to attend religious observances is one that can validly be waived by its beneficiaries and that the plaintiff had done exactly that by subjecting herself to the school’s rules and regulations when she enrolled as a student. 120

The right to self-determination is not absolute but must be exercised in a manner that is consistent with the principles enunciated in the Bill of Rights. 121 In Prince v. President, Cape Law Society & Others, the Constitutional Court was called upon to decide on the constitutionality of a law prohibiting the possession and use of a dependence-producing drug, 122 cannabis (better known

113 Id. § 29(3).
114 Id. § 15(2).
115 Id. § 29(4).
116 Wittmann v. Deutscher Schulverein 1998 (4) SA 423 (T) at 423 (S. Afr.).
117 Id. at 424.
118 Id.
119 Id. at 427.
120 Id. at 455.
122 Prince v. President, Cape Law Soc’y 2002 (2) SA 794 (CC) at 800 (S. Afr.).
in South Africa as “dagg” and similar to marijuana), in so far as that legislation was made applicable to its possession and use for religious purposes. The applicant in that case was a law graduate whose application for registration of his community service contract, as a prelude for admission to the practice of attorney, had been refused by the Cape Law Society. The Law Society judged that he was not “a fit and proper person” for legal practice because of two previous convictions for the illegal possession of cannabis and his stated resolve to continue using the drug. The applicant maintained that he was a member of the Rastafari religion, that cannabis was regarded by that sect as a “Holy Herb,” and that its use constituted an integral part of Rastafari rituals. The Constitutional Court acknowledged that “the right to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation places a substantial limitation on the religious practices of Rastafari.” However, if an exemption were to be made in regard to the possession and use of a harmful drug by persons who do so for religious purposes, “the State’s ability to enforce its drug legislation would be substantially impaired.” In a five to four decision, the Court declined to make an exception in favor of persons possessing or using cannabis for religious purposes.

In *Christian Education South Africa v. Minister of Education*, the constitutionality of a provision in the South African Schools Act, which prohibits corporal punishment in independent schools, was in issue. The Applicant, on Biblical grounds, claimed the right to apply corporal punishment in its parochial (independent) schools, and argued that the legislation being contested violated the right to self-determination afforded to religious communities by the Constitution. The Court would have nothing of it. The

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123 *Id.* at 799 n.4.
124 *Id.* at 800.
125 *Id.* at 799-800.
126 *Id.* at 800.
127 *Id.* at 799 n.4.
128 *Id.* at 799.
129 *Id.* at 836–37.
130 *Id.* at 842.
131 *Id.* at 844–45.
132 South African Schools Act 84 of 1996 s. 10(1).
Biblical texts cited by the Applicant\textsuperscript{135} referred to corporal punishment inflicted by parents on their own children and did not sanction persons acting \textit{in loco parentis} to do the same.\textsuperscript{136} Flogging of children had been designated in South Africa,\textsuperscript{137} and elsewhere,\textsuperscript{138} as a cruel and inhuman (or degrading) punishment; and, in terms of the Constitution, the right to self-determination may not be exercised “in a manner inconsistent with any provision of the Bill of Rights.”\textsuperscript{139}

Speaking for a unanimous court, Justice Sachs observed:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.\textsuperscript{140}

Failure to act on the part of governmental authorities in order to facilitate the practice of religion does not constitute a violation of the freedom of religion or belief. This was decided in a judgment of the Witwatersrand Local Division of the High Court when it declined to overrule a decision of the Independent Broadcasting Authority not to grant a broadcasting license (on several grounds) to a corporation with a particular religious agenda.\textsuperscript{141} Of course, if (everything else being equal) a broadcasting license were to be


\textsuperscript{136} \textit{Id.} at 765.

\textsuperscript{137} \textit{State v. Williams} 1995 (3) SA 632 (CC) at 648 (S. Afr.).


\textsuperscript{139} S. AFR. CONST. 1996, § 31(2).

\textsuperscript{140} \textit{Christian Educ. S. Afr.}, 2000 (4) SA at 779 (citations omitted).

\textsuperscript{141} \textit{Kingdom Radio (Pry) Ltd. v. Chairperson, Indep. Broad. Auth.} 2006 (1) SA 421 (JHC) at 540(S. Afr.).
granted to the one but not to other religious organizations, that would amount to unbecoming discrimination.

B. Upholding General Conformity

Affording to religious communities the right to self-determination within the confines of their own ranks does not mean that the doctrinal specificity of a religious community can be imposed on the entire South African population. In its early jurisprudence, the Constitutional Court did not always come to grips with the full implications of this basic principle of religious neutrality. In Lawrence v. State, the Court had to consider the legality of one of the remnants of South Africa’s Sunday observance laws,142 namely an Act prohibiting the sale of alcoholic liquor on Sundays, Good Friday and Christmas day.143 A narrowly divided Court upheld the constitutionality of the Act on the ground that the South African Constitution does not include an Establishment Clause.144 “Establishment” practices could possibly be rendered unconstitutional, the majority held, if they amounted to unfair discrimination within the meaning of Section 8 of the Constitution.145 The majority also conceived circumstances in which endorsement of a religion or religious belief by the State could be held to contravene the free exercise provisions of Section 14, namely, if the State were to coerce people, directly or indirectly, to observe the practices of a particular religion, or place constraints on them that would hinder observance of their own religion.146 Such coercion had not been proven in Lawrence,147 and the Court consequently decided that the concerned proscription of the Liquor Act did not violate the free exercise provisions of the Constitution.148

In a concurring opinion, Justice Sachs (joined by Justice Mokgoro) proceeded on the assumption that the Religion Clauses in the Constitution do proscribe establishment.149 In essence, the concurring opinion held that the

142 Lawrence v. State 1997 (4) SA 1176 (CC) at 1186 (S. Afr.).
143 See Liquor Act 27 of 1989 (S. Afr.).
144 Lawrence, 1997 (4) SA at 1210; see also Ryland v. Edros 1997 (2) SA 690 (CC) at 703 (S. Afr.).
145 Lawrence, 1997 (4) SA at 1210. As Section 9 of the Constitution was not invoked by the appellant, the Court was not willing to consider further whether selection of the Christian Sabbath and Christian holidays as “closed days” for purposes of the Liquor Act did amount to unfair discrimination. Id.
146 Id. at 1211.
147 Id.
148 Id. at 1212.
149 Id. at 1234 (stating “[t]he objective of section 14 is to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must”).
coupling of Sundays, Good Friday and Christmas Day as "closed days" for the purpose of a grocer's wine license amounted to endorsement by the State of the Christian Sabbath (only the sale of wine on a Sunday was in issue in the case)\textsuperscript{150} and that such religious favoritism violates the establishment component of the constitutional provisions on freedom of religion.\textsuperscript{151} However, given that persons whose religious day of rest falls on another day of the week would feel compelled to close their grocer business on that other day and thus would suffer trivial commercial disadvantages,\textsuperscript{152} and, secondly, because constraining the sale of alcoholic beverage on certain days—albeit ones designated for religious reasons by Christianity—serves good secular purposes,\textsuperscript{153} the violation of freedom of religion is justified under the limitations provision of the Constitution.\textsuperscript{154} Justice Sachs consequently concurred in the decision of the Court holding that the concerned provision of the Liquor Act was not unconstitutional.\textsuperscript{155}

The dissenting opinion of Justice O'Regan (joined by Justices Goldstone and Madala) admitted that the Constitution does not contain an establishment clause,\textsuperscript{156} but nevertheless held that "public endorsement of one religion over another is in itself a threat to the free exercise of religion . . . ."\textsuperscript{157} Justice O'Regan disagreed with the proposition mooted by President Chaskalson that the Religion Clauses could only be invoked if state coercion was involved. Rather, favoritism of one religion over others would suffice, and this variety of establishment should be censured under the general guarantee of freedom of religion.\textsuperscript{158}

The minority opinion accordingly placed special stress on religious favoritism in South Africa's repressive past as a guide to constitutional provisions representing "a rejection of our history . . . ."\textsuperscript{159} Having decided that freedom of religion "requires . . . that the legislature refrain from favouring one religion over others" and that "[f]airness and even-handedness in relation to diverse religions is a necessary component of freedom of

\textsuperscript{150} \textit{Id.} at 1220.
\textsuperscript{151} \textit{Id.} at 1235.
\textsuperscript{152} \textit{Id.} at 1230.
\textsuperscript{153} \textit{Id.} at 1231.
\textsuperscript{154} \textit{Id.} at 1241.
\textsuperscript{155} \textit{Id.} at 1242.
\textsuperscript{156} \textit{Id.} at 1213.
\textsuperscript{157} \textit{Id.} at 1216.
\textsuperscript{158} \textit{Id.} at 1218.
\textsuperscript{159} \textit{Id.} at 1216.
Justice O’Regan decided that the proscription under consideration amounted to unconstitutional favoritism of the Christian religion. In particular, she highlighted the coupling of Sundays, Good Friday and Christmas Day for purposes of that proscription; the violation of religious freedom in this instance cannot be saved under the limitations clause.

In the latter context it should be noted that the dissenting opinion laid special stress on the fact that religious freedom was singled out in the 1993 Interim Constitution as one of a few constitutional rights that could only be subjected to limitations if those limitations were both reasonable and necessary. The necessity requirement has been omitted from the limitations provision of the 1996 Constitution, and one could perhaps argue that Justice O’Regan and the other two Justices who subscribed to her opinion might in the future be more readily persuaded that the limitation of freedom of religion in cases like the one under consideration would be constitutionally justified. However, that, in this writer’s respectful submission, does not follow. There are good reasons to hold that the necessity requirement was omitted, first, because it was tautological (stricter scrutiny in some cases is already part of reasonable considerations), and, second, because the necessity requirement created a misleading assumption as to the hierarchy of constitutionally protected rights and freedoms (as though the ones to which it applied were to be considered more important than those not included in the necessity category). Therefore, omission of the necessity requirement in the 1996 Constitution is without substantive consequence.

The constitutionality of legislation enacted for paving the way to bring South Africa’s education policy and practices in line with constitutional principles, the National Education Act and the South African Schools Act, was unsuccessfully contested. In the case of the South African Schools Act,

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160 Id. at 1218.
161 Id.
162 Id. at 1219.
163 Id. at 1213.
165 National Education Act 27 of 1996 (S. Afr.).
166 South African Schools Act 84 of 1996. The Act was initially introduced as a Bill of the Gauteng legislature but was subsequently enacted as an Act of Parliament to apply nationally.
167 See Ex Parte Speaker of the Nat’l Assembly: In Re the Constitutionality of Certain Provisions of the Nat’l Educ. Policy Bill 83 of 1995 1996 (3) SA 289 (CC) (S. Afr.) (rejecting the submission that the Bill would authorize the national authorities to usurp powers reserved for the provinces); see also Ex Parte Gauteng
the constitutional attack was focused on provisions that implicated the future of Afrikaans schools and Christian education. In a concurring judgment, Justice Sachs noted that:

[I]mmense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalizing access to education are strong, and even although these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past contained in the powerful postscript.\(^{168}\)

In a case instructing the legislature to amend a provision in the Marriage Act, based on the common-law definition of a marriage as “a union of one man with one woman, to the exclusion, while it lasts, of all others,” in order to make allowance for same-sex marriages,\(^{169}\) the Constitutional Court was confronted with amici briefs claiming that, from a religious perspective, “the institution of marriage simply cannot sustain the intrusion of same-sex unions.”\(^{170}\) These briefs referenced texts from the Old and New Testaments to support their claim. Justice Albie Sachs, delivering the unanimous decision of the Court, noted the many difficulties attending “the relationship foreshadowed by the Constitution between the sacred and the secular.”\(^{171}\) He went on to say:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people’s temper and culture, and for many believers a significant part of their way of life. Religious organisations constitute important sectors of national life and

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\(^{169}\) Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) at 529 (S. Afr.).

\(^{170}\) Id. at 558.

\(^{171}\) Id. at 559.
accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.\textsuperscript{172}

Yet, the Court must recognize the distinctive spheres which the secular and the sacred occupy and not force one into the sphere of the other;\textsuperscript{173} it must “accommodate and manage [the] difference of intensely-held world views and lifestyles in a reasonable and fair manner.”\textsuperscript{174} Moreover, the Court must not impose the religious views of one section of the population on the other, and it must in particular protect minorities against discrimination through majority opinions.\textsuperscript{175} The Court concluded “that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the right of religious organisations to continue to refuse to celebrate same-sex marriages.”\textsuperscript{176}

IV. CONSTITUTIONAL RIGHTS AND OBLIGATIONS OF RELIGIOUS INSTITUTIONS

The rights and freedoms enunciated in the Bill of Rights also belong to a juristic person (which in South African law includes ecclesiastical institutions)\textsuperscript{177} but only “to the extent required by the nature of the rights and the nature of that juristic person.”\textsuperscript{178}

The question as to whether a church institution has the right to freedom of religion has not been settled in South Africa. Professor Gerrit Pienaar argued that the church as a juristic person is not capable of having a faith or conscience and that the constitutional clauses on freedom of religion consequently do not apply to a church.\textsuperscript{179} Professor Malherbe, on the other hand, proclaimed outright that the constitutional provisions under

\textsuperscript{172} Id.
\textsuperscript{173} Id. at 561.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 562.
\textsuperscript{177} See NGK in Afrika (OVS) v. Verenigde Gereformeerde Kerk in Suid-Afrika 1999 (2) SA 156 (SCA) (S. Afr.) (holding that congregations of a particular Church have consistently been treated by the courts as distinct juristic persons).
\textsuperscript{178} S. Afr. Const. 1996; § 8(4).
\textsuperscript{179} Gerrit Pienaar, Konstitusionele Voorskrifte rakende Regspersone [Constitutional Provisions Concerning Juristic Persons], 60 J. Contemp. Roman-Dutch L. 564, 581 (1997); see also Stuart Woolman, Application, in CONSTITUTIONAL LAW OF SOUTH AFRICA, supra note 75, at 10-1, 10-8.
consideration afford church institutions, as juristic persons, the right to freedom of religion.\textsuperscript{180} Surely, religious freedom entails more than having faith or a conscience. As noted by Professor John Witte, “active religious rights” also include:

[A] religious institution’s power to promulgate and enforce internal religious laws of order, organization, and orthodoxy, to train, select, and discipline religious officials, to establish and maintain institutions of worship, charity, and education, to acquire, use, and dispose of property and literature used in religious worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.\textsuperscript{181}

Churches can exercise these powers as a matter of constitutional religious rights.

Religious institutions, as juristic persons, are also bound by the provisions of the Bill of Rights “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”\textsuperscript{182} That is to say, religious institutions are bound in instances where “a provision of the Bill of Rights is capable of being applied to the particular private relationship.”\textsuperscript{183} Their duty to comply may be tested in the secular courts of the land.

Courts of law will not “embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of . . . [religious] belief.”\textsuperscript{184} Yet, should a conflict arise as to the legal rights and duties of parties to a dispute, a court will not decline to give a judgment in the matter by reason of doctrinal issues that might have a bearing on those rights and duties.\textsuperscript{185} For example, South African courts have thus entertained jurisdiction, following a schism, to decide which one of two religious factions was entitled to the use of a

\begin{footnotesize}
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\item[182] S. AFR. CONST. 1996, § 8(2).
\item[185] Allen v. Gibbs 1977 (3) SA 212 (SEC) at 218 (S. Afr.).
\end{itemize}
\end{footnotesize}
particular name, or could lay claim to church property. The courts have also reviewed the decisions of an internal ecclesiastical tribunal.

In *Ryland v. Edros*, the court addressed to what degree the new constitutional dispensation may have affected the jurisdiction of state courts where “doctrinal entanglement” prevails, but did not make a clear decision. Judge Farlam stated that the American position as to “doctrinal entanglement” might well have become part of South African law in virtue of the new constitutional principles pertaining to freedom of religion. Although the South African Constitution does not have an Establishment Clause, the American rule pertaining to “doctrinal entanglement” can also be based on free exercise considerations.

In this writer’s respectful opinion, South African law concerning the jurisdiction of courts of law in matters where religious belief becomes an issue, is sound as it is. It is not for state institutions to judge the substance, or the truth or falsehood, of religious belief per se. However, it is a vital function of government to resolve, through its judicial arm, disputes pertaining to the rights and obligations of its subjects; and courts of law ought not to shy away from that responsibility merely because those rights and obligations cannot in a given case be established without considering doctrinal issues.

Religious institutions are particularly sensitive to the exercise of review powers by secular courts in regard to disciplinary proceedings of an

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186 *Old Apostolic Church of Afr. v. Non-White Old Apostolic Church of Afr.* 1975 (2) SA 684 (C) (S. Afr.).
190 *Ryland*, 1997 (2) SA at 703.
191 In *Ryland v. Edros*, Judge Farlam referred in this regard to *United States v. Ballard*, 322 U.S. 78 (1944). 1997 (2) SA at 703. However, that case (admittedly on free exercise grounds) simply reiterated that courts of law in America are precluded from establishing the truth or falsehood of religious belief. In a dissenting judgment, Justice Stone (in whose judgment Justices Roberts and Frankfurter concurred) was not prepared to hold that the constitutional guarantee of freedom of religion would afford immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one’s religious experiences. As to entanglement jurisprudence in the United States, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367 (1970); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Kedrof v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). In *Jones v. Wolf*, a majority of the Court decided that a property dispute emanating from a church schism could indeed be decided on a “neutral principle” and the Court consequently exercised jurisdiction to resolve the dispute. 443 U.S. 595 (1979).
ecclesiastical tribunal. In South Africa, decisions of an ecclesiastical tribunal cannot be taken on appeal to a secular court, but such decisions can be reviewed by a court of law. The court exercising review powers will not interfere in the domestic affairs of an ecclesiastical institution duly constituted and operating in terms of its rules, but will intervene if an ecclesiastical tribunal has failed to follow the prescribed procedural rules or acted ultra vires. The tribunal must apply its mind to the matter and not make arbitrary decisions; it must remain within the confines of its authority and not act ultra vires; it must maintain good faith and not be motivated by malice, ill will or spite; and it must act reasonably. In conducting disciplinary hearings, an ecclesiastical tribunal must uphold the “elementary rules of justice.”

Emphasis is often placed on the right of a person under investigation to be heard in his or her own defense (audi alteram partem), but even then, the ultimate test is not audi alteram partem as such but “the fairness of the process” in light of the nature of the proceedings. The audi alteram partem rule in any event does not apply if the person wanting to be heard lays claim to a privilege to which he or she will normally not be entitled.

Upholding the basic principles of justice and other constitutional rights of members of a religious organization has become critical in South Africa due to, and to the extent of, the applicability of the Bill of Rights obligations to juristic persons. In Taylor, the Witwatersrand Local Division of the High Court was confronted with exactly that dilemma. The Plaintiff in the matter had been served a notice of excommunication (cherem) from the Orthodox Jewish Faith

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195 Van der Vyver, supra note 3, para. 229.
196 Theron v. Ring van Wellington van die N.G. Sendingkerk, 1976 (2) SA 1 (A) at 10 (S. Afr.); Odendaal, 1961 (1) SA at 719.
197 Taylor, 2005 (1) SA at 397.
198 Mankathsu v. Old Apostolic Church of Afr. 1994 (2) SA 458 (TkJA) at 463–64 (S. Afr.); see also Jacobs v. Old Apostolic Church of Afr. 1992 (4) SA 172 (TkJG) (S. Afr.) (holding that a member of a Church cannot insist on inspecting the books and financial records of the Church when no such right has been vested in him by the Constitution of the Church).
199 Taylor, 2005 (1) SA at 362.
by a Jewish ecclesiastical court (Beth Din) and applied for the *cherem* to be set aside on the grounds that it violated his constitutional right to freedom of religion\textsuperscript{200} and, as a component of the right to self-determination, the entitlement to practice his religion and maintain religious associations with fellow members of his faith.\textsuperscript{201} That indeed was found to be the case, but the Court went on to consider the legality of those violations in view of the limitations provisions of the Constitution (Section 36). The Court noted that "[a] religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for."\textsuperscript{202} Having noted that "the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded,"\textsuperscript{203} and in the absence of evidence of bias or bad faith on the part of the Beth Din, the Court upheld the constitutionality of its *cherem*.\textsuperscript{204}

V. RELIGIOUS RIGHTS OF A CHILD

The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief in dealing with religious rights of a child lays special stress on the exercise of those rights within a family environment. The parents or guardians of a child have the right to organize the family life in accordance with their religion or belief;\textsuperscript{205} the child may have access to education in matters of religion or belief in accordance with the wishes of the parents or guardians and may not be compelled to receive teaching in religion or belief which goes against the wishes of the parents or guardians,\textsuperscript{206} and if a child is no longer in the care of his or her parents or legal guardians, their expressed wishes in matters of religion or belief are to be taken into account.\textsuperscript{207} In all of this, the best interests of the child remain the supreme guiding principle. The practices of religion or belief in which the child is brought up must, under no circumstances, be detrimental to his or her physical or mental health or to his or her full development.\textsuperscript{208}

\textsuperscript{201} Id. § 31(1)(b).
\textsuperscript{202} Taylor, 2005 (1) SA at 397.
\textsuperscript{203} Id. at 396.
\textsuperscript{204} Id. at 397.
\textsuperscript{205} 1981 U.N. Declaration, supra note 25, art. 5(1).
\textsuperscript{206} Id. art. 5(2).
\textsuperscript{207} Id. art. 5(4).
\textsuperscript{208} Id. art. 5(5).
South African law also places a high premium on the family environment. The Constitutional Court on one occasion observed:

The parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children.\(^{209}\) A Bill to consolidate and expand the laws dealing specifically with children is currently under advisement.\(^{210}\) A lengthy section in the Bill enumerates circumstances that must be taken into account in establishing the best interests of the child, and those circumstances include “the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment.”\(^{211}\)

The exercise of parental rights is subject to limitations dictated in general by the best interests of the child. Withholding medication or therapeutic treatment from a child for religious reasons,\(^{212}\) or claiming the sanction of Biblical texts instructing parents to apply “the rod of correction” for corporal punishment that exceeds the bounds of moderate chastisement,\(^{213}\) cannot be legitimized under pretenses of parental authority and the State has a duty to step in to prevent, counteract, and punish such abuses.

Nor can parents dictate to their children the religion they should adhere to upon reaching a stage in their development when they could and should decide for themselves. A case in point is one where the Transvaal Provincial Division of the High Court was petitioned to endorse a settlement agreement in a divorce action which contained the following provision: “Both parties undertake to educate the minor child [then three years old] in the Apostolic Church and undertake that he will fully participate in all the religious activities of the Apostolic Church.”\(^{214}\) The Court refused to make this provision an order of Court, basing its decision on the best interests of the child. Acting Judge Fabricius had this to say:

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\(^{210}\) *See* Children’s Bill, 2003, Bill 70-2003, enacted as Children’s Act at 38 of 2005.

\(^{211}\) *Id.* § 6(1)(i).

\(^{212}\) *See* *Hay v. B* 2003 (3) SA 492 (W) (S. Afr.) (overruling a decision of the parents who, for religious reasons, would not give their consent for their child to receive a blood transfusion considered by a pediatrician to be necessary for the survival of the child).

\(^{213}\) *See supra* text accompanying notes 133–41.

\(^{214}\) *Kotze v. Kotze* 2003 (3) SA 628 (T) at 629 (S. Afr.).
It is often stated that it is "useful" (if not essential) to ensure that a child belongs to a church, or adheres to a religion and partakes in its activities, so that it can, at a more mature age, at that stage exercise its free choice. There is a fallacy in this argument. It fails to appreciate fully the nature of the human being within the framework of the imposition of religious dogma upon it. . . . If a child is forced, be it by order of the parents, or by an order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution . . . .

CONCLUSION

South Africa is not a secular State but can perhaps best be depicted as a religiously neutral State. That is to say, religion is not a political taboo, but the Constitution requires evenhandedness in official dealings with religion and religious institutions. South African law thus, for example, permits religious observances in state and state-aided schools, subject to the principle of voluntary participation in such observances and affording to all religions with substantial support in the concerned school district a proportional share in conducting or participating in the religious ceremonies.

Persons are entirely at liberty to entertain a particular religious or non-religious belief without any state-imposed constraint whatsoever. Manifesting one's religion or belief can, on the other hand, be subjected to limitations with a view to the rights and freedoms of others or the general interest. Limitations on freedom of religion or belief must in all circumstances be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

South African law will not tolerate religious practices which threaten the life and limb of any person or that would otherwise constitute decidedly unbecoming conduct. Applying this norm in actual practice could result in irreconcilable conflict situations. One analyst has noted, with reference to the cases of *Prince* (the right of Rastafarians to use cannabis as part of a religious ritual) and *Christian Education of South Africa* (corporal punishment in parochial schools), that "religious associations have not fared particularly

215 *Id.* at 631.
216 Farlam, *supra* note 75, at 41–42.
217 *See supra* text accompanying notes 123–32.
218 *See supra* text accompanying notes 133–41.
well in the few cases to reach the Constitutional Court.” Religious belief is founded on faith—the acceptance as truth of something that cannot be demonstrated through empirical observation and analysis or substantiated through scientific proof or systematic analysis based on such demonstration or proof. Faith can therefore not be challenged on the basis of sense perception, scholarly verification, or logical reasoning. And the truly faithful will feel constrained to live up to their faith-based principles by actually practicing the prescribed manifestations of their creed. Prohibiting practices perceived by members of a faith community as a matter of religious obligation will therefore in many instances provoke resistance. As noted by the same analyst, the religious communities affected by Prince and Christian Education are now expected to simply “jettison a doctrine or two in order to comply with the broader social and political norms,” while belonging to “an ascriptive association” may have the implication of “one’s identity and life [being] shaped in a manner that does not readily permit the alteration of either belief or act.”

Unbecoming religious practices are furthermore not always easy to identify. It is undoubtedly true that financial gain rather than spiritual concerns may inspire the missionary practices of those religious sects that promise a place in heaven to converts in exchange for their personal life savings and selfless services—but who is to say? Many cults only use the guise of religion to entice a prestige- or profit-rendering following into their fold—but how can one tell? Insidious means of proselytism (creating a relationship of dependency through the deprivation of food and sleep, or down-right brainwashing) has become standard practice of several religious sects—but where exactly does one draw the line? Many self-professed “evangelists” shamelessly exploit the miseries of persons in distress, through poverty or illness, in order to secure their subservience—but what can one do? Here, legal proscription may not be the answer, lest juridical protection become the tool of political repression.

Courts of law must strike a fair balance between enforcing the norms of proper conduct and upholding respect for the internal sovereignty of religious institutions. Autonomy is a juristic person’s right to privacy and is to such social entities what the right to life is to natural persons. Avoiding state

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220 Id. at 44-65.
221 Id.
intervention in the internal affairs of non-state institutions, albeit through Bill of Rights constraints, is therefore in itself a constitutional value to be cherished and a political principle to be nurtured in deference to the kind of freedom that opposes totalitarianism. Courts of law, when called upon to do so, will adjudicate internal disputes within the ranks of a religious community, but will always do so with due deference to the sphere sovereignty of that community. Their review powers will only be applied to ensure that an ecclesiastical tribunal has acted within the confines of the domestic laws of the religious institution concerned, has not exceeded its prescribed powers, and has observed and applied the most basic principles of natural justice and fair play.

In defining the dimensions of freedom of religion or belief, and in designating the ambit of a religious institution’s sphere sovereignty, South African law attempts to stay abreast of, and to apply, general standards of international law—not merely as benevolence toward world opinion but as a matter of constitutional imperative. For those principles to filter through as constraints upon the decrees and ceremonies of religious communities and the day-to-day lives of the people within those communities is, however, still in its infancy.

South Africa belongs to that category of political communities where Bill of Rights decrees have been imposed from the top down rather than having grown from the bottom up. That is to say, the rights and freedoms protected by the Constitution have been dictated by internationally recognized norms, based largely on Western perceptions of right and wrong, which are in many instances not in conformity with the moral perceptions and customary practices of sections of the South African population. Some of the laws that are being drafted to implement the principles of human rights from time to time provoke strong voices of protest from groups within the country whose age-old customs may fall prey to the concerned legal reform measures.

Effective implementation of the human-rights based laws and judgments of the Constitutional Court within the entire country will in the final analysis be conditioned by the cultivation of a human rights ethos as the stronghold of all peoples and in all tribal communities of the “rainbow nation.” In this respect, South Africa still has many extra miles to run.