

**AN ASSESSMENT OF CONSTITUTIONAL GUARANTEES
OF RELIGIOUS RIGHTS AND FREEDOMS
IN SOUTH AFRICA**

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Declaration

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

March 2002

ABSTRACT

The central issue which is considered in this thesis is the meaning of the constitutional guarantees of religious rights and freedoms in South Africa. In other words, it is concerned with the functions of the state, through its laws or conduct, in respect of religion and with its relationship towards the institutional church or religious community.

It is argued that religious freedom is, in fact, a bundle of rights and freedoms. The "essential rights and freedoms of religion" which constitute this "bundle" are identified in the context of the historical development of religious rights. It is shown that religious rights theories have developed in the West which include concepts of freedom of conscience, the right to freely exercise religion, accommodation of pluralism of a confessional and institutional nature, equality of all religions before the law, nondiscrimination on the grounds of faith, institutional separation of church and state and some separation of state (or law) and religion.

It is maintained that no single principle could by itself guarantee religious freedom and that these rights and freedoms are mutually supportive of and mutually subservient to the highest goal of guaranteeing religious freedom. These essential rights and freedoms are therefore treated as constituting minimum standards for the protection of religious freedom and it is argued that religious freedom as protected in the South African Constitution should be interpreted to incorporate these multiple principles.

It is shown that, prior to the promulgation of the interim Constitution the essential rights and freedoms of religion were not adequately protected in South Africa and that the constitutional entrenchment of these essential religious rights was necessitated by various factors in the preconstitutional South African society.

The position with regard to religious rights and freedoms in post-Constitutional South Africa is considered by briefly sketching the broader constitutional context and by assessing the constitutional clauses protecting religious rights to determine whether the essential rights are protected. The religious rights provisions in the Constitution are analysed in detail in order to determine how they should be interpreted and implemented to ensure adequate protection of the essential rights and freedoms of religion in South Africa.

OPSOMMING

Die sentrale vraagstuk wat in hierdie proefskrif ondersoek word is die betekenis van godsdienstrete en vryhede wat in die Grondwet verskans word. Dit ondersoek die funksie van die staat, hetsy deur wetgewing of staatsoptrede, ten opsigte van godsdienstrete en ten opsigte van kerke of godsdienstgroepe.

Daar word geargumenteer dat godsdienstrete inderdaad uit 'n aantal regte, oftewel, 'n bondel regte, bestaan. Die essensiële regte en vryhede van godsdienstrete wat hierdie bondel opmaak word geïdentifiseer met verwysing na die historiese ontwikkeling van godsdienstrete. Teorieë van godsdienstrete het in die Weste ontwikkel wat die volgende essensiële regte en vryhede insluit: vryheid van gewete, die reg om godsdienstrete vrylik te beoefen, akkommodasie van pluralisme, gelykheid van alle godsdienstrete en nie-diskriminasie op grond van godsdienstrete, institusionele skeiding van kerk en staat en gedeeltelike skeiding van staat en godsdienstrete.

Die argument lui verder dat 'n enkele beginsel nie opsigself godsdienstevryheid kan waarborg nie en dat hierdie regte en vryhede mekaar wedersyds ondersteun en tesame die doel van godsdienstevryheid dien. Die essensiële regte en vryhede van godsdienstrete word daarom behandel as minimum standarde vir die beskerming van godsdienstevryheid en daar word 'n saak uitgemaak dat godsdienstevryheid in die Suid-Afrikaanse Grondwet geïnterpreteer behoort te word as synde hierdie veelvuldige beginsels in te sluit.

Die proefskrif toon dat die essensiële regte en vryhede nie voor die inwerkingtreding van die interim Grondwet in Suid-Afrika genoegsame beskerming geniet het nie en dat die konstitusionele verskansing daarvan deur verskeie faktore in die pre-konstitusionele Suid-Afrika genoodsaak is.

Die posisie na die inwerkingtreding van die Grondwet word geëvalueer deur kortliks die breë grondwetlike konteks te skets en vas te stel of die artikels in die Grondwet wat met godsdienstrete handel, inderdaad die essensiële regte en vryhede van godsdienstrete beskerm. Hierdie artikels word in diepte geanaliseer ten einde te bepaal hoe hulle geïnterpreteer en geïmplementeer behoort te word ten einde die essensiële godsdienstrete en vryhede genoegsaam te beskerm.

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CHAPTER 1

INTRODUCTION

1. Introduction

The central issue to be considered in this thesis is the meaning of the constitutional guarantees of religious rights and freedoms in South Africa. It is clear that there is no consensus on the meaning of religious freedom in South Africa. In fact, the members of the Constitutional Court¹ do not yet have even broad agreement on the meaning of the religious freedom provisions found in the South African Constitution.² This is not surprising given the complex history of the right, the complex nature of the right, the complexity of the sections themselves and the complexity of the South African society in which these rights are exercised.

In the process of interpreting the religious rights provisions in the Constitution, the following questions, amongst others, therefore arise:

How did religious rights emerge and what is the historical content of the right?

What are the essential elements of religious rights and freedoms?

Were religious rights and freedoms adequately protected in South Africa before 1994?

What is the effect of the history of religious rights in pre-1994 South Africa on the interpretation of the constitutional clauses protecting religious rights?

1 Smith 2001 *SALJ* 2-5 shows that Sachs J's comment in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) par 18 to the effect that there was no dissent in *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) on the definition of freedom of religion, is misleading because the Constitutional Court was, in fact, markedly divided on the very nature of freedom of religion in the *Lawrence* case. Five of the nine justices who decided the latter case did not hold Chaskalson P's view on the extent of the right as evidenced by the decision of O'Regan J at par 128 and the decision of Sachs J at par 79. See the discussion of the *Christian Education* and *Lawrence* cases in ch 5 and 6.

2 The Constitution of the Republic of South Africa 108 of 1996. This Constitution will be referred to as "the Constitution" or the "new" or "final" Constitution in this thesis. The Constitution of the Republic of South Africa 200 of 1993 will be referred to as "the interim Constitution".

What is the effect of the new constitutional dispensation on the protection of religious rights?

How are religious rights protected in the Constitution and how did this come about?

Are the essential elements of religious rights and freedoms protected under the new Constitution?

How are the complex sections protecting religious rights in the Constitution to be interpreted?

The aim of this thesis is to answer these questions in order to, in the end, reach an understanding of the religious rights guarantees in the South African constitutional context.

2. Delimitation

2.1 Legal nature of study

Religious rights issues can be researched at many levels³ and by means of a variety of methods. This thesis is of a legal nature. The central issue is the constitutional protection of religious rights in South Africa. In other words, it is concerned with the functions of the state, through its laws or conduct, in respect of religion and with its relationship towards the institutional church or religious community.

However, it is obvious that the existence of religious freedom is also influenced by other factors in society. Durham,⁴ for example, states that in any generalised reflection on religious freedom one should first recognise that there are certain "threshold conditions" that should be met before religious freedom can materialise. According to him

3 A report was prepared by the Work Committee: Religion of the HSRC Religion which was appointed on 30 November 1981 by the Main Committee of the Human Sciences Research Council Investigation into Intergroup Relations. The report was published as Oosthuizen GC, Coetzee JK, de Gruchy JW, Hofmeyr JH and Lategan BC *Religion, Intergroup Relations, and Social Change in South Africa* (1988 Connecticut). This Work Committee compiled the following nonexhaustive list of possible research themes (at p 2-3 of the report): Religiosity in South Africa; The function of religious communities in South Africa; Pluralism as religious phenomenon; Relationship between church and state; Ideology and religion in South Africa; Religion and economic aspects; The role of religion in motivating socio-political action; Concepts of man in South Africa; Methodology of the study of religion; and Religion and change.

4 Durham *Perspectives* 12-15.

... there must be some measure of (1) pluralism, (2) economic stability, and (3) political legitimacy within the society in question. In addition, (4) there must be some willingness on the part of differing religious groups and their adherents to live with each other.

A comprehensive discussion of social, political and economic inequalities and patterns of intolerance⁵ does not fall within the scope of this thesis since religious rights issues are here assessed from a legal and constitutional perspective. It is clear that, without the necessary empirical studies, the question of whether these threshold conditions are *de facto* satisfied in South Africa, cannot be addressed here.

However, the "threshold conditions" will be discussed in this thesis in the sense that the constitutional entrenchment and implementation of certain fundamental human rights can enhance the achievement or fulfilment of the threshold conditions which are necessary preconditions for the true protection of the essential rights and freedoms of religion. In turn, as will be shown, the constitutional and legal protection of the essential rights and freedoms of religion can have a positive or negative impact on patterns of intolerance, economic stability or political legitimacy in the country.

2.2 Hermeneutical study

Although a variety of methods are used in this thesis, it remains a hermeneutical study. The following approaches are used to determine the meaning and scope of the religious rights guarantees in the Constitution: a historical approach is used to determine the essential features of religious rights and to sketch the circumstances in which the constitutional religious rights guarantees emerged in South African; a *teleological* approach is used by taking into account the underlying purpose and objectives of the provisions; a grammatical approach is used to

5 Lerner *Group Rights and Discrimination* 81, 84-86 states that: " 'Discrimination' is a term used in the three major anti-discrimination treaties ... and it has a clear legal significance. This is not the case with the term 'intolerance', a rather imprecise and vague term which has been used to describe emotional, psychological, philosophical and religious attitudes that may prompt acts of discrimination or other violations of religious freedoms, or manifestations of hatred or persecutions against persons or groups of a different religion or belief." On the relationship between political intolerance and religion in South Africa, see Du Plessis and Gouws 2000 *Emory Int'l L Rev* 657-698.

determine the meaning of the words and concepts which appear in the religious rights clauses; a systematic approach is used by interpreting these clauses with reference to the other provisions of the Constitution and the existing legal order; and comparative discussions of provisions and case law from other systems are used on an *ad hoc* basis to support certain interpretations of the religious rights provisions.

3. Central theoretical argument

In essence, this thesis is about what freedom of religion means in South African law. It will be argued that religious freedom is, in fact, a bundle of rights and freedoms. The "essential rights and freedoms of religion"⁶ which constitute this "bundle" will be identified in the context of the historical development of religious rights. It will be shown that "no single principle could by itself guarantee such religious liberty"⁷ and that these rights and freedoms are "mutually supportive and mutually subservient" to the highest goal of guaranteeing religious freedom. These essential rights and freedoms will therefore be treated as constituting minimum standards for the protection of religious freedom and it will be argued that religious freedom as protected in the South African Constitution should be interpreted to incorporate these multiple principles. The thesis will assess the religious rights provisions in the South African Constitution to determine whether and how these essential rights are protected and how, as standards, they should be interpreted and implemented in the South African constitutional context to ensure adequate protection of religious freedom.

4. The structure of the thesis

The thesis has three main parts: a historical analysis of the emergence and content of the essential rights and freedoms of religion (chapter 2), an overview and evaluation of the legal protection of religious rights in South Africa prior to 1994 (chapter 3) and an analysis and assessment of the constitutionally entrenched guarantees of religious rights and freedoms in

6 The phrase "the essential rights and liberties [of religion]" was first used by Elisha Williams as quoted and referred to by Witte and Green *American Constitutional Experiment* 514. See their discussion at 514-531 on the essential rights and liberties of religion in the American constitutional context.

7 Witte and Green *American Constitutional Experiment* 530.

the South African Constitution (chapters 4-7).

The thesis commences with an investigation of the emergence of the essential rights and freedoms of religion. Chapter 2 distills the most widely accepted principles for the protection of religious freedom from the diverse theological and political traditions of the West. It is shown that, in the course of history and as a result of certain theological and political tensions, religious rights theories have developed in the West which include concepts of freedom of conscience, the right to freely exercise religion, accommodation of pluralism of a confessional and institutional nature, equality of all religions before the law, nondiscrimination on the grounds of faith, institutional separation of church and state and some separation of state (or law) and religion. These essential rights and freedoms of religions came to be regarded as the minimum standards of religious freedom. It will be argued that these "essential rights and freedoms" deserve acceptance in the South African constitutional context.

Chapter 3 analyses the position with regard to church and state, and law and religion in South Africa prior to the promulgation of the interim Constitution in the context of the above mentioned essential rights and freedoms of religion. It is shown that the essential rights and freedoms of religion were not adequately protected in South Africa before the commencement of the interim Constitution and that the constitutional entrenchment of these essential religious rights was necessitated by various factors in the preconstitutional South African society.

Chapters 4 to 7 consider the position with regard to religious rights and freedoms in post-Constitutional South Africa by sketching the broader constitutional context, assessing the constitutional clauses protecting religious rights, interpreting and refining the essential rights and freedoms in view of the particular South African constitutional context where they will be implemented, and assessing the constitutional practice in view of this refined interpretation of religious rights and freedoms in South Africa.

Chapter 4 first looks briefly at the genesis of the new constitutional dispensation in South Africa and the emergence of constitutional guarantees of religious freedom. The second part of the chapter contains a number of observations on constitutional interpretation, by way of introduction to the chapters in which the constitutional provisions protecting religious freedom

are considered.

Chapters 5 and 6 consider the religious rights provisions contained in the final Constitution with a view to ascertaining whether the essential rights and freedoms of religion, as identified in chapter 2, are constitutionally protected in South Africa. Chapter 5 focuses on the specific (essential) rights to freedom of conscience, free exercise of religion and religious pluralism, and chapter 6 deals with the separation of state (or law) and religion, equality of religion, and the institutional separation of church and state. Once it is clear that these essential rights are, in principle, protected by the Constitution, the relevant religious rights provisions in the South African Constitution are analysed in detail in order to reach a refined understanding of the meaning and role of the essential rights in South Africa and how they should be implemented to ensure adequate protection of religious rights and freedom in the South African constitutional context.

Reliance on and the implementation of the general interpretation,⁸ application and limitation provisions in the Constitution, known as operational provisions, form an intrinsic part of the process of interpreting and implementing the provisions on religious rights. Chapter 7 considers the (possible) effects of these operational provisions on the understanding of the constitutional sections entrenching religious rights and freedom. The discussion in that chapter is in effect a continuation of the discussion in chapters 5 and 6 but occurs, for practical reasons, in a separate chapter. Chapter 8 constitutes the conclusion to this thesis.

5. Terminology

In the last instance, an important terminological distinction should be highlighted at the outset. As mentioned above, the thesis is concerned with the functions of the state, through its laws or conduct, in respect of religion and with its relationship towards the institutional church or religious community. A distinction will be drawn between the issues of "state and religion"⁹

8 The general interpretation clause is discussed in ch 4.

9 In this thesis, "state and religion" is also sometimes referred to as "law and religion". "Law" in this sense only refers to state laws ("staatlike reg") and do not include nonstate laws such as church laws.

and "state and church".¹⁰ This terminological distinction can be illustrated with brief reference to Dooyeweerd's¹¹ doctrine of sphere sovereignty. Dooyeweerd's theory is accepted here only for purposes of showing, by way of introduction, that church and state, as institutions, have different competency spheres and different roles to play in respect of law and religion.

According to Dooyeweerd, church and state are essentially different types of institutions or, in the words of Van der Vyver,¹² "distinct social entities".¹³ This, simply speaking, implies that neither institution is subject to the other, that each has its own internal structure and that each has original inherent powers not derived from the other. In other words, both have internal legal rules to which members would be subject, and the competency to form such law inheres in the specific social entity.

There is, however, a symbiotic interrelationship between the fundamentally different societal structures. In the social environment, for instance, law and religion are distinct aspects in respect of which both the church and the state (or any other distinct social entity) have a role to play which is determined by their respective "leading functions".¹⁴ This, in turn depends on the structure and typical nature of the state and the church respectively.

Dooyeweerd typifies the state as a body politic, constrained as a result of its particular, distinctive nature to establish and maintain a legal order within its defined territory. The state's duty is therefore to regulate the legal relationship between itself and its citizens and among

10 When the phrase "church and state" is used in this thesis, the word "church" should be understood to also include religious institutions, communities and groups.

11 As set out in his work, *De Wijsbegeerte der Wetsidee* (1935-36).

12 See the exposition of Van der Vyver *Juridiese Funksie van Staat en Kerk* 63-99. For a brief English explanation of the theory see Van der Vyver *Introduction* xli-xliv. Whilst it is acknowledged that this is a Calvinist theory, it nevertheless remains an acceptable and valuable scientific theory explaining the interaction of church and state, and of state and religion. The theory was initially developed specifically with a view to explaining the legal relationship between church and state. This thesis is, however, not concerned with any other application of the theory.

13 The Afrikaans term is "samelewingskring".

14 In Afrikaans, "bestemmingsfunksie".

citizens *inter se*. Religious communities or churches, on the other hand, are essentially charged with fostering faith.

Each social entity is therefore directed by its own typical nature and purpose in the performance of all its functions, including the "nontypical" functions. In the case of the church, its typical nature is to foster faith, but it also makes internal rules and church laws for its members. Although it thus performs a function at the juridical level, the exercise of this function is directed by its inherently confessional nature. The typical function of the state, on the other hand, is juridical, but it also performs a function in respect of religion. However, the distinctively juridical nature and purpose of the state limit and determine the performance of its religious function.

Whereas the issue of "state and religion" is concerned with one of the functions of the state, namely the conduct and laws of the state in respect of religion, the issue of "church and state" is concerned with the competency spheres of different institutions. In this thesis, the phrase "church and state" will be used whenever church and state as two distinct (and distinctive) institutions are referred to. Although the phrase "church and state" usually covers all instances of state involvement with religion, especially in American jurisprudence,¹⁵ it will here be used in its narrower, institutional connotation.

The distinction between "church and state" and "state and religion" is important for a proper understanding of two of the principles contained in the bundle of essential rights and freedoms of religion, namely "the (institutional) separation of church and state" and the "separation of state (or law) and religion" respectively. It will be shown that although institutional separation of church and state is possible, complete separation of state and religion is neither possible nor constitutionally required. On the contrary, the state would be in breach of its constitutional duties if it refrained from performing any functions in respect of religion.

15 In American religious rights discourse the constitutional prohibition of the "establishment of religion" is understood to mandate both the separation of church and state and of politics and religion.

CHAPTER 2

EMERGENCE OF THE ESSENTIAL RIGHTS AND FREEDOMS OF RELIGION

1. Introduction

As set out in the introductory chapter, this thesis is mainly concerned with freedom of religion in South African law.¹ But, the first questions that come to mind and that need to be addressed in a study such as this are how the constitutional entrenchment of religious rights and freedoms originated; what the essential features of freedom of religion are and what the core meanings of these rights and freedoms are. An overview of history can throw light on these questions and enhance our understanding of the present-day concept of religious rights, as eloquently explained by Randall:²

... it is of the utmost importance, for one who wishes to understand the life about him, to comprehend its intellectual forces, to discern the probable drift of the current, and perchance to take his place at the oar. Ideas are much more lasting than anything else in man's civilization, and those which find themselves in modern minds have roots going back into the immemorial past....

This chapter provides no more than an overview³ of the basic models of church-state relations

1 Sections 9, 15 and 31 of the South African Constitution, which will be discussed in more detail in ch 5 and 6, entrench a number of rights and freedoms of religion.

2 *Making of the Modern Mind* 4-6.

3 It is emphasised that this chapter contains only an overview, and a selective one at that. To stand at the end of the second millennium and summarise 2000 years of history of church and state and law and religion, is too ambitious a task for a chapter in a thesis. The idea here is not to give a full exposition of historical events that shaped us, but rather to highlight certain significant historical aspects in order to promote understanding of contemporary religious rights discourse. Berman and Witte *Church and State* 502 point out: "In general, however, the great struggles, and the great compromises, between ecclesiastical and civil authorities that dominated Western politics from the eleventh to the nineteenth centuries came, in the twentieth century, to be a kind of ancient history, (continued...)"

in Western history,⁴ the emergence of the concept of religious rights in this context and the development of the rights and freedoms which can today be regarded as the essential rights and freedoms of religion. It will be shown that certain religious tensions in the course of history gave rise to the entrenchment of basic guarantees of religious freedom in certain peace treaties⁵ and, in the eighteenth century, in constitutional texts.⁶ This paved the way for the eventual entrenchment of certain religious rights in the constitutions of most countries⁷ as well as in international human rights instruments.⁸

Since the historical overview in this chapter is meant to enhance our understanding of developments that have shaped the basic guarantees in the protection of religious rights and freedoms today, it cannot claim to be a thorough analysis professing to engender a true understanding of each historical era "in its own terms".⁹

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- 3 (...continued)
tremendously significant as a source of understanding and inspiration but no longer a vital factor in the resolution of current tensions between religion and politics."
- 4 See Berman and Witte *Church and State* 489ff for an overview of "the interrelationships of ecclesiastical and civil authorities in certain critical periods in the history of the Roman Empire and of Europe."
- 5 For example at the Peace of Augsburg (1555) and at the Peace of Westphalia (1648), as will be shown below in this chapter.
- 6 See for example s 16 of the Virginia Bill of Rights of 1776; the Austrian Act on Religious Tolerance of 1781; the Virginia Bill Establishing Religious Freedom of January 1786; the Prussian Edict on Religion of 1788; s 1-4 of the Allgemeines Landrecht für die preussischen Staaten Part II Title II; the First Amendment of the United States Constitution; and the French Declaration of the Rights of Man and Citizen.
- 7 The entrenchment of religious rights in different national constitutions are by no means identical. In different countries with different traditions, there exist a considerable range of church-state configurations and different degrees of religious freedom. See, for example, Durham *Perspectives* 36.
- 8 Religious rights and freedoms are protected in leading international human rights instruments, such as in art 18 of the Universal Declaration of Human Rights and in art 18(1) of the International Covenant on Civil and Political Rights (1966), and in regional human rights instruments such as in art 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art 12(1) of the American Convention on Human Rights (1969) and in art 8 of the African Charter on Human and People's Rights (1981). See the discussion below in this chapter.
- 9 See Tierney *Religion, Law, and Constitutional Thought* 8-13 who refers to Claude Lévi-Strauss who
(continued...)

The historical overview in this chapter is moreover deliberately confined to developments *in the West*. The "West" traditionally included ancient Palestine, Greece and Rome, but today it generally refers to Western Europe and the Americas. By limiting this discussion to the West, developments in at least three quarters of the world are omitted, for example the entire Eastern Orthodox Christian tradition, the Jewish tradition, Islam, Hinduism, Buddhism and African traditions.¹⁰ Nevertheless, this limited scope can be justified by the fact that religious human rights, as currently entrenched in international human rights instruments, are typically Western in origin.¹¹ In this regard, Tierney¹² points out that:

The Western experience that I want particularly to consider is in some ways paradigmatic, since a doctrine of natural rights - or human rights as we say nowadays - first grew up in the Christian West. Of course, all the great religious cultures of the world have given expression to ideals of justice and right order in human affairs, but they have not normally expressed those ideals in terms of subjective natural rights. (It would be hard, for instance, to imagine a Confucian Hobbes or Locke.)

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- 9 (...continued)
drew the distinction between a "synchronic" and "diachronic" approach to the study of societies. In view of this distinction Tierney *Religious Rights* 30 (quoting Butterfield *Whig Interpretation of History* 18) warns against extreme "present-mindedness", or the telling of a "winner's history" in the study of history. Pelikan *Vindication of Tradition* 65-82 at 69 in similar vein warns against "traditionalism" in the study of history. He quotes Alfred North Whitehead speaking about how to discern "the philosophy of an epoch", namely, not by chiefly directing "your attention to those intellectual systems which its exponents feel it necessary explicitly to defend," but rather by finding "some fundamental assumption which adherents of all the variant systems within the epoch unconsciously presuppose...".
- 10 In this historical overview, reference will be made to the position of some of these groups as minority groups.
- 11 An interesting aspect that emerges from a historical study of religious rights, is the interrelationship between the development of human rights, as we know them today, and religious rights. Witte *Introduction* xxii n 18 shows that the most important prototype for Western-style human rights was the medieval canon law of the Catholic Church. This subject, however, does not fall within the ambit of this thesis.
- 12 Tierney *Religious Rights* 17, 43-45.

It should be noted here that Western perceptions of human rights and the universality¹³ of the liberal individualistic human rights ideology as devised and understood in the West, are increasingly being questioned.¹⁴ As a result a debate has ensued in the United Nations as to the universality¹⁵ of "Western style" human rights.¹⁶ However, the full problem of universality, indivisibility and interdependence of human rights justifies a separate study and will not be dealt with in this thesis. The United Nations' approach to the practical application of human rights principles so as to accommodate ethnic, cultural and religious peculiarities is subscribed to for purposes of the present study. This approach allows for a "margin of appreciation" in the application of human rights principles, albeit within the boundaries of basic human rights values.¹⁷

The emergence of religious rights and freedoms will be traced in this chapter by looking at

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- 13 The principle proclaiming the universality of human rights is founded on the notion that all human rights apply uniformly and with equal force throughout the world. It thus opposes the doctrine of the "relativity" of human rights, which maintains that in the application of human rights in concrete situations allowance should be made for particularities that attend cultural, ethnic or religious varieties.
- 14 See for example Arjomand *Religious Human Rights and the Principle of Legal Pluralism in the Middle East* 331-348.
- 15 See for example Robert Traer *Faith in Human Rights* (1991) 216 (as quoted by Van der Vyver *Introduction* xii) who set out to demonstrate that "human rights are the center of a global moral language that is being justified, elaborated, and advocated by members of different religious traditions and cultures." He goes on to proclaim: "This is true not only in the West, but also in Africa and Asia. It is true not only in the First and Second Worlds, where liberal and socialist human rights have evolved, but in the Third World as well. Jews, Christians, Muslims, Hindus, Buddhists, and advocates of religious traditions indigenous to Africa and Asia fundamentally agree about human rights."
- 16 Van der Vyver *Introduction* xi states that it is true that governments and religions alike would not want to be seen to contradict the salient appeal of human rights but points out that this universal adherence to its demands to a large extent signifies no more than rhetorical consensus.
- 17 See in this regard the Vienna Declaration and Programme of Action, 25 June 1993, UN Doc A/CONF 157/23, Part 1 par 5 (also referred to as the "Vienna Final Act") which concludes: "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights."

periods in the history of the West during which, according to Witte,¹⁸ important paradigm shifts in the relationship between church and state and law and religion occurred. They will be discussed in chronological order owing to the rather "unsystematic" development of religious rights. The first such period was the fourth and fifth centuries, the time in the Roman Empire when Christianity was established by virtue of Roman law. The first important paradigm shift took place in 313 AD when the Edict of Milan was issued. In the eleventh to thirteenth centuries (the papal revolution), the prevailing theocratic monism was challenged by the Pope who claimed undisputed papal authority and the freedom of the church. This found expression in the establishment of the Christian (Roman Catholic) religion by canon law. During the Protestant Reformation in the sixteenth century, the authority of the Roman Church was challenged and this led to a number of new theories on the relationship between church and state and a re-establishment of the Christian (Roman Catholic) religion by civil law. The wars of religion during the seventeenth century gave rise to agitation for religious toleration by religious dissidents; and the seventeenth and eighteenth centuries saw the rise of constitutional guarantees of religious freedom.

It will be shown in this chapter that, during these periods, different models of church-state relations developed (which models still exist today) and that these relations have profoundly influenced (and are still influencing) the role of the state in respect of religion. The emergence and development of the essential rights and freedoms of religion will be investigated against the background of the church-state relations in these periods. It will be shown that certain basic guarantees of religious freedom were introduced by the Edict of Milan, and the development of these guarantees will be traced up to the point where they had become entrenched in constitutional texts and in international human rights instruments.

18 As set out by prof John Witte's course, "History of Church and State Relations in the West", at Emory University in 1995. I am indebted to prof Witte whose course contributed greatly to my understanding of the historical material discussed in this chapter and whose course material has been a valuable source for this chapter.

2. The Roman Empire in the first three centuries AD

2.1 Church and state

In the centuries before the Edict of Milan (313 AD) the Roman Empire was the central and dominant force in all walks of life. The concept of a separate church did not exist. The empire itself was in fact considered to be holy and worthy of worship: the city of Rome was held to be divine, the Emperor the divine authority (sometimes even the son of God) and Roman law the divine liturgy which included numerous formal acts and rituals performed by the pontiffs. This became known as the imperial cult. Local laws and government structures were allowed to exist only in so far as they did not interfere with Roman governance.

2.2 Law and religion

In the first three centuries AD, Roman law as a form of celebration of the Emperor was used to establish the imperial cult, and defamation laws were passed in due course to protect the Emperor's name, honour and dignity. The public liturgy, for example, was prescribed by law, as were holy days, rest, leisure, public baths and oaths, and the formalities to be observed especially at the imperial court. Other laws prescribed a private liturgy with regard to such things as marriage, property, contracts, wills and the rituals of Roman law. There were laws dealing with the public property of the Empire, regulations against the violation of sacred buildings, and laws governing the pontiffs'¹⁹ discipline, clothes, office and conduct. The "imperial cult" was established as the religion of the Roman Empire and as such formed the first prototype of religious establishment by law. It will be shown that this pre-Christian pattern of establishing religion by law would be repeated in different forms in later centuries.

2.3 Religious tolerance

In the first three centuries the Christian church and Jewish communities were largely isolated

19 The "clergy" of the Roman Empire.

from official Roman society and received virtually no support and protection.²⁰ Christians did not regard the emperor as a divine being but as a persecutor of the true faith, and before long the cardinal features of Christianity led to conflict with the state. The church taught obedience to authority (limited only by the Christian conscience), separation from the secular world, and a sense of mission.²¹ As a consequence, Rome launched a systematic persecution of the Christians.²²

Jewish groups were also persecuted. The Romans destroyed Jerusalem in 70 AD, killed and enslaved many of the leaders and forbade the rest to teach Jewish law. After the demolition of Jerusalem, many Jews lived in diaspora.²³

3. The Edict of Milan

The year 313 constituted a turning point in European history. The fourth century opened with vicious persecution of Christians, but after the conversion of the Emperor Constantine, the execution of Christians was stopped. In 313, a year after his conversion, Constantine issued the Edict of Milan. It expressed the relationship between the Roman empire and the church in a novel way. As will be shown, the Edict is a classic source of religious freedom. It provides as follows:²⁴

We, Constantius and Licinius the Emperors, having met in concord at Milan and having set everything in order which pertains to the common good and public

20 See Berman and Witte *Church and State* 489.

21 See Tellenbach *Church, State, and Christian Society* 25-37 for an exposition of the attitude of Christianity towards the world during the first to fifth centuries.

22 See Ehler *Twenty Centuries of Church and State* 1-10 for a discussion of "The Church against Pagan Rome". The author mentions that: "The attitude of the Roman state toward the primitive Church falls into three stages. The State first ignored the new religion, then persecuted it, and finally accepted it."

23 See Dorff and Rossett *Roots and Growth of Jewish Law* 265-275 for an exposition of the situation in Israel at the end of the first century and at the beginning of the second.

24 Owing to the importance of the Edict, it will be quoted extensively. The translation of the *Edict of Milan on the Toleration of the Christian Religion* (313) is by Ehler and Morrall *Church and State through the Centuries* 4-5.

security, are of the opinion that among the various things which we perceived would profit men, or which should be set in order first, was to be found the cultivation of religion; we should therefore give both to Christians and to all others free facility to follow the religion which each may desire, so that by this means whatever divinity is enthroned in heaven may be gracious and favourable to us and to all who have been placed under our authority. Therefore we are of the opinion that the following decision is in accordance with sound and true reasoning: that no one who has given his mental assent to the Christian persuasion or to any other which he feels to be suitable to him should be compelled to deny his conviction, so that the Supreme Godhead ("Summa Divinitas") whose worship we freely observe, can assist us in all things with his wonted favour and benevolence. Wherefore it is necessary for your Excellency to know that it is our pleasure that all restrictions which were previously put forward in official pronouncements concerning the sect of Christians would be removed, and that each one of them who freely and sincerely carries out the purpose of observing the Christian religion may endeavour to practise its precepts without any fear or danger. We believed that these points should be fully brought to your attention, so that you might know that we have given free and absolute permission to practise their religion to the Christians. Now that you perceive what we have granted them, your Excellency must also learn that for the sake of peace in our time a similar public and free right to practise their religion or cult is granted to others, so that every man may have free opportunity to worship according to his own wish. This has been done by us to avoid any appearance of disfavour to any one religion.

First, it is clear from this passage that freedom of conscience, including the concept of voluntarism, is granted. Christians and all other religions are free to profess any religion they may rationally and voluntarily desire. It is further decreed that anything that encumbers the religious conscience should be removed. In other words, any legal discrimination which people might have suffered in consequence of their religion has been removed by the Edict.

Secondly, the freedom to practise religion, in other words, free exercise of religion, is granted expressly. It is proclaimed that no one should be prevented from discharging the obligation of his or her religion. This right extends to public manifestations of religious beliefs.

Thirdly, the Edict recognises religious pluralism by extending freedom of conscience and free exercise of religion "both to Christians and to all others".

Fourthly, the principle of equality is introduced by the phrase: "to avoid any appearance of disfavour to any one religion".

The Edict continues as follows:

We have decided furthermore to decree the following in respect of the Christians: if those places at which they were accustomed in former times to hold their meetings (...) have been at any previous time acquired from our treasury or from any other person, let the persons concerned be willing and swift to restore them to the Christians without financial recompense and without trying to ask a price. Let those who have received such property as a gift restore whatever they have acquired to the Christians in similar manner. If those who have bought such property or received it as a gift, seek recompense from our benevolence, let them apply to the Vicar, by whom their cases will be referred to our clemency. You are to consider it your duty that all these things shall be handed over to the Christian body immediately and without delay by your intervention. And since the aforesaid Christians are known to have possessed not only those places at which they are wont to assemble, but others also pertaining to the law of their body, that is of the churches, not of private individuals, you are to order in accordance with the law which we have described above the return of all possessions to the aforesaid Christians, that is to their bodies and assemblies without any further hesitation or argument.

In the fifth place, the Edict grants individual and corporate restitution for past offences against religious freedom. Effective provision is made for the restitution of lands and buildings confiscated during the persecutions, including property which had been sold or given to private persons. It also undertakes to indemnify those who would resign the property without objection.²⁵

The Edict did not establish Christianity as such; it ordered the right of free exercise of religion to be restored to Christianity and all other religions. There is no reference to orthodox Christianity or a Trinitarian God. The reference is to a divine God only. The Christians seem

25 The modern principle of restitution as applied to the Jews, in Eastern Europe and in South Africa, has its roots here, but will not be dealt with further in this thesis.

to be singled out for restitution because they had been persecuted.²⁶

The Edict introduced four basic principles of religious freedom: freedom of conscience, free exercise of religion, pluralism and equality. It is remarkable that the idea of individual religious rights and equality between religions was conceived thus early in the Western tradition. However 64 years later, in 380 AD, the Edict was revoked by the Edict Establishing Catholicism, and the protection of religious rights came to an end. Or so it seems. Witte²⁷ shows, as discussed below, that after the "window" of individual religious freedom had been closed, religious rights were perceived as the rights of a group of people.

4. The Roman Empire in the fourth and fifth centuries

4.1 Church and state

Almost all the Roman emperors after Constantine²⁸ were Christians, and the Christian faith²⁹ was established as the state religion in 380.³⁰ The Edict of 380 provides as follows:

We desire all people...to turn to the religion...this faith is that we should believe, in accordance with apostolic discipline and Gospel teaching, that there is one Godhead, Father, Son and Holy Spirit, in an equal Majesty and a holy Trinity.

26 Cochrane *Christianity and Classical Culture* 177-180 notes that the specific purpose of the Edict of Milan was "to secure for Christianity the privileges of a 'licensed cult' (*religio licita*)". Also see his remarks on the provisions of the Edict.

27 *Introduction* xxii.

28 See Cochrane *Christianity and Classical Culture* 177-180, 213-216, 221-223, 254-256, 259, 294-299, 318, 321-337 on Constantine, Constantius and Theodosius.

29 From the first to the third centuries, the Christian Church became more organised, obtaining a legal character. Its first internal law was the *Didache* (c.170) which contained mainly teachings of the twelve apostles. See Schaff *Teachings of the Twelve Apostles* 162-218.

30 This was done by the Edict of the Emperors Gratian, Valentin II and Theodosius I establishing Catholicism as the State Religion, February 28, 380. It forms part of the first title of the Theodosian Code. For a translation of the original document, see Ehler and Morrall *Church and State through the Centuries* 7 and Pharr *Theodosian Code* 438.

In other words, the "window" of religious freedom opened up by the Edict of Milan was closed by the Edict of 380 AD which established the Christian faith as the state religion. The Christian church now received the direct support of the imperial authority.³¹ The traditional Roman cult was gradually Christianised, and prevailing Roman doctrines and Christian teachings were intertwined so that the Roman Church became the universal "state" which embraced all peoples. The Christian Church of the fourth and fifth centuries seems to have succeeded the Western Roman Empire as the political force.³² In the thus established *corpus Christianum*, the (Christian) Roman emperor - the head of the Holy Roman Empire - was also the head of the Church.³³ The emperor was regarded as God's appointee on earth. Despite all the emperor's authority, he nevertheless remained a layman, with no authority to administer the sacraments. He also had to accept the authority of the church in spiritual matters.³⁴

At this stage the church appeared to be a "department of religious affairs" in an imperial theocratic church-state. However, as the imperial power crumbled in the West, the independent role of the church was vigorously reasserted by Pope Gelasius I. In 494 the "Gelasian" theory was enunciated by Pope Gelasius with his separation of two spheres of authority in the world, namely the sacred authority of the priesthood and the royal power.³⁵ The Gelasian formula of the two powers was later copied and interpreted in a variety of ways, but it remained the

31 Berman and Witte *Church and State* 490.

32 After the death of Theodosius I (395 AD) the empire was divided into the Western and the Byzantine empires. The last Western Emperor, Romulus Augustulus, was deposed in 476 AD, in other words, the Western Roman Empire "fell" in 476 AD when invaded by Germanic tribes. The eastern Roman Empire came to an end in 1453 when it was invaded by the Turks.

33 Berman and Witte *Church and State* 490 point out that, although the emperor was no longer worshiped as a god, he remained the "supreme ruler of both civil and religious affairs". Constantine namely declared: "I am emperor and I am priest". At a later stage this system of imperial dominion within the church was denounced as "caesaropapism" (which means both caesar and pope).

34 This could be illustrated by referring to the fact that Ambrose, bishop of Milan, excommunicated emperor Theodosius in 390 AD for massacring the people of Thessalonika. He was only readmitted to Communion after he had publicly repented.

35 Pope Gelasius (492-496) wrote in his letter to emperor Anastasius, "Two there are, August emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power...". For a translation of the letter of Pope Gelasius I to Byzantine Emperor Anastasius I (494) see Ehler and Morrall *Church and State through the Centuries* 10-11.

accepted statement of the relationship between church and state for nearly 600 years. Its most important consequence was the entrenchment of a certain dualism of authority in the West.³⁶

4.2 Law and religion

In the fourth and fifth centuries Roman law became a vehicle for establishing Christianity just as it had formerly been used to establish the imperial cult. Civil laws defined the church, orthodoxy, doctrine, liturgy and religious teaching. On the ecclesiastical side, civil laws set the standards for the clergy³⁷ who were also granted privileges, exemption from civil laws, immunity from prosecution by municipal councils (civil courts) and sanctuary.³⁸ Civil laws also regulated the acquisition, use, maintenance and alienation of sacred church property. With regard to polity, imperial laws ordered the division of the church into bishopdoms and prescribed the times when councils would gather and make decisions on basic clerical appointments to higher offices.

4.3 Religious tolerance

The establishment of Christianity by law also implied a tightening of the law against "heretical" groups.³⁹ The Edict of 380 which established Catholicism proclaimed:⁴⁰

36 Ehler and Morrall *Church and State Through the Centuries* 1-2.

37 See Justinian *Novellae Constitutiones* (c.548 AD) title 3, 5, 6. Translation in Scott *Civil Law* vol 16.

38 Numerous examples can be found in the Theodosian Code (380) Title 2 and in the Sirmondian Constitutions. Translation in Pharr *Theodosian Code* 439-450.

39 See the Theodosian Code (380), especially titles 4 ("Those persons who contend about religion"); 5 ("Heretics"); 6 ("Holy baptism shall not be repeated"); 7 ("Jews, Caelicolists, and Samaritans") and 10 ("Pagans, Sacrifices and Temples") and the Sirmondian Constitutions par 4, 6 and 12 in Pharr *Theodosian Code* 438-476.

40 Translation of Ehler and Morrall *Church and State through the Centuries* 7. The translation of Pharr *Theodosian Code* 438 reads as follows: "We command that those persons who follow this rule shall embrace the name Catholic Christians. The rest, however, whom we adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative which We shall assume in accordance with the divine judgment."

We order those who follow this doctrine to receive the title of Catholic Christians, but others we judge to be mad and raving and worthy of incurring the disgrace of heretical teaching, nor are their assemblies to receive the name of churches. They are to be punished not only by Divine retribution but also by our own measures, which we have decided in accordance with Divine inspiration.

Initially, Rome's attitude towards the Jews, especially those living in Palestine and elsewhere in dispersed communities, was one of indifferent toleration.⁴¹ In the third century, Jews enjoyed religious toleration to the extent that the state (by law) exempted them from certain duties (for example from liturgies which were offensive to their religion) and upheld certain privileges (for example those which exempted Jews from profaning their Sabbath and religious festivals). Judaism was explicitly declared to be a "permitted religion".

After the Edict of Milan, Rome's policy towards Christians changed, but the feeling of anti-Semitism became stronger. This later became official Roman policy. Laws similar to those which had been used to persecute Christians were enacted against "heretic" individuals and groups. Harsh persecution of Jews followed in the fourth century.

Theodosius (364-395), under the influence of Chrysostum and Athanasius, changed Rome's policy towards the Jews. Theodosius saw the Jews as "half-Christians" and translated this into legal terms by granting them "second class" citizen status. This "half" status led to the granting of a series of effective minimum group rights. But, as the hostility towards the Jews increased, many more restrictions against Jews were entrenched in various legal codes⁴² and in legislation.⁴³ This situation continued after the division of the Roman Empire into the Western

41 Since the destruction of Jerusalem in 70 AD.

42 Such as in the Code of Theodosius (380) title 8. See the translation in Pharr *Theodosian Code* 439-450.

43 See the systematic and detailed exposition of Linder *Jews in Roman Legislation* 67-89 who groups and discusses the laws relating to Jews in three main categories: "(1) those concerning relations between the Jews and the government; (2) those concerning relations between Jews and non-Jews; (3) those concerning relations between Jews and other Jews." He furthermore maintains that over a very long period of time, distinct legal traditions were created in each of these three areas. Also see Schreiber *Jewish Law* 283; Elliot and Rossett *Roots and Growth of Jewish Law* 265-275.

and Eastern empires.⁴⁴ In fact, the pattern which had been introduced in the fifth century persisted in the West until the nineteenth century.⁴⁵

5. The High Middle Ages

5.1 The relationship between church and state

The system of imperial rule prevailed in the West until the late eleventh century. Between 1050 and 1150 the Papal Revolution altered the relationship between church and state dramatically.⁴⁶ The prevailing theocratic monism was challenged by Pope Gregory VII⁴⁷ who claimed undisputed papal authority and the "freedom of the church".⁴⁸ This led to the

44 After 476 AD, Justinian's legal code applied particularly to the East (Justinian's Code also contained anti-Jewish legislation). In the western part of the Empire, some Germanic leaders (as successors to the Western Roman Empire) compiled a kind of code of Roman law for the Roman citizens in their states (for example the Visigothic Code). According to the principle of personality, every person lived according to the law of his own tribe or country and was judged accordingly. The circumstances of the Jews improved temporarily in these Germanic states in which general toleration was granted to religious minorities so that they were free to follow their traditions. Visigoth Spain was different. As Schreiber *Jewish Law* puts it at 281: "There the intensive drive for the unification of the country, plus the extreme views held by the local Catholic clergy, resulted in the persecution of ethnic minorities and harsh measures taken against them. This included both Jews, Moslems and heretical Christians." The Visigothic Code (*Lex Romana Visigothorum*) was compiled in 560 AD at the instigation of Alaric II, the ruler of the Visigoths, and contains far-reaching provisions on Jews under the heading "Concerning the Eradication of the Errors of All Heretics and Jews". See the translation of Scott *Visigothic Code* 362-382. It is interesting to note that codes of Roman law such as this was a contributory factor in the preservation of the dormant Roman law during the Middle Ages.

45 Parkes *The Jew in the Medieval Community* 101.

46 On the revolutionary character of the Papal Revolution and as an overview, see Berman *Law and Revolution* 85-119.

47 The problem of appointing the Pope was an acute one. Between 950 and 1050 more than 80 popes had been appointed. Gregory was the first Pope since 950 to be appointed by a church council.

48 In his revolutionary document *Dictatus Papae* (The Dictates of the Pope) (March 1075) Gregory decreed, for example: "(7) That for him [the Pope] alone it is lawful to enact new laws...; (12) That he may depose Emperors; (22) That the Roman Church has never erred, nor ever, by the witness of the Scripture, shall err to all eternity." See the translation in Ehler and Morrall *Church and State Through the Centuries* 43-44. There is controversy about the document. It has been said that it might
(continued...)

investiture contest⁴⁹ between Henry IV and Pope Gregory VII (1075-1122).⁵⁰ The Church maintained that, if the church were to set itself free from all secular control and gain control of its own mission and sword, the imperial power had to be shifted from the Emperor (Henry IV) to the Pope. The prevailing practice of lay investiture moreover had to be forbidden. This view was justified with reference to Gelasius's doctrine (of 494) which in due course became a "two-swords" doctrine.⁵¹

The two-swords doctrine of Pope Gregory represented a total philosophical shift. This doctrine was acceptable on account of its religious implications. It was assumed that in the nature of things there was continuity between God and the world. According to the God-given natural law, everything had its place in the hierarchy of things that emanated from God; the pope held the highest rank with direct access to God. It was believed that human nature had lost its perfect community with God as a result of sin. To regain access to God, an individual needed someone to unlock the gates of heaven and lock the gates of hell. The power of the key was held by the clergy who acted as God's agents in administering grace in the form of the seven sacraments.⁵² This gave the church and canon law enormous power, since the salvation of the

- 48 (...continued)
be a fourteenth century forgery, but Witte's theory is that Gregory decreed it early in his reign, summarising his revolutionary programme.
- 49 In a nutshell, the investiture conflict arose because, for six centuries, a lay person - the King - had the power to vest clergy with the necessary power of office. This was now (1076) denied by Pope Gregory who declared that only the Pope or his agent could do it. The King, Henry IV, sent a letter back to Gregory saying that he (Gregory) had usurped the authority of his office and declared him a heretic. Gregory in his turn excommunicated the King, who did penance, upon which he was absolved by the Pope. A civil war raged for 40 years before a compromise was reached in a series of Concordats. See Tierney *Crisis of Church and State* 51-73, 91-92 for the correspondence between Gregory and Henry.
- 50 See Tellenbach *Church, State, and Christian Society* 25-37.
- 51 For early papal variations of the two-power theory, see Humbert *Three Books Against Simony* (1054-1058); Peter Damian *Letter to King Henry IV* (1065); Honorius Augustodunensis *Summa Gloria* (c.1100). For early imperialistic versions of the two-power theory, see the letter of Henry IV summoning the German Bishops to the Diet of the Worms (1076); The Anonymous York Tractates (c.1100).
- 52 On the power of the keys, see Tierney *Origins of Papal Infallibility* 39-45, 82-86, 115-121; Thomas
(continued...)

souls of the laity was in their hands. The political exposition of this notion served to establish church superiority vis-à-vis the state and the superiority of canon law vis-à-vis civil law.

The investiture conflict between Pope Gregory and Henry IV eventually resulted in a compromise peace embodied in the concordat of Worms (1122), which deprived secular authority of the power to appoint priests and bishops. The Roman Catholic church of the twelfth century thereby established itself as a "unified, hierarchical, autonomous, politico-legal entity".⁵³ Because neither side could make good its more extreme claims, a dualism of church and state persisted in medieval society. This meant that both secular and ecclesiastical authorities ruled in the same territories and over the same people with overlapping jurisdictions. Many works on political theory have endeavoured to rationalise this dualism.⁵⁴

The persistent dualism in medieval society is not to be equated with the modern notion of a "wall of separation" between the church, on the one hand, and the state, religion and politics on the other. In the Middle Ages, the powers of church and state constantly overlapped, but as Tierney⁵⁵ puts it, "the church remained committed to a limitation of state power in the sphere of religion".⁵⁶

5.2 Law and religion

In the eleventh century, one of the implications of Gregory's goal of the freedom of the church

52 (...continued)
Aquinas *Summa Theologica* Part III Questions 17, 18.

53 Berman and Witte *Church and State* 492.

54 See Berman and Witte *Church and State* 494 for a brief exposition of the prevailing theoretical interpretation inspired by the dual character of church and state in the period from Gregory VII to the Protestant Reformation. For an overview see Gierke von *Political Theories of the Middle Age* 7-21. Also see Ewart Lewis *Medieval Political Ideas* vol 2 506-538 who discusses the relation between kingship and priesthood.

55 Tierney *Religious Rights* 24.

56 By the end of the Middle Ages, the Catholic Kings had again acquired a large measure of control over church appointments, but in the Reformation era the theory of royal divine right was challenged by new forms of protest, as will be discussed below.

was that the church did not tolerate civil laws which regulated its internal or external affairs. The church itself thus became a state-like legal entity with a corporate structure resembling that of the Roman Empire, and canon law effectively governed all levels of government. It was the one source of both legality and morality.

5.3 Religious tolerance

At the end of the tenth and in the early eleventh century, Jewish communities, religion and law experienced marked growth.⁵⁷ But from the twelfth century onwards there was no longer any question of tolerance towards Jews. The theological response from the Catholic church was that Jews were outsiders, outcasts from the *corpus Christianum* by reason of their participation in the killing of Christ, and that they existed on sufferance of the ecclesiastical and political authorities.⁵⁸ This manifested in both canon and civil law restrictions on Jews individually and collectively.⁵⁹ The translation of hatred and intolerance to legal terms was indeed sinister. In canon law numerous restrictions were enacted, for example, restrictions on interpersonal relations with Christians, commercial restrictions, limited access to church courts and a variety of taxes.⁶⁰ After 1215⁶¹ Jews were even made to wear distinctive markings when travelling

57 See Schreiber *Jewish Law* 281-291 for a discussion of the position of the Jews from 313 AD in the Western and Eastern Empires up to the tenth century which saw growth and prosperity for Jews until the crusades which inaugurated a prolonged era of religious persecution of Jews in Eastern Europe.

58 Parkes *The Jew in the Medieval Community* 102 writes that church legislation regarding the Jews "turned consistently on two points...the prevention of Jewish influence or authority over Christians, and the relegation of the Jews to the status of social inferiority befitting a deicide people." See examples of different conciliar and synodical decrees to this effect in Grayzel *Church and Jews* 315, 319, 323, 333, 335, 337.

59 See Parkes *The Jew in the Medieval Community* 101-123, 128-136 who states: "The three pillars on which was raised the structure of medieval Jewish society were Roman law, Canon law and Germanic Custom." He deals in turn with the restrictions on and protections of the Jews in each system.

60 There are also examples of certain protections in canon law (although still within the paradigm of seeing Jews as perfidious), such as Innocent III *An Edict in Favour of the Jews* (1199), and in medieval Spanish law *Las siete partidas* Title 24 (1265).

61 The Fourth Lateran Council, an international conference of Catholics was summoned by the Pope in November 1215 and assembled in the Lateran church in Rome. See the Decrees of the Fourth Lateran Council of 1215 concerning the Jews in Marcus *The Jew in the Medieval World* 137-141, who under
(continued...)

outside their segregated communities.⁶² The civil authorities had extensive authority over Jews. The insulated communities were almost always "chartered". These "charters" regulated the relationship between the civil authorities and the Jews.⁶³ The feudal lords could (subject to canon law only) claim civil taxes or human labour for payment. These charters became progressively stricter until they were revoked at the end of the twelfth century when the Jews were expelled. So many of them were killed or died in transit that this period has become known as the medieval holocaust.⁶⁴

The church's reaction to Islam was more unsystematic because this faith was not well understood. It was accepted that Muslims were heathens and strangers to Christendom. During the great crusades, Christians marched to the Middle East to open up the way to Jerusalem to convert souls and to annihilate the enemies of the church.⁶⁵

Heresy was regarded as the ultimate sin. It was described as a voluntary defiance of God's word as interpreted by the church in contradistinction to heathens who did not have God's full word and intentionally rejected it. Heresy was also viewed, legally, as the worst crime. The

61 (...continued)
the auspices of Pope Innocent III adopted many anti-Jewish provisions.

62 See Grayzel *Church and Jews* 49-59, 72-82.

63 Germanic custom allowed either the king or a local magnate to assume the protection of a "stranger" (the status acquired by Jews in Germanic communities). Charters were granted by kings, cities, and clerical and secular princes who lay down varying conditions of Jewish settlement. See Parkes *The Jew in the Medieval Community* 101-123. See also for example the *Charter of the Jews of the Duchy of Austria* (1244); *Charter of John to the Jews of England and Normandy* (1201); *Charter of Edward I to the Jews of England* (1275).

64 See Riley-Smith *First Crusade and Persecution of Jews* 51-72. The Oxford Dictionary defines crusade as any of several military expeditions made by Western European Christians in the 11th to 13th centuries to recover the Holy Land from the Saracen Muslims. As to the crusaders' motives in attacking Jews, Riley-Smith writes at 56: "There is evidence for the wish to get supplies by extortion and looting, for attempts to convert Jews by force and for a desire for vengeance on them." He regards the last of these as the worst. He further writes at 67: "It is clear that in respect of the desire for vengeance a significant number of crusaders did not distinguish between Muslims and Jews and could not understand why, if they were called upon to take up arms against the former, they should not also persecute the latter."

65 For an overview, see Bray *The Mohammaten and Idolatry* 89-99.

restrictions against heretics came largely from fourth century Roman law to which new laws were added. The inquisition, which was superior to local civil and ecclesiastical courts, was initially appointed by the papal *curia* (later even by Bishops) to enquire into heresy. They had far-reaching powers to subpoena witnesses and to indict blindly. Judges participated actively in the inquisition by way of interrogation, and torture was an accepted means of inquisition.

5.4 Development of religious freedom in the Middle Ages

Tierney⁶⁶ mentions three aspects of medieval religion that eventually contributed to the expansion of religious freedom. In the first instance, the medieval church insisted on the freedom of the church from state control. This, as shown above, resulted in a struggle between popes and kings over many centuries. Sometimes a pope would claim a theocratic role for himself, and at other times a king would acquire extensive control over church appointments. Tierney states:⁶⁷

Freedom of the church from control by the state is one important part of modern religious liberty. But it is only part. The *libertas ecclesiae* that medieval popes demanded was not freedom of religion for each individual person but the freedom of the church as an institution to direct its own affairs. It left open the possibility, all too fully realised from the twelfth century onward, that the church might organize the persecution of its own dissident members.

Secondly, medieval canonists and moral theologians often upheld the value of the individual conscience as a guide to proper conduct; the duty to obey one's conscience. Tierney⁶⁸ shows that "an emphasis on the primacy of the individual conscience was an important element in later theories of religious rights".

Thirdly, Tierney discusses the idea emerging in medieval times that everyone had natural rights which would play an important role in subsequent theories of religious freedom. He

66 *Religious Rights* 22-27.

67 *Religious Rights* 24.

68 *Religious Rights* 24-25.

refers to the fact that little or no consensus exists about the origin of the doctrine or how it relates to the Christian tradition. However, he writes:⁶⁹

(t)he origin of the later natural rights theories is to be found in the Christian jurisprudence of the late twelfth century, especially in the work of the canonists of that era...(t)he crucial development was that the new personalism in religious life, and the everyday concern with rights in secular society, infected the language of the canonists when they came to discuss the concept of *ius naturale*, natural right. Earlier the phrase *ius naturale* had been understood in an objective sense to mean natural law or "what is naturally right." But the canonists who wrote around 1200, reading the old texts in the context of their more humanist, more individualistic culture, added another definition. In their writings, *ius naturale* was now sometimes defined in a subjective sense as a faculty, power, force, ability inhering in individual persons. From this initial subjective definition, the canonists went on to develop a considerable array of natural rights.

6. The era of the Protestant Reformation

6.1 Church and state

The reformations of the sixteenth century (1510-1540) defied the fundamental ideas underlying medieval society.⁷⁰ These reformations commenced during the fifteenth century when the authority of the Roman Church was challenged at theological, legal and political level. The theological authority of the pope was challenged by the conciliar movement⁷¹, as a result of which it became increasingly difficult to see canon law as divine. The legal rule of

69 *Religious Rights* 27.

70 For an overview of the Reformation era, see Harbison *Age of Reformation* 3-46; Berman and Witte *Church and State* 495-498; Ehler *Church and State* 54-68.

71 Conciliarism concerned the theory of the church councils. Their criticism, in a nutshell, was that although the pope was the first member of the council, he was also one of the members. He thus had to yield to the collective judgment of the council. The idea that the office is infallible but the officer not, was concretised in fifteenth century conciliarism. (It still lies at the heart of modern political theory.) See Ehler and Morrall *Church and State Through the Centuries* 96-144 for their chapter on "The conciliar period and the age of discovery".

the church was attacked by scripturalists⁷² who maintained that the church should not add laws to the Bible, that the power of the sword was vested in civil authority and that the church should confine itself to exercising the power of the Word. The international rule of the church was undermined by the existence and growth of independent (national) polities, increasing support for these federal structures by both the civil authorities and the clergy and the increasing power of civil authorities.⁷³ The fundamental assumptions of canon law were challenged by nominalistic⁷⁴ and humanistic⁷⁵ philosophies.⁷⁶ Thus, there no longer existed one world (*corpus Christianum*), one church, one ruler or one law. Yet, notwithstanding the enormous changes in philosophy after the Protestant Reformation,⁷⁷ there was some continuity in the theories on church-state relations.

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- 72 Scripturalism is also known as Marsilianism, after Marsilius of Padua who wrote *Defensor Pacis* in 1324.
- 73 See for example the *Statute of Praemunire* enacted by Richard II, King of England (1393) which gave the crown certain powers vis-à-vis the church, for example the power to appoint local clergy (cf lay investiture contest of 1130), to impose limitations on taxes, rates, annates and tithes to Rome, and on all matters outside the technical jurisdiction of the church. Also see the *Pragmatic Sanction of Bourges*, enacted by Charles VII, King of France (1438) which, in addition to the three above-mentioned restrictions, subjected church property to civil taxes and refused immunity from prosecution on common law crimes (crimes had to be prosecuted in French courts). The *Concordat of Bologna* between Pope Leo X and Francis I, King of France (1516) was a cause of protracted tension between the popes and the French kings. By this law the French monarchy openly reorganised the Conciliar theory of the Council's superiority over the pontiff and deprived him of the majority of his rights and revenues in France.
- 74 Nominalism (writers such as William of Ockham, Sectus, Biel, followed by such authors as Hobbes and Locke) inspired reformation by criticising and "flattening out" the hierarchy of the "chain of being" cosmological assumption of canon law.
- 75 Humanist philosophies in this context advocated a return to the first principles, freeing the church from its medieval traditions.
- 76 See Berman and Witte 1989 *Southern Californian LR* 1573 et seq.
- 77 The term "Reformation" refers to different movements in the sixteenth century which challenged the authority, structure and doctrine of the Roman Catholic church. The four broad movements are, the Lutheran Reformation, the English Reformation, the Anabaptist Reformation and the Calvinist Reformation.

6.1.1 The Evangelical Reformation

Martin Luther (1483-1546) attacked the concept of a visible, hierarchical and corporate church which exercised both political and legal jurisdiction.⁷⁸ Luther replaced the Gregorian (1075) "two swords" theory with a theory of two kingdoms.⁷⁹ Yet, in Luther's Two Kingdoms theory one can detect certain aspects of the Gelasian (494) two powers theory, namely that there are two realms, the earthly and the heavenly. According to Gelasius's theory, Christ was the head of the universal church, but since one human officer could not bear the burden of representing the power on earth, Christ had divided it into two. God empowered the emperor to govern temporal affairs as the vice-regent, and the clergy would have to give account of spiritual matters (including the conduct of the emperor). In Lutheran polities the emperor was replaced by a Christian prince, so to speak, and the strong advisory role of the church was retained.⁸⁰ (Obviously, the theological premises on which this theory was based, differed substantially from the earlier Gelasian theory.) According to the Lutheran model, the prince would rule by virtue of natural law and be restrained by the responsibilities of his own confession. The effect of Luther's separation of the earthly and heavenly kingdoms was that the civil ruler exercised all legal and political authority on earth. The implications for church-state relations were that supreme authority over the church vested in the Christian monarch. Lutheranism established itself territorially and became the established religion in most parts of Germany and Scandinavia.⁸¹

As mentioned above, the theological premise of papal authority was replaced by more

78 See Martin Luther *Ninety Five Theses* (1517); Martin Luther *On the Burning of the Canon Law Books* (1520). For an exposition of the relationship between canon law and civil law during this time and Luther's attack on canon law, see Witte *Law and the Protestants*.

79 On the theory of two Kingdoms, and church and state see Witte and Berman 1989 *Southern Californian Law Review* 1573 et seq.

80 For Luther's view on the temporal authority, to what extent it should be obeyed and how far secular authority extends, see Dillenberger *Martin Luther* 382-392 and Porter *Luther* 53-57.

81 For the rise of the established church in Germany and Scandinavia, see Bainton *Reformation* 141-159; Skinner *Foundations of Modern Political Thought* vol 2 p 81-90. This stage was unfortunately followed by religious intolerance. See for example Mueller *Church and State in Luther and Calvin* 60-72.

nominalistic theories during the Lutheran Reformation.⁸² Luther declared that the true church was the invisible community of believers or the heavenly kingdom. Roman Catholicism rejected the notion of an invisible church in favour of the visible institutional structure and a priesthood which mediated grace to the baptised. However, Luther maintained that whilst the church on earth assumed a visible form, it retained its divine government and that, in the earthly church, everyone was priest, prophet and king. The consequence of his theory was that the sacraments and the mediatory role of the clergy became superfluous since everybody had direct access to God. In terms of this theory, canon law was likewise unnecessary since the legal view of the church as an independent legal and political power was replaced by the simpler notion of the church as a community of saints with the Bible as their only source of authority (*sola Scriptura*).⁸³

6.1.2 The English Reformation

The English Reformation of the sixteenth century, as a result of which the Anglican church was established, followed about a decade after the Lutheran or Evangelical Reformation in Germany.⁸⁴ Anglicanism established itself nationally. King Henry VIII broke all contact between the church in England and the pope by passing a series of reform statutes.⁸⁵ His aim

82 For the theological and political premises of Lutheran legal philosophy, see Witte and Berman 1989 *Southern Californian LR* 1573.

83 See Pelikan *Spirit versus Structure* 5-31.

84 It is analogue to the Lutheran reformation in its defiance against papal authority, which resulted in a truncation of church jurisdiction and a vesting of great power in civil authority and in its viciousness against religious outsiders. There are however more differences: Lutheranism began as a theological movement and developed into politics, while with Anglicanism the opposite is true; Lutheranism resulted in a complete review of Catholicism, while Anglicanism retained much of that doctrine; and, Lutheranism rejected the ecclesiastical structure of the Catholic church, while Anglicanism retained the whole structure. For an overview see Lecler *Toleration and Reformation* vol 2 329-379; Berman and Witte *Church and State* 497.

85 *Proclamation Against Erroneous Books* (1530), *Act in Restraint of Appeals* (1533), *Act Concerning Ecclesiastical Appointments and Absolute Restraint on Annates* (1534), *Act Concerning Peter's Pence and Dispensations* (1534), *Supremacy Act* (1534) and *Statute of Six Articles* (1539). See the acts in Stephenson and Marcham *Sources of English Constitutional History* 387-388, 304-312. See Lecler *Toleration and Reformation* 329-379 for an exposition of the Anglican schism (1534-1547).

was to wipe out papal power in his kingdom, to replace it with royal authority and to completely subject the church in England to the state.⁸⁶ In doing so, the church *in* England became the church *of* England, with the king of England as its supreme head.⁸⁷ In the Anglican Reformation one thus finds a resurrection of the imperialist versions of the two swords theory.⁸⁸ Henry VIII's caesaropapism⁸⁹ was entrenched in civil laws, which established Anglicanism and introduced radical changes in religious doctrine, liturgy and morality.⁹⁰ However, English Protestants kept the offices of pastor and prince distinct. The pastor's office was to preach God's word and administer the sacraments, and it was the prince's duty to rule the church. Mary Tudor (1553-1558) tried to restore Roman Catholicism by repealing Henry's laws and killing dissenters,⁹¹ but Elizabeth I (1558-1603) re-established the Church of England.⁹² After the Elizabethan era certain doctrinal shifts took place, but until today the English monarch is the head of the Anglican church.

6.1.3 The Anabaptist movement

Anabaptism was a kind of pan-western movement, not confined to one geographical area, and it consisted of different groups (Mennonites, Amish, Hutterites and Baptists) who had certain principles in common, namely adherence to the early apostolic church, the principles of the

86 Ehler *Church and State* states 57: "The Anglican Reformation did not originate in any mass movement or popular passions stirred up by forceful preachers. It sprang from the personal passions of the autocratic ruler of England, Henry VIII, and consolidated itself owing to a no less personal, psychological complex of his equally notorious daughter, Elizabeth I."

87 For Anglican theories of church and state see Sommerville *Politics and Ideology* 203-216.

88 See Hughes *Theology of English Reformers* 235-253.

89 Such complete subordination of church government to the supreme secular ruler later became known as "Erastian".

90 Ehler *Church and State* 58 states: "As a result, the church of England became a mere department of state administration, to a degree which had never been reached before in any other instance of Christian caesaro-papism."

91 *First Statute of Repeal* (1553), *Act Concerning Regal Power* (1554), *Second Statute of Repeal* (1555). See these acts in Stephenson and Marcham *Sources of English Constitutional History* 317-329.

92 *Act of Supremacy* (1559), *Act of Uniformity* (1559), *Act Prohibiting Bulls from Rome* (1571). See these acts in Stephenson and Marcham *Sources of English Constitutional History* 384-387, 344-353.

Schleitheim Confession⁹³ and principles of voluntarism and separatism.⁹⁴ The Anabaptists believed that the real church was constituted by a separate group who underwent true baptism for the first time. They did not consider the members of the state church as true Christians. They thought that the church had to be a voluntary group of Christians, and that it should be an international organisation. The intrusion of the state in the internal life of the church as an organisation could therefore not be tolerated.⁹⁵ The Anabaptists, like Luther, used a two kingdom theory as the theoretical basis of their theology. The grounds for a separated church were set out in their Schleitheim Confession of Faith (1527). They believed that all men belonged to only one of two kingdoms, namely that of God and that of the devil.⁹⁶ According to Luther's theory, the dialectic between church and state implied that "both church and state are the battle grounds of God and Satan".⁹⁷ The Anabaptists altered Luther's theory by placing the church at the centre of God's activity, and assigning the rest of the world to control by the demonic.

The Anabaptists viewed themselves as disciples of Christ, and argued for the unconditional acceptance of certain key elements of the New Testament ethic. This inevitably resulted in tension with the state. The Anabaptists defined the church as a community of regenerated believers who had voluntarily entered the church by baptism upon confession of faith. The

93 For the Schleitheim Confession, see Lumpkin *Baptist Confessions of Faith* 25-30, and for a discussion thereof see Friedman *Theology of Anabaptism* 38-47.

94 Anabaptists internally adhered to the principles of self-government, discipleship, fellowship and simplicity. Externally, they related to the world by withdrawing (asceticism), obedience, nonresistance, hospitality and mission.

95 For the view of Anabaptist writers such as Hubmaier, Sattler, Schiemer, Rothmann, Stadler, Simons, Riedeman, Philips, Denck and Hutter on the church and on government, see Klaassen *Anabaptism in Outline* 101-115, 244-257.

96 The Schleitheim Confession of Faith (1527) states in its third article: "All those who have fellowship with the dead works of darkness have no part in the light. All who follow the devil and the world have no part with those who are called unto God out of the world. All who lie in evil have no part in the good." And in the fourth article: "For truly, all creatures are but in two classes, good and bad, believing and unbelieving, darkness and light, the world and those who have come out of the world, God's temple and idols, Christ and Belial, and none can have part with the other."

97 See Sanders *Protestant Concepts* 75-96.

visible state church (accepted by both Roman Catholics and Protestants), was rejected as being no church at all.⁹⁸

6.1.4 The Calvinist Reformation

In the Calvinist reformation⁹⁹ certain aspects of Luther's theology were affirmed. However, the Calvinists argued that the visible church was not subordinate to the state in any way; the church was an institution equal to and independent of the state. Some aspects of Pope Boniface's version of the two swords theory can be found in Calvinism. The theocratic claims of the papacy which culminated in Boniface's "mature" version of the two swords theory as incorporated in the Bull, *Unam Sanctam* (1302)¹⁰⁰ during the High Middle Ages were (*inter alia*) that every human creature had to be subject to the Roman pontiff.¹⁰¹ Calvin maintained that the church, a corporate identity, had its own "sword", separate from that of the state, and had received its authority from God. It could be stated that, with regard to the relationship between church and state, Calvin started out with Luther's (horizontal) two kingdoms theory and later (after 1541) superimposed a form of (vertical) two swords theory on it.¹⁰² Theoretically, Calvinism implied the institutional separation of church and state (two powers), but in practice it came close to the two swords theory and a sort of theocracy.

98 See Friedman *Theology of Anabaptism* Part II 38-47.

99 For an overview, see Bainton *Reformation* 110-122, and for the plight of French Huguenots 160-172.

100 For the Bull "Unam Sanctam" of Pope Boniface on the plenitude of the papal power (18 November 1302), see Sidney and Morrall *Church and State through the Centuries* 89-92.

101 Ehler *Church and State* 75 sums up the three principal points of Boniface VIII's formulation in the *Bull Unam Sanctam* as follows: "1. all power, spiritual and temporal, belongs in principle to the Church (the theory of the two swords); 2. while she herself keeps the direct exercise of the first, she leaves that of the second to the kings; 3. the Pope has a general right of supervision, jurisdiction, and punishment over the secular power, including the right to depose kings." The third point was evidently not present in Calvin's theory.

102 See Calvin *Institutes* Book IV ch 1, 6, 8, 10, 11 and 20. For a discussion of Calvin's view on church and state and religious freedom, see Witte 1995 *Calvin Theological Journal* 1-27.

6.2 Development of principles of religious freedom

In the Protestant era certain principles of religious freedom were inspired by the above-mentioned new theologies and concomitant theories on church-state relations.

6.2.1 Luther

Luther triggered the transformation of the law by introducing a nominalistic, egalitarian theology in Germany. This was reflected in the law. All the special rights, privileges and immunities of the clergy were withdrawn. The distinction between clergy and laity disappeared, and was translated into a denial of the church's legal and political authority at the executive, legislative and judicial levels. Luther taught that the state, an institution of the earthly kingdom with no divine qualities, ruled by virtue of natural law, which found its sources in reason, conscience and the Bible. It has been stated that:¹⁰³

The Protestant Reformation inaugurated by Martin Luther in 1517 was, at its core, a fight for religious liberty - liberty of the individual conscience from intrusive canon laws and clerical controls, liberty of political officials from ecclesiastical power and privilege, liberty of the local clergy from central papal rule and oppressive princely controls.

6.2.2 Elizabethan England

A system of legal restraints was introduced in Elizabethan England. First, certain traditional clerical functions were restored to the clergy in their capacity as a semiautonomous religious department of the state. This led to the granting of special privileges and exemptions to the body of clergy. The civil law expression of this limited (corporate) religious freedom later formed the basis for the extension of these group (corporate) rights to all religious groups. Secondly, parliament created ecclesiastical courts and, more specifically, the Court of High Commission, with the responsibility to review or initiate changes in doctrine or liturgy.¹⁰⁴

103 Witte 1995 *Calvin Theological Journal* 24-25.

104 See Elton *Tudor Constitution* 218-226.

Thirdly, the medieval doctrine of papal infallibility, according to which the papal council could nullify papal decrees if they conflicted with tradition, was introduced into common law in the period 1590-1600. The Catholic doctrine of papal infallibility, together with the English practice of the Court of High Commission, introduced a system of checks and balances in terms of which the ecclesiastical judge could weigh new ecclesiastical laws against precedent and equity and invalidate them. This system was initially used as a corporate remedy of the church but later developed into the doctrine of judicial review.

6.2.3 Anabaptists

The Anabaptists contributed substantially to the idea of religious freedom. Their resurrection of the ancient Judaic idea of a church completely separate from the world introduced the notions of the separation of church and state and of state and religion and voluntarism. The notion of a "wall of separation" between the church and the world has its origin in Anabaptism writings, but it embodied the idea of protecting the church from the state, not the state from intrusions of the church. Sanders¹⁰⁵ maintains that, since the Anabaptists' understanding of the separation of church and state was the result of their controversy with Zwingli over the freedom of the church within the political order, they did not necessarily anticipate a formal "disestablishment" of religion by law. It is nevertheless clear that they rejected the state religion of their time and, as is evident from the writings of Denck and Menno Simons,¹⁰⁶ anticipated a pluralistic society. The Anabaptist constitutional ideas about the separation of church and state, freedom of conscience and the "wall of separation" between church and state are at the heart of the present American constitutional dispensation of church and state.

The Anabaptists were singled out by the civil authorities of sixteenth century Europe for a fate of imprisonment, torture, banishment, hanging and drowning.¹⁰⁷ There were some instances

105 *Protestant Concepts* 79, 91.

106 See excerpts from their writings in Klaassen *Anabaptism in Outline* 290-301.

107 See Kreider *Anabaptists and the State* 180-193 who discusses the reasons for this by looking at the state's view of the Anabaptists and the Anabaptists' view of the state. On the prosecution of the Anabaptists see Klaassen *Anabaptism in Outline* 290-301 and Estep *Anabaptist Beginnings* 47-53.

of *de facto* toleration as a result of the good work of the Anabaptists in communities,¹⁰⁸ but in general they were viciously persecuted.¹⁰⁹ Kreider¹¹⁰ advances as possible reasons for this persecution that the authorities believed that the Anabaptists were "dismembering the church, the very body of Christ, and thus shattering the ideal of a unified civil and religious community." The authorities furthermore feared that the Anabaptists were "undermining the authority and prestige of the magistracy" and that their "civil disobedience would produce an epidemic of contempt for governmental authority." They also feared the missionary expansion of the movement. This harsh persecution, however, gave rise to inspired appeals for religious toleration and freedom by Anabaptist writers in a century of intolerance.¹¹¹ Cogent arguments for and sophisticated defences of religious freedom contributed richly to the development of religious rights. It has been stated that:¹¹²

This despised group thus became the first Protestant advocates of a separation of church and state, not on rational, pragmatic, or political grounds, but as a consequence of a theology of discipleship and the church as a community of disciples.

6.2.4 Calvin

Calvin also contributed substantially to the development of ideas on religious freedom.¹¹³

108 Many of the civil authorities were willing to work out a *modus vivendi* with the Anabaptists and offered them immunity from arrest if they would only remain quiet, attend church, baptise their children, and cease to evangelise overtly.

109 Sanders *Protestant Concepts* 75.

110 Kreider *Anabaptists and the State* 181.

111 See excerpts from Anabaptist writings on religious toleration in Klaassen *Anabaptism in Outline* 290-301.

112 Sanders *Protestant Concepts* 79.

113 Calvin's thoughts are reflected in various confessions of faith, for example article 36 of the *Confessio Belgica*. This article expresses belief in a theocracy, in terms of which the state recognises one Christian Church and roots out all other "false" doctrines by means of the sword. This view had to be reinterpreted in the twentieth century in view of such principles such as the concept of religious freedom.

Although he did not draw a clear distinction between religious and political freedom, his views formed the basis for the institutional separation of church and state.¹¹⁴

Witte¹¹⁵ highlights the fact that a perennial theme in Calvin's writings is that religious freedom must always be exercised with becoming moderation. Calvin believed that freedom and law, freedom and order, and toleration and discipline were all meant to function together and to constantly balance one another to achieve the ideal of "moderate religious freedom". Witte illustrates clearly why Calvin "is a controversial candidate for the honour roll of religious liberty in the West", but maintains that neither wholly negative nor wholly positive interpretations of Calvin in this context do justice to him.¹¹⁶ He concludes that Calvin's political ideas "were sufficiently protean and provocative to inspire a wide range of both totalitarian and democratic tendencies":

Calvin's most original and lasting contribution to the Western tradition of religious liberty lay in his restructuring of the liberty and order of the church. Calvin was able to find a way between both the Erastian tendencies of Lutherans and Anglicans that subordinated the church to the state, and the ascetic tendencies of Anabaptists and radicals that withdrew the church from the state and society. He did so by combining ingeniously within his ecclesiology the principles of the rule of law, democracy, and liberty and giving the church a moral responsibility within the entire community.... This integrated theory of the church and state had obvious

114 A number of Calvinistic groups were formed internationally, in Switzerland, France, the Netherlands, Scotland, England and New England where they were referred to as Calvinists, Huguenots, Pietists, Presbyterians, Puritans and Congregationalists respectively. At the end of the sixteenth century, all these groups belonged to one basic movement inspired by Calvin. Later, these forms took on an independent development.

115 1995 *Calvin Theological Journal* 3.

116 Witte 1995 *Calvin Theological Journal* 2 writes: "It is easy to select from these scattered sentiments quotations to support both positive and negative impressions of Calvin. Calvin often wrote with a strong rhetorical flourish, and in unguarded moments or on particularly controversial subjects, he was not above the bombast and hyperbole that typified sixteenth century humanist literature. Calvin's champions can find many strong statements in his writings on separation of church and state, liberty of conscience, free exercise of religion, and make Calvin out to be the father of modern religious liberty and political democracy. Calvin's critics can assemble an equally high pile of quotations on religious bigotry, chauvinism, prejudice, repression, and officiousness, and make Calvin out to be a rigid and unbending theocrat."

implications for the theory of the state.... What Calvin adumbrated, his followers elaborated. In the course of the next two centuries, European and American Calvinists wove Calvin's core insights into the nature of corporate rule into a robust constitutional theory of republican government, which rested on the pillars of rule of law, democratic processes, and individual liberty.

7. The religious wars of sixteenth- and seventeenth-century Europe

7.1 Divergence in religion and law

Very little unity existed in Europe by 1600. Both religion and law had become seriously fragmented. After the Reformation there were a number of rival religious groups and, as some groups became more fundamentalist, intolerance was spreading. The result was religious warfare. After the Council of Trent in 1545 which tried to imbue the old institutions with a fresh dynamism, the Roman Catholics ardently tried to recover the support they had lost, and the Protestants were no less eager to gain new ground. Ehler¹¹⁷ emphasises that, as a consequence, civil wars inside many European countries were characterised by extreme fierceness and cruelty.

The notion of common law was also lost. Formerly, canon law with all its branches covered nearly all transactions, but by 1600 the Catholic church no longer had universal jurisdiction and the universal common law (or *ius commune*) had disappeared. In southern Europe, an attempt to find a public international law which all people could customarily obey and which would unite the Catholic polities resulted in a return to canon law. This did not happen in northern Europe. Treaties and alliances which had been concluded were constantly breached, and civil and religious wars raged.¹¹⁸

7.2 Germany

In Germany, where Luther had begun his Evangelical reformation with a call for the freedom of the church and the state and with advocating religious freedom, his writings after 1530

117 See the chapter on "The Impact of the Enlightened Monarchs" by Ehler *Church and State* 69-85.

118 For an overview, see Dunn *Religious Wars* 32-40, 82-92, 164-178.

showed evidence of increasing intolerance towards "dissenters", whether they were Anabaptists, Zwinglians or Calvinists.¹¹⁹ The same applied to the Jews.¹²⁰ Luther had initially been very solicitous towards the Jews and had accommodated them in his theology,¹²¹ but three years before his death in 1543, his changed attitude culminated in radical antisemitist propaganda, evidencing hatred and contempt.¹²² By 1550 the openness and toleration of the Germany which used to be a haven for dissenters, had changed drastically.

7.3 England

In Elizabethan England, all dissent was looked upon with hostility by the state, whether it emanated from Catholics, from other reformation movements or consisted merely of differences in worship within the Anglican church itself. Catholics were the worst off and had to contend with draconic laws intended to destroy Catholicism throughout the kingdom. They were branded as heretics, convicted of high treason, coerced not only to attend Anglican services, but also to receive communion there. In 1585 all subjects were ordered to denounce Jesuit and other missionaries, and the death penalty could be incurred for persuading someone to return to the Roman Catholic Church. In the 1585 Act,¹²³ Catholic priests were ordered to leave the kingdom within forty days. In 1593¹²⁴ it was laid down that no Catholic over sixteen was allowed to travel more than five miles from his home. It has been stated that "[t]he measures taken since 1559, as a whole, set up against Catholics in England a legislative

119 See Müller *Church and State in Luther and Calvin* 60-72 for an exposition of Luther's changing attitude towards dissenters and Jews.

120 See Marcus *The Jew in the Medieval World* 165-169 on Martin Luther and the Jews 1523-1543.

121 Luther *That Jesus Christ was a Born Jew* (1523).

122 Of which *Concerning the Jews and Their Lies* (1543) is the most notorious. It starts with the phrase: "What then shall we do with this damned, rejected race of Jews? Since they live among us and we know about their lying and blasphemy and cursing, we can not tolerate them if we do not wish to share in their lies, curses and blasphemy."

123 *Act against Jesuits and Seminarists* (1585).

124 *Act against Papists* (1593).

apparatus of surpassing perfection."¹²⁵

The Anabaptists were also fiercely prosecuted. Puritans, and especially Separatists, experienced bloody persecutions, vexations by the police, and imprisonment, though to a lesser degree than the Catholics. The Puritans, who were suppressed by the queen in 1577,¹²⁶ wished to eliminate from Anglican usage everything that was not based on Scripture, in other words, they wanted the church reformed in the Calvinist sense, and saw the church and the state as two distinct organisms.¹²⁷ Separatist leaders, who sought to found Christian communities that depended on neither the church nor the government,¹²⁸ were imprisoned. After 1590, the position of dissenters became even more precarious when new acts were passed in 1593 against both the "Papists" and the "Puritans".¹²⁹ According to these Acts, any person who resisted royal authority, misled others or took part in illicit religious services, was liable to imprisonment, and afterwards would be given the choice of either leaving the country or conforming to the official religion. As Lecler¹³⁰ puts it: "Elizabeth's reign was, even with regard to Protestant dissenters, a period of unremitting intolerance."

7.4 France

During the second half of the sixteenth century, France was virtually torn apart by forty years

125 See Lecler *Toleration and Reformation* 380-395.

126 All clergy had to subscribe to the following three points" (1) The queen possesses supreme power in the Church of England; (2) The Book of Common Prayer contains nothing that is contrary to the Word of God; (3) The whole of the Thirty-nine Articles is in accordance with the Word of God." See Lecler *Toleration and Reformation* 380-395.

127 Before 1570 their attack focused mainly on liturgical ceremonies, but after that it was directed to the hierarchical organisation of the church and they demanded the equality of all its ministers. Thus began Presbyterianism.

128 Separatists, like the Anabaptists, saw the church as a voluntary association of believers in a sinful world. Congregationalism flowed from this movement.

129 *Act against Sectaries* (1593) and *Act against Papists* (1593).

130 See Lecler *Toleration and Reformation* 380-395.

of destructive religious war.¹³¹ Jesuits and others who opposed the royal domination of the Roman Catholic church were outlawed. The French Huguenots (French Calvinists) in particular,¹³² who denounced the theology of the Roman Catholic church and the monarchy, were harshly persecuted. Denounced as heretics, their communities were condemned as illegal associations, their leaders were executed and their literature was banned. The Calvinists retaliated by attacking convents and desecrating Catholic churches, smashing the holy relics and statuary. In 1561 Catherine de Medici tried to reduce the tension by formulating a policy of toleration and proclaiming the Edict of January 1562, which granted the Huguenots freedom of public worship beyond walled towns and of private assembly within. But, an incident when the Duke of Guise killed 63 Huguenots which he found worshipping in a barn, set off the wars again. After ten years of inconclusive war, at least 3000 Huguenots (some contemporaries estimate it at 10 000) were killed on 24 August 1572 during the St Bartholomew massacre in Paris.

8. Sixteenth and seventeenth century peace treaties which protected religious rights

After the religious wars in Europe during the seventeenth and eighteenth centuries, several treaties followed which incorporated clauses that guaranteed certain rights to groups with a religion different from that of the majority. Among the most important were the Peace of Augsburg (1555), the Edict of Nantes (1598) and the Treaty of Westphalia (1648).¹³³

8.1 Peace of Augsburg

131 For a discussion of the fight for recognition of the Calvinistic faith, see Bainton *Reformation* 160-172; Dunn *Religious Wars* 32-40.

132 In 1559 the Huguenots held their first national synod in France.

133 Also see the Treaty of Oliva (1660) in favour of the Roman Catholics in Livonia, ceded by Poland to Sweden; the Treaty of Nimuguen (1678) between France and Spain; the Treaty of Ryswick (1697) protecting Catholics in territories ceded by France to Holland; and the Treaty of Paris (1763) between France, Spain and Great Britain, in favour of Roman Catholics in Canadian territories ceded by France. See Lerner *Group Rights and Discrimination* 7.

The conflict between Lutherans and Catholics in Germany was eventually resolved at the Peace of Augsburg in 1555,¹³⁴ according to the principle *cuius regio eius religio*. This principle meant that each prince could establish Catholicism or Lutheranism within his own territory and, in the imperial cities, Lutheranism and Catholicism were to have equal rights¹³⁵ and dissenters had to be permitted to emigrate. However, non-Lutheran Protestants were totally banned from Germany.

The Peace of Augsburg was thus one of the first documents in which religious rights were protected in that Catholic and Protestant groups were granted limited rights to establish their faiths. The first "individual" religious right which was extended at this occasion was the minimum religious right, the right to emigrate or leave the group (to vote with your feet).

8.2 Edict of Nantes

In 1598 Henry IV (the King of France) and Philip II (the Emperor of Spain) finally made peace. The Edict of Nantes (1598)¹³⁶ ended the war in France between Roman Catholics and Huguenots. This treaty espoused important principles of religious freedom. Although the edict established Gallican Catholicism (Gallicanism) as the official religion, Huguenots who lived outside Paris were granted religious freedom. Those Huguenots who lived in Paris were only permitted to worship privately, and public worship continued to be banned.¹³⁷ This treaty was a unique document in its time in that it was the first document to grant religious freedom in this manner.

8.3 The Peace of Westphalia

134 The Religious Peace of Augsburg was entered into on 25 September 1555. See Ehler and Morrall *Church and State through the Centuries* 164-173.

135 Berman and Witte *Church and State* 496.

136 The Edict of Nantes was enacted by Henry IV, King of France, on 13 April 1598. See Ehler and Morrall *Church and State through the Centuries* 183-188. It remained in force for 87 years, until 1685 when Louis XIV eliminated the threat of ecclesiastical pluralism by revoking the Edict of Nantes with the Edict of Fontainebleau.

137 Berman and Witte *Church and State* 498.

At the turn of the sixteenth century the division in Western Christendom had crystallised into a *de facto* Protestant North and a Catholic South. But, as Ehler¹³⁸ states, "the dynamism of the two hostile religious ideologies however, was not content with any *de facto* crystallization" and in 1618 the 30 years war broke out and developed into a major international conflict.¹³⁹

After these bitter religious wars between Roman Catholics and Protestants in the latter part of the sixteenth century and the first half of the seventeenth century, the peace treaty of Westphalia was concluded in 1648.¹⁴⁰ This treaty is of particular importance to religious rights issues since it contained important principles of religious freedom.¹⁴¹ At Westphalia the principles of the Peace of Augsburg and the Edict of Nantes were confirmed by stating that each ruler could establish Catholicism, Lutheranism or Calvinism in his domain.¹⁴² The principle of *cuius regio eius religio*, coined by the Peace of Augsburg, became a general rule practically all over Europe in the seventeenth and eighteenth centuries. Nonestablished groups, though forbidden to worship in public, were granted permission to exercise their religion privately. They were to suffer no further violations of their political and civil rights.

Despite severe papal condemnation of the treaty, it remained the fundamental religious law of Europe until the nineteenth century. Its policy of establishment and toleration was gradually accepted by most Protestant and Catholic leaders.¹⁴³

8.4 Church-state relations and religious freedom after the Peace of Westphalia

138 Ehler *Church and State* 70.

139 See the chapter on the thirty years' war (1618-1648) by Dunn *Age of Religious Wars* 82-92.

140 For the religious clauses of the Peace of Westphalia (Treaty of Osnabrück of 24 October 1648), see Ehler and Morrall *Church and State through the Centuries* 193-198.

141 Ehler *Church and State* 71 puts it as follows: "...by the peace treaties of Westphalia the disruption of Christianity [by the Reformation] was finally recognized and legalized in International Law, and its recognition was put on contractual basis between the signatory powers."

142 In 1685 Louis XIV revoked the Edict of Nantes and Peace of Westphalia and discarded the principles enunciated therein in the Edict of Fontainebleau. See Ehler and Morrall *Church and State through the Centuries* 208-213.

143 Berman and Witte *Church and State* 499.

The patterns of church-state relations and religious freedom that existed in seventeenth-century Europe provided the templet for Western church-state relations for centuries to come.¹⁴⁴ In addition, seventeenth century Europe expanded to include various colonies, and transplanted the European theories of church and state to these new territories.

In Lutheran polities (in Germany and Scandinavia) church and state were separated and all legal and political authority vested in the state. The principle of *cuius regio eius religio* was strictly applied, allowing the right of emigration to religious dissenters, but only a few limitations were imposed on the power of the ruler. The princely or city council ruled over doctrine and liturgy and had title interests in church property. This absolute control of the ruler was sometimes benevolent, but sometimes not. There also existed pockets of strong anti-Semitism, and intolerance against Anabaptists.

In England the Anglican church was established as the official religion. The church was equal to the commonwealth and there was, subject to certain limitations, a conflation of church and state. The monarch was the supreme head of the church and the commonwealth. By 1600 there were equal numbers of conformists and nonconformists, but increased repression of Protestants during the early seventeenth century led to the 1649 establishment of a Puritan Commonwealth, which tolerated both Protestants and Anglicans (but not Roman Catholics) without establishing Anglicanism. In 1660 Anglicanism was re-established as the state religion. Growing tolerance of Protestants culminated in the Bill of Rights and the Toleration Act of 1689. Parliament granted freedom of association and worship to all Protestants and removed many legal and political restrictions on Protestants, but Roman Catholicism remained to be proscribed.

In Gallican France there existed a separation of and rivalry between church and state. According to an abridged version of the two-swords theory, canon law was subject to the papacy and civil law subject to the royalty. The national establishment of Gallicanism initially tolerated Calvinism, but gradually abandoned the toleration policies of Nantes and Westphalia. Strong antipapal sentiments also existed within the Gallican party. Supported by theories of

144 See Hyma *Christianity and Politics* 221-262.

absolute monarchy (expounded for example by Jean Bodin), the French monarchs organised a national Catholic church. Louis XIV restricted the freedoms of Huguenots and other dissenters (Protestant or Catholic) and imposed harsh taxes on them. In 1685 the growing intolerance of Calvinists culminated in the Edict of Fontainebleau in which Louis XIV repealed the Edict of Nantes. He ordered all Protestant churches and schools to be destroyed, proscribed all theologies that deviated from official Gallicanism and banished all dissenting clerics from France.¹⁴⁵

In what was later known as the Netherlands, the greatest degree of religious freedom existed.¹⁴⁶ Hyma¹⁴⁷ remarks:

This republic had in the midst of the terrific conflict acquired the finest colonial empire in the world, the largest merchant marine, the bulk of the carrying trade in European waters, a policy of religious freedom (with certain limitations in our eyes, but not in the eyes of contemporaries), an excellent system of representative government, and such high social and intellectual standards that all other nations were astonished.¹⁴⁸

The Netherlands had formerly been a feudal colony of the Holy Roman Empire, bound by charters for rights, duties and taxes. As the distant sovereign became more greedy and

145 Berman and Witte *Church and State* 499.

146 See Hyma *Christianity and Politics* 234-262 who discusses the ideas of freedom, representative government and democracy in Dutch writings of the sixteenth century (for example by Emmius and especially, in the political theories of the Dutch Baptists) and their influence on, for example Althusius ("who for all practical intent formed a part of Dutch Calvinism from 1604-1634") and Grotius. He maintains that such authorities as Hooker, Milton, Hobbes and Locke, in developing their ideas on democracy and political institutions, "drew heavily upon sources beyond the sea." Although a great degree of religious freedom existed in the Netherlands, it has to be kept in mind that the principle of theocracy still existed, as expressed in the *Confessio Belgica*, which principle was often abused by the state.

147 Hyma *Christianity and Politics* 224 .

148 In this respect, note can be taken of the writings of Ubbo Emmius (Liberates), the foremost historian and authority in political science in the northern provinces of the Dutch Republic in the second half of the sixteenth century, which account for the enthusiasm for civic freedom in the northern Netherlands.

extracted more taxes and manpower, the people in Holland started reacting against the Spanish Emperor. As the Emperor, Philip II, heard about the reformist literature, he sent the duke of Alva with Inquisitorial powers to put in place the bloodiest inquisition in Western Europe. William the Silent (Prince of Orange) resolved to aid the oppressed heretics in the Netherlands. Under his influence, the Dutch organised resistance and the seven northern provinces formed the Union of Utrecht in 1579, creating a confederated government. The Union of Utrecht document is one of the most powerful instruments in history which contributed to the establishment of the present conception of religious toleration. It was drawn up in an age of almost universal religious intolerance and of growing absolutism. Article XIII of the Union of Utrecht document declared:

...every private citizen must remain free in his religion, and that no one may be brought before inquisitors to be examined as to his religious beliefs, in accordance with the terms of the Pacification of Ghent.

The Union of Utrecht went much further than the Pacification of Ghent¹⁴⁹ in extending complete freedom of worship and religious belief to the people (although some preference was given to Calvinism.) This constitutional document remained in force for almost 150 years.

By the end of the seventeenth century reasonably adequate theories of religious rights existed which included some degree of freedom of conscience, free exercise of religion, religious pluralism, equality and separation of church and state.

9. Constitutional entrenchments of religious freedom in the eighteenth and nineteenth centuries

During the eighteenth and nineteenth centuries, provisions in favour of religious minorities were incorporated in the domestic law of some countries. This protection of religious groups was to a large extent the result of the protection afforded to religious groups in the

149 William the Silent drafted the Pacification of Ghent in 1576.

international treaties mentioned above.¹⁵⁰

In addition, philosophers of the enlightenment in the eighteenth century stressed the autonomy of the individual. They also advocated the religious neutrality of government and (civil) law. In the late eighteenth and early nineteenth centuries, many countries were influenced by the revolutionary democratic ideas of the French Revolution. Tierney¹⁵¹ states that:

In this new climate of opinion, when persecution was increasingly condemned as contrary to the teachings of Jesus, all the old medieval strands of argument about the freedom of the church from secular control, the overriding authority of conscience, and the existence of natural rights were taken up again and woven into new patterns.

He states that the freedom of the church from secular control had come to mean that the civil magistrate had no right to interfere with any person's choice of religion. The authority of the individual conscience developed into freedom of conscience as of right and led to a degree of religious toleration.

The final outcome of all the new argument about conscience was a fusion of the new ideal of religious liberty with the older doctrine of natural rights. Freedom of conscience came to be seen as one of the natural rights of man, guaranteed by natural law and discernable by the "light of reason" or "light of nature".¹⁵²

During the late eighteenth and early nineteenth centuries a number of (individual) religious rights were entrenched in various national constitutions.¹⁵³ The United States Constitution of 1791 explicitly guaranteed religious freedom and forbade state support of religion. It is stated in the first amendment: "Government shall make no law establishing any religion or curtailing the free exercise thereof." In France the concordat between Pope Pius VII and the First French Republic in 1801 guaranteed the free exercise of religious beliefs. However, the French

150 See Lerner *Group Rights and Discrimination* 7.

151 *Religious Rights* 39. Also see the discussion at 36-42.

152 Tierney *Religious Rights* 42.

153 See the overview by Berman and Witte *Church and State* 500-502.

Catholic church formally remained the established church of France throughout the nineteenth century. In 1905, the Law of Separation of Church and State removed the church from state control and support. In Belgium the 1831 constitution guaranteed freedom of religion and restricted state support thereof. However, the state continued to remunerate the clergy of the Catholic, Lutheran and Calvinist churches. In Prussia the constitution of 1850 alleviated the strict state control of churches imposed by Friedrich II. In the Austro-Hungarian empire, concordats between the pope and the emperor reduced the state control of churches. In Italy the Italian Law of Guarantees of 1871 guaranteed religious freedom for all citizens and the autonomy of the church in spiritual matters and ecclesiastical education and appointments. In England the Anglican church remained the established church. The Catholic Emancipation Act of 1829 permitted Roman Catholics to sit in Parliament, and the Universities Act of 1820 opened public schools and universities to Catholics. By the end of the nineteenth century, all remaining instances of legal discrimination against Catholics had been removed.

Today, most Western countries have adopted laws, policies or guarantees in their constitutions to protect a plurality of religious groups and beliefs.¹⁵⁴ Most Western countries have also adopted legal measures to insulate the state from the church.¹⁵⁵

10. Religious rights and freedoms in international human rights law¹⁵⁶

10.1 Group rights versus individual rights

As we have seen above, "international human rights law actually began, rather timidly, as an attempt to protect discriminated groups, particularly religious minorities, through initial

154 Berman and Witte *Church and State* 502 however point out that "constitutional battles between church and state continue to be waged in some countries over such matters as government taxation of churches, government support of religious schools, and the giving of religious instruction in state-supported schools."

155 Establishment policies are still in effect to some extent in the United Kingdom, France, Scandinavia, Germany and Austria in the form of financial support and special protection.

156 Extensive commentaries exist on the international protection of freedom of religion or belief. For a detailed discussion of (and references to) international human rights standards and activities addressing freedom of religion or belief, see Tahzib *Freedom of Religion or Belief* 63-247.

emphasis on tolerance more than on rights".¹⁵⁷ In 1815, the historic Congress of Vienna expanded the protection of minority groups beyond the purely religious field,¹⁵⁸ thus reflecting the influence of the new egalitarian principles.¹⁵⁹ But it was only after the First World War that a minorities protection system was established.¹⁶⁰ After the Second World War¹⁶¹ the emphasis in the protection of international human rights shifted from *group* protection to the almost exclusive protection of *individual* rights and freedoms.¹⁶² The new approach was that, whenever a person's rights were violated or restricted because of a group characteristic (race, religion, ethnic or national origin or culture), the matter could be resolved by protecting the rights of the individual, on a purely individual basis, mainly through the principle of nondiscrimination. Such was the method followed by the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Proposals for inclusion of an article on national minorities in the Universal Declaration of Human Rights were rejected.

10.2 International human rights instruments

- 157 Lerner *Group Rights and Discrimination* 7. Also see Alessandra Luini del Russo *International Protection of Human Rights* (1971) 14, as quoted by Lerner *Group Rights* 7 who states that, initially "not the individual, but groups of individuals, minorities, within one political community appeared to the conscience of civilized nations as in need of protection at the international level".
- 158 It could be stated that the protection of individual international human rights followed in the wake of religious group rights.
- 159 Thereafter, for example, the Treaty of Berlin (1878) contained provisions in favour of Turks, Greeks and Romanians under Bulgarian rule, and the International Convention of Constantinople (1881) protected Muslims in territories that came under Greek control.
- 160 See Lerner *Group Rights and Discrimination* 11-19 for a discussion of the minorities treaties system established between the World Wars.
- 161 See Lerner *Group Rights and Discrimination* 14-16 for the position after World War II.
- 162 This could lead one to conclude that individual protection is a full and systematic form of protection, which presupposes and includes corporate protection. But, the international community realised that the nondiscrimination rule and the individual-centred approach alone were not enough to protect the rights of individuals as members of a group, and certainly not of the group as such. This was particularly evident in the case of multiethnic, multireligious or multicultural societies and resulted in new legal instruments to protect "minorities", now called "communities", "peoples" or "groups". See Lerner *Group Rights and Discrimination* 16.

Religious rights and freedoms are nowadays protected in most international human rights instruments.¹⁶³ As Durham¹⁶⁴ states, these international human rights instruments reflect -

the strata of older, narrower conceptions of religious liberty that have been deposited in the course of the historical broadening of religious freedom over time until the modern expansive protections have been attained.

10.2.1 The Charter of the United Nations

The United Nations Charter¹⁶⁵ does not contain any explicit reference to freedom of religion or belief¹⁶⁶ but does propose that fundamental freedoms be available to all (pluralism) without distinction (equality). In terms of article 1(3), the purposes of the United Nations are:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

While the Charter was being drafted at the United Nations Conference on International Organization in San Francisco in 1945, a clear expectation emerged that an international bill

163 See Lerner *Religious Human Rights under the United Nations* 79-134 for an overview of clauses in the leading international human rights instruments which in general endorse the principle of religious freedom and nondiscrimination on the grounds of religious persuasion and a discussion of issues such as gender issues, educational demands, employment practices and the plight of indigenous populations.

164 *Perspectives on Religious Liberty* 26-30. Also see the discussion below in ch 6.

165 Unanimously approved on June 25, 1945, signed June 26, 1945, entered into force Oct 24, 1945 (in Accordance with Art 110) (last amended in 1971), 1 UNTS xvi; 59 Stat. 1031; TS No 993, 3 Bevans 1153, 1976 YBUN 1043.

166 The preamble and articles 1, 13, 55, 56, 62, 68 and 76 contain references to human rights and fundamental freedoms in general. Article 55(c) and 56 spell out the basic obligations of the United Nations and the Member States in achieving the purposes of the United Nations in the field of human rights.

of rights would be created under the Charter.¹⁶⁷

10.2.2 The International Bill of Rights

(a) The Universal Declaration of Human Rights (1948)

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights¹⁶⁸ at its third session on 10 December 1948. This declaration constitutes the first part of the five part international bill of rights.¹⁶⁹ Article 18 specifically pertains to freedom of religion or belief and protects freedom of conscience, the right to practise religion freely and pluralism:

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.¹⁷⁰

Equality and pluralism are protected by article 2(1):

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

167 This was mentioned by US President HS Truman in his address at the final plenary session of the San Francisco Conference on June 26, 1945.

168 Adopted Dec 10, 1948, GA Res 217A (iii) UN GAOR, 3d Sess, pt 1, 183d plen mtg at 71, UN Doc A/810 (1948).

169 The constituent parts of the international bill of rights are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Optional Protocol and the Second Optional Protocol to the International Covenant on Civil and Political Rights. Only the first three documents contain provisions of religious freedom. There are several other international human rights instruments pertaining to freedom of religion or belief. They include rights regarding religious minorities and groups, the prohibition of discrimination on the grounds of religion or belief and the religious education of children. See the discussion by Tahzib *Freedom of Religion or Belief* 94-121.

170 See the discussion of this provision by Tahzib *Freedom of Religion or Belief* 70-81.

(b) The International Covenant on Civil and Political Rights (1966)

Article 18 of the International Covenant on Civil and Political Rights¹⁷¹ is directly concerned with the right to freedom of thought, conscience and religion.¹⁷² The four paragraphs of this article reiterate the concepts embodied in article 18 of the Universal Declaration of Human Rights and amplify them by adding three specific implications to the general provision. The concepts of thought, conscience and religion, however, remain undefined.¹⁷³ Article 18 of the International Covenant on Civil and Political Rights reads as follows:¹⁷⁴

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with other and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion belief of his choice.

171 Adopted Dec 16, 1966, entered into force Mar 23, 1976 (in accordance with Art 49(1), GA Res 2200A (XXI), Annex UN GAOR 21st Sess, Supp No 16, 1496th plen mtg at 52, UN Doc A/6316 (1967).

172 Art 2, 4, 8, 29, 24, 26 and 27 also contain provisions pertaining to freedom of religion or belief.

173 With regard to the freedom of thought, conscience and religion, also see: Art III of the American Declaration of the Rights and Duties of Man (1948); Art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Art 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); Art 18(1) and (2) of the International Covenant on Civil and Political Rights (1966); Art 12(1) and (2) of the American Convention on Human Rights (1969); Principle VII of the Final Act of the Conference on Security and Co-operation in Europe (1975); Art of the African Charter on Human and People's Rights (1981); Art 1, 6, 7, and 8 of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981); and Principles 11 and 16 of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989).

174 See the discussion of this provision by Tahzib *Freedom of Religion or Belief* 81-92.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷⁵ is virtually identical to article 18(1) and (3) of the International Covenant on Civil and Political Rights. Article 12(1) of the American Convention on Human Rights¹⁷⁶ in turn closely parallels article 9 of the European Convention.

Article 26¹⁷⁷ of the International Covenant on Civil and Political Rights protects equality and pluralism:

All persons are equal before the law and are entitled to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar provisions appear in article 1 of the American Convention and article 14 of the European Convention.

(c) The International Covenant on Economic, Social and Cultural Rights (1966)

175 Nov 4, 1950, UNTS 213:333, entered into force Sept 3, 1953, as amended by Protocol No 3, entered into force Sept 21, 1970 and Protocol No 5, entered into force Dec 21, 1971.

176 Nov 22, 1969, OAS Treaty Series No 36 at 1, OEA/Ser.L/V/II.23 doc rev 2 entered into force July 18, 1978.

177 Also see art 2, 4 and 20.

The provisions regarding freedom of religion or belief in the International Covenant on Economic, Social and Cultural Rights¹⁷⁸ are contained in articles 2 and 13. Article 2(2) includes a comprehensive guarantee that the rights stipulated in the International Covenant on Economic, Social and Cultural Rights may be exercised without discrimination on the grounds of religion. It reads as follows:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10.2.3 The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981)

A lengthy process preceded the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief which comprises a preamble and eight articles.¹⁷⁹ Although it is not a convention and therefore does not have the binding effect of a convention, it is not without legal effect. At least some of its provisions are normative and are regarded as part of customary international law.¹⁸⁰

Article 1 protects the right to freedom of thought, conscience and religion, pluralism and the right to practise religion, but has not retained the same level of protection contained in earlier corresponding provisions. Article 8 (the savings clause), however, prevents the 1981 Declaration from restricting or derogating from any right defined in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights. Article 1 provides:

178 Adopted Dec 16, 1966, entered into force Jan 3, 1976 (in accordance with Art 27(1), GA Res 2200A (XXI) Annex UN GAOR, 21st Sess, Supp No 16, 1496th plen mtg at 49, UN Doc A/6316 (1967).

179 For the full text see Tahzib *Freedom of Religion or Belief* Appendix A 495-498. Also see the discussion at 165-189.

180 See Tahzib *Freedom of Religion or Belief* 187.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public and in private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

Articles 2, 3 and 4 are concerned with equality and nondiscrimination on the grounds of religion or belief. Article 2 provides:

1. No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

10.3 The Vienna Concluding Document

Durham¹⁸¹ points out that the principles of religious freedom enunciated in Principles 16 and 17 of the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (Vienna Concluding Document), which were promulgated in 1989, contain a remarkable list of specific requirements needed to avoid encroachments on religious freedom. These principles serve as a useful summary of concrete religious freedom norms that have won acceptance in Europe, including the former Soviet bloc and in the United States and Canada in the Helsinki process. One can agree with Durham that these principles, which are particularly sensitive to modern problems, constitute an invaluable contribution and deserve acceptance throughout the world. Principles 16 and 17 are worth quoting in full:

181 *Perspectives* 37.

16. In order to ensure the freedom of the individual to profess and practise religion or belief the participating States will, *inter alia*,
- 16a take effective measures to prevent and eliminate discrimination against individuals or communities, on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, political economic, social and cultural life, and ensure the effective equality between believers and non-believers;
- 16b foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers;
- 16c grant upon their request to communities of believers, practising or prepared to practise their faith within the constitutional framework of their states, recognition of the status provided for them in their respective countries;
- 16d respect the right of religious communities to
- establish and maintain freely accessible places of worship or assembly,
 - organize themselves according to their own hierarchical and institutional structure,
 - select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State,
 - solicit and receive voluntary financial and other contributions;
- 16e engage in consultations with religious faiths, institutions and organizations in order to achieve a better understanding of the requirements of religious freedom;
- 16f respect the right to everyone to give and receive religious education in the language of his choice, individually or in association with others;
- 16g in this context respect, *inter alia*, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions;
- 16h allow the training of religious personnel in appropriate institutions;
- 16i respect the right of individual believers and communities of believers to

- acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief;
- 16j allow religious faiths, institutions and organizations to produce and import and disseminate religious publications and materials;
- 16k favourably consider the interest of religious communities in participating in public dialogue, *inter alia*, through mass media.
17. The participating States recognize that the exercise of the above mentioned rights relating to the freedom of religion or belief may be subject only to such limitations as are provided by law and are consistent with their obligations under international law and with their international commitments. They will ensure in their laws and regulations and in their application the full and effective implementation of the freedom of thought, conscience, religion or belief.

11. Conclusion

11.1 Church-state models

A number of basic church-state models presented themselves through Christian theologies in the West. In the first three centuries, there was an identification of church and state and law and religion in Roman law. The establishment of the "imperial cult" by Roman law, however, formed the first prototype of religious establishment by law. This pattern was followed when the Christian faith was established as the state religion in 380. The Christian church was then directly supported by the imperial authority and the Roman Emperor was also the head of the Church. This system of imperial rule prevailed until the late eleventh century when the Roman Catholic Church established itself as a unified, hierarchical, autonomous, politico-legal entity. The church itself became a state-like legal entity with a corporate structure resembling that of the Roman Empire, and canon law effectively governed all levels of government. The Roman model of church and state relations thus proclaimed the superiority of canon law and subjected the state to the church.

During the Protestant Reformation of the sixteenth century the authority of the Roman

Catholic Church was challenged at theological, legal and political level. This led to new theoretical expressions of the relationship between church and state. Luther maintained that the (Christian) civil ruler exercised all legal and political authority and that the authority over the church vested in the Christian monarch. The Lutheran model thus implied jurisdiction of the state over the church, but awarded a strong advisory role to the church.

In England papal power was replaced with royal authority and the church was subjected to the state, with the King as the head of the Church. The Anglican model thus implied strong political authority over ecclesiastical authority.

The Anabaptist movement maintained that there are two kingdoms, that of God and that of the devil. The church was seen as a voluntary community of believers, ascetically dissociated from the secular. The Anabaptist or Free Church model thus introduced the idea of a wall of separation between church and state.

Calvin's views formed the basis for the institutional separation of church and state and the recognition of church and state as equal institutions. In simple terms, the Calvinist model implied covenants between church and state to form one greater community, without the notion of superiority.

These basic models of church-state relations which developed historically can thus be divided into the following broad categories, that is, models in terms of which (1) there is complete identification of church and state (2) the church reigns supreme over the state; (3) the state reigns supreme over the church; (4) covenants between church and state exist and (5) a complete separation of church and state exist.¹⁸² The discussion in this chapter showed that a certain measure of institutional separation between church and state came to be regarded as one of the essential requirements for the protection of religious rights and freedoms.

182 Van der Vyver *Introduction* XX-XLIV identified four distinct dogmatic presuppositions reflected in the modern constitutions of the world: As extreme positions (1) the American notion of the wall of separation between church and state, and (2) the Islamic Shari'a proclaiming the identity of law and religion; and somewhere in between, (3) the scholastic adage of subsidiarity and (4) the typical Calvinist doctrine of sphere sovereignty.

It is also clear that each of these church-state models has a particular implication for the role of the state (law) in respect of religion. However, there does not seem to be a single universal formula for reconciling religious rights and state authority. It is apparent from this chapter that religious freedom is not necessarily directly parallel to the degree of separation between state and church and state and religion which exists in a country. Total religious freedom does not necessarily occur in the case of complete separation between state and religion (or "nonidentification" of the state with the church and "nonestablishment" of religion by law), nor is religious freedom necessarily totally absent in the case of identification of the state with the church or the establishment of religion by law.¹⁸³ But, both strongly positive and strongly negative identification of state and church and state and religion appear to correlate with low levels of religious freedom, because in both cases the state adopts a sharply defined attitude towards one or more religions, leaving little room for dissenting views.

11.2 The emergence of religious rights

Against this background of church-state relations in the West, the concept of religious right emerged. The Edict of Milan introduced four core principles of religious freedom, namely freedom of conscience, freedom to practice religion, accommodation of religious pluralism and equality of all religions. The Edict of Milan provided not only rights, but also the ability to exercise them. Moreover, the Edict granted corporate and individual restitution for Christians¹⁸⁴ and most importantly, gave individual litigants standing to claim exemptions from Roman law.

In medieval times, religious rights were only *de facto* present in canon law¹⁸⁵ in the form of

183 See Durham *Perspectives* 15-25 and the further discussion in ch 6.

184 This affirms the existence of the rights at that stage because *ubi ius ibi remedium* ("where there is a right, there is a remedy").

185 Witte *Introduction* xxii note 18 explains this in a nutshell: "The most important prototype for Western style (religious) human rights was the medieval canon law of the Catholic Church. This law defined the rights of the clergy to their liturgical offices, their exemptions from civil taxes and duties, and their immunities from prosecution and compulsory testimony. It defined the rights of ecclesiastical organizations like benefices, monasteries, and charities to form and dissolve, to accept and reject (continued...)"

exemptions, immunities, privileges and protections of certain groups such as the clergy. These exemptions, immunities, privileges and rights were thus put into practice as group rights by canon law. In granting these rights to the clergy, a class of people with special religious rights was created, which rights were enforceable in ecclesiastical courts.

Three aspects of medieval religion also contributed to the development of theories of religious rights. In the first instance, the medieval church insisted on the freedom of the church as an institution from state control. Secondly, medieval canonists and moral theologians often upheld the value of the individual conscience as a guide to proper conduct which was an important element in later theories of religious rights. Thirdly, the idea emerged in medieval times that everyone had natural rights. This would play an important role in subsequent theories of religious freedom.

The plight of religious dissidents contributed substantially to religious freedom. The concept of religious pluralism was already envisaged by the Edict of Milan of 313, which came as an answer to the persecution of Christians. During medieval times, *de facto* protection of dissidents or minorities and protection of minority groups contributed to the evolution of religious freedom. Judaism was, for example, outlawed in the fourth and fifth centuries but Theodosius changed Rome's policy to the Jews and gave them "second class citizen" rights. These rights included that their property would not be subjected to special taxes, that their worship services would not be interrupted and that they were allowed to have their own schools, charities, welfare, rituals and ceremonies. They were, in other words, effectively granted minimal religious group (corporate) rights. Certain individual rights were also granted, for instance that Jewish persons could litigate in civil courts and participate in any activity which did not involve the swearing of oaths. Although these rights were revoked and the Jews

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(...continued)

members, to establish order and organization, to acquire, use, and alienate property. It defined the rights of religious conformists to worship, proselytize, maintain religious symbols, travel on religious pilgrimages, and educate their children. This elaborate system of religious rights - though devised for the governance of the established church alone - was, after the Protestant Reformation, incorporated into the heart of Western laws governing religion and the church. The gradual expansion of religious toleration after the sixteenth century did not destroy the Roman law and canon law systems of religious rights. Rather, it extended its protections and privileges to an ever greater variety of religious groups and individuals - and today forms many of the basic guarantees of a religious rights regime."

subjected to many canon and civil law restrictions in the High Middle Ages, the fact remains that, at times, religious pluralism was *de facto* tolerated.

During the protestant reformations the divine papal authority was challenged by forms of protest that led to new ways of asserting religious rights. After the reformations and the philosophic shift to a more nominalistic paradigm (in which society is seen as a collection of individuals), these privileges could no longer be confined to the clergy by reason of their superiority. According to the new theologies, these privileges and rights belonged to every Christian by reason of the fact that all are created equally by God (the "priesthood of all believers"), as explained by Luther and Calvin.

After the religious wars in sixteenth and seventeenth century Europe, the *de facto* protection of religious rights eventually culminated in the *de jure* recognition of certain religious rights in peace treaties. Religious pluralism was recognised at the Peace of Augsburg (1555) by granting the limited right to establish their religion to Catholic and Protestant groups (*cuius regio eius religio*) and a minimum religious right, the right to emigrate, to religious dissenters. This right to leave the faith or political community was in place in Catholic and Protestant polities by 1600. This right forms the core of the concept of voluntarism.

The Edict of Nantes (1598) ended the war in France between Roman Catholics and Huguenots (French Calvinists). The rights of Calvinists were defined in this document so that they could have their own communities outside Paris and the freedom to do what they wanted to, provided they stayed separate, for example by not entering the city centres or proselytising. Thus, a kind of right to be "separate but equal" was granted. This right was, however, revoked in 1685 and the communities were banned.

The seventeenth century religious wars culminated in the Peace of Westphalia (1648) in which document the principles of the Peace of Augsburg and the Edict of Nantes were confirmed. Religious pluralism was protected by granting each ruler the right to establish Catholicism, Lutheranism or Calvinism in his domain. A free exercise right in the sense of religious freedom of hearth and home was also granted, as long as the exercise was private, nonproselytising and noncorporate.

In eighteenth century writings one finds a mixture of elements of religious freedom, collected from previous millennia. These included freedom of conscience (including concepts of voluntarism), the right to free exercise of religion, religious pluralism, equality, and separation of church and state and of law and religion. In enlightenment thought the class of persons entitled to religious rights was extended to include not only Christians but all religious people. The above-mentioned principles of religious freedom thus developed into the essential rights and freedoms of religion and were, in varying degrees, constitutionalised in the West during the eighteenth and nineteenth centuries.

During the twentieth century, some of these principles of freedom of religion or belief have been incorporated in international instruments protecting human rights and fundamental freedoms and their contents have been refined. It is clear that the international norm setting with regard to religious rights has not been brought to a close yet. There is, however, an emerging consensus on international standards for the protection of religious rights, including (a) freedom of thought, conscience and religion, (b) the freedom to practise (exercise) religion or belief in worship, observance, practice and teaching, (c) the idea of pluralism, (d) equality and nondiscrimination on the grounds of religion or belief (e) institutional separation of church and state and (f) some separation of law and religion.

CHAPTER 3

CHURCH AND STATE, AND LAW AND RELIGION IN SOUTH AFRICA PRIOR TO 1994

1. Introduction

In the previous chapter the development of the concepts of freedom of conscience, free exercise of religion, religious pluralism, equality, institutional separation of church and state and separation of law and religion were analysed and it was argued that these concepts could be regarded as the essential rights and freedoms of religion. This chapter will therefore proceed from the premise that adequate constitutional or statutory protection of religious freedom includes these concepts in some form.

This chapter is concerned with the legal (constitutional and statutory) protection of these essential rights and freedoms of religion in South Africa before the 1993 Constitution¹ came into effect. As has been stated,

...while religious freedom may claim theological and moral motivations...the exercise of it is a resolutely social and judicial matter and is generally decided by the state. The nature of a state, its constitution and laws have a direct bearing on religious liberty. When constitutions and laws change, the extent of religious liberty may be expanded or restricted. The state is therefore the main actor on the scene of religious liberty in the modern period.²

It will be shown, with reference to the history of religious rights in South Africa,³ that the

1 South Africa's first supreme constitution with a bill of rights, the Constitution of the Republic of South Africa 200 of 1993 ("the interim Constitution") came into operation in February 1994. The Constitution of the Republic of South Africa 108 of 1996 ("the final Constitution" or "the Constitution") was adopted on 8 May 1996.

2 Koshy *Religious Freedom* 33.

3 Plekhanov *History* 224 states that "Every society lives in its own particular historical environment, which may be, and very often is, in reality very similar to the historical environment of surrounding (continued...)"

essential rights and freedoms of religion had not been adequately protected in South Africa in the period prior to 1993. Many historical factors precluded such protection and it was therefore essential to guarantee the constitutional protection of people's basic religious rights.

The position in South Africa with regard to religious freedom prior to 1994 will first be analysed with reference to the relationship between church and state and the establishment⁴ of religion by law in the eras of the Dutch East India Company (1652-1795), Batavian Republic (1803-1806), British rule (1806-1910), the Boer Republics and post-Union South Africa, the latter including the Union of South Africa (1910-1961) and the Republic of South Africa from 1961 until 1994.⁵

The relationship between church and state in the preconstitutional era was mainly determined by the relationship of the state with the Christian churches, and the focus of the discussion of church and state will therefore be mainly on the law relating to Christian churches.⁶

With regard to the relationship between law and religion, it will be shown that, after 1652, the Christian foundations of South African common law were amplified by a variety of statutory provisions aimed at entrenching certain Christian principles.⁷ In this way the legislator, instead

3 (...continued)
other nations and peoples, but can never be, and never is, identical with it.

4 "Establishment" in this sense broadly refers to state law supporting or favouring one religion or one religious group over others.

5 It should be kept in mind that the first three periods describe the position in the Cape of Good Hope; the fourth, the position in the Transvaal and the Free State; and that the fifth and sixth periods include the whole of South Africa.

6 See Pillay and Hofmeyr *Perspectives on Church History* 232-273, 290-300 for an overview of the development of Christianity in South Africa from 1487-1990.

7 Although not part of the subject matter of this thesis, it has to be pointed out that law itself is not neutral. Underkuffler-Freund 1997 *SAPL* 50 states in this regard: "We have been assuming that the law is, itself, 'neutral' - that it is not *itself* the expression of particular moral (religious) values and beliefs. In fact, it can be persuasively argued that all law is the 'choice' or 'establishment' of one belief system or 'religion' to the exclusion of others - that choice being, in itself, a violation of principles of equality. This question of the *implicit* favouring of governmentally-participating religions or beliefs
(continued...)

of protecting religious rights, compelled all citizens to live according to Christian principles.

Secondly, the position with regard to religious freedom prior to 1994 will be analysed with reference to the legal position of religious minorities, namely black Christian Groups, Muslims and Jewish groups in South Africa. The position of black Christian groups will be discussed because of the unique racist laws which applied (*inter alia*) to them, and to show that these prejudices were stronger than the Christian religious affiliation. The position of Muslims will be discussed to illustrate the convergence of racial and religious discrimination. The position of Jewish groups, which have long been discriminated against in the West because of their "non-Christian" beliefs will, on the other hand, be discussed to show that, despite certain religious discriminations, they have had a relatively secure position in South Africa for racial reasons.

In chapter 1 reference was made to the theory of Durham that certain "threshold conditions" had to exist in a society *before* true religious liberty could emerge in a society. As already pointed out in that chapter, the existence of the threshold conditions will not be analysed in depth in this thesis since political plurality, political legitimacy, economic stability, sociopolitical factors⁸ and an empirical evaluation of religious tolerance do not form part of this study which is mainly concerned with the legal dimensions of religious rights. It will,

7 (...continued)
over non-participating ones is particularly difficult. If religion remains...a part of individual *and* collective life, it is impossible to avoid the 'choice' or 'endorsement' of those particular religions by government whose beliefs, exercises, symbols, or values are a part of laws and government practices." Church laws and religion had a definite influence in the formative stages of Roman-Dutch law: on Roman law, canon law and indigenous Dutch law. South African common law is deep-rooted in Roman-Dutch law. It could thus be said that, to the extent that Christian principles influenced canon law and Roman law, and to the extent that Roman-Dutch law was influenced by (reformed) Christianity, the South African common law was influenced by certain Christian principles in its formative stages. Also see Van der Vyver 2000 *Emory Int'l L Rev* 781-783 on what he calls "religiously inspired radiation of secular legal institutions".

8 It should, for example, be kept in mind that the Colony at the Cape was also influenced by, to name but a few, the ideas of the Enlightenment, the Eighty Years War (1568-1648), and the patriotic movement in the Netherlands, and the ideas of the French Revolution (1789). In the Cape itself several sociopolitical factors influenced the relationship between church and state and the position of religious minorities.

however, become evident in the course of this chapter that, apart from the inadequacy of the legal protection of religious rights, the threshold conditions of Durham were in fact, and in varying degrees, absent in preconstitutional South Africa and that a variety of reasons necessitated the constitutional entrenchment of religious rights and freedoms in this country.

2. A historical overview⁹ of the relationship between church and state, and the establishment of Christianity in South Africa prior to 1994

2.1 The Dutch East India Company (1652-1795)

2.1.1 The relationship between church and state

This paragraph deals with church-state relations during the period of Dutch rule at the Cape.¹⁰ During the first thirteen years (1652-1665) after the arrival of Jan van Riebeeck at the Cape, spiritual matters were looked after by a "sick-comforter" ("sieketrooster") under the supervision of the Political Council ("De Politieke Raad").¹¹ There was no church council or consistory at that stage, and spiritual matters were under "state" control; for example, punitive measures were imposed by the Council if someone failed to attend religious services,¹² the council proclaimed fast days and days of prayer, and it even punished misconduct by the curate. It is also clear that the Council enforced the tenets of Christianity by means of these

9 For an insightful overview of the evolution of church-state relations in South Africa, see Van der Vyver 1999 *BYU-LR* 635-672.

10 On the relationship between church and state from 1652-1795, see Booyens *Verhouding tussen Kerk en Staat (1652-1795)*. Pillay and Hofmeyr *Perspectives on Church History* 235-247 discuss the establishment of Christianity in the early period of settlement (1665-1804), from a church history perspective.

11 The political council initially consisted of the Commander and the captains of the ships with which they came, but this was later changed to the Commander, Vice-Commander and a secretary. After 1675 one of the freemen also had a seat on the council. See Jooste *Verhouding tussen Kerk en Staat* 37-48 for a discussion of the position during the first thirteen years at the Cape.

12 The first time when a person did not attend the religious services on a Sunday he was punished by withholding six days' wine rations; the second time, one month's wages were withheld, and the third time, he was punished by one year hard labour without pay, in chains. See Jooste *Verhouding tussen Kerk en Staat* 242-243.

measures.¹³

In 1665 the directors of the East Indian Company (the Council of Seventeen) appointed the first minister, who was to be solely in their service. He installed a church council, on which a representative of the Political Council also had a seat in order to look after the interests of the government. Although all ministers received their appointment from the Council of Seventeen, they first had to be appointed by the Political Council before they could serve at the Cape. The ministers were political appointees¹⁴ and operated under strict government control.

As the Cape expanded and more congregations were established, a need developed for a church order to regulate church government and the relationship between the churches.¹⁵ The state did not officially endorse any church order, however, it seems that the church councils followed the guidance of the Reformed Church Order of Dordrecht (1618-1619), a Church Order of the Reformed Church in the Netherlands.¹⁶

In 1746 a Combined Church Meeting was held for the first time ("Gekombineerde Kerkvergadering"), thus integrating the congregations of the Cape. However, the representative of the Political Council was also to be present and the government expected the

13 The Council justified these provisions as follows (as quoted by Jooste *Verhouding tussen Kerk en Staat* 243): "Ende vermits wij sien datter veele sijn die hun dagelijckx uijt het gebet ende uijt Sonndaeghse Christelijcke oefeningen ende vermaningen absenteren ende vrij weinigh op haren Godsdienste letten, die alle ware Christenen van conscientien wegen nochtans principalijk ende voor all saecken behoorden in achtginge te nemen in gevalle den segen des Heeren over dese plaetse ende van sijn Heer de genade over onse sielen niet willen ontbloot blijven". When a comet appeared in 1665, the Council made these provisions on Sunday observance even stricter in fear of punishment by the Lord in the form of long-tailed stars.

14 Norman *Christianity* 103 states that the Company appointed 900 ministers in the period of its rule at the Cape.

15 See Jooste *Verhouding tussen Kerk en Staat* 49-66 for a discussion of the church organisation at the Cape until the end of the eighteenth century.

16 On the Synod of Dordrecht of 1618 and South Africa, see Jooste *Verhouding tussen Kerk en Staat* 28-31; Pillay and Hofmeyr *Perspectives on Church History* 234, 250.

Meeting to submit all their decisions to the Political Council for approval.¹⁷ Although the respective church councils, in terms of Reformed church law, governed the congregations, the Political Council intervened freely in church affairs.¹⁸

2.1.2 The establishment of religion by law

The church at the Cape did not have an official name,¹⁹ but it was obviously the Reformed (State) Church of the Netherlands that had been transplanted to the Cape.²⁰ It followed that the favoured church in the Netherlands would also be the favoured church at the Cape. As early as 1642, the *Statuten van Batavia* provided that no other religion than the "gereformeerde christelycke relegie" would be allowed in the Netherlands.²¹ Transgression of this provision could be punished by loss of property, banishment, corporal punishment or even the death sentence. The statutes also provided that the state would protect this true religion against other sects and attitudes and that public offices would be reserved for members of the Reformed

17 In 1759 the Political Council abolished the Combined Meeting due to a decision of the Combined Meeting to correspond with the synod of South-Holland which was not duly approved by the Political Council. Regardless of several requests to reinstate the Meeting, the Political Council insisted that the Meeting did not serve any purpose. Jooste *Verhouding tussen Kerk en Staat* 77 maintains that this attitude can be attributed to the increasing independence of the congregations and the fact that the Political Council would have had to relinquish their authority in certain matters.

18 Jooste *Verhouding tussen Kerk en Staat* 69-70 mentions that the Political Council intervened in true church matters such as baptism (it made a decision on who had to be baptised), religious services (it decided on new Psalms to be sung and even that the congregation had to sing faster) and disciplinary proceedings (it interfered with and changed disciplinary findings of congregations).

19 During the period 1665-1842 this church is referred to in different ways; sometimes as the "ware Christelike Gereformeerde Kerk" or "Gereformeerde Godsdienst", and towards the end of the eighteenth century, as the "Hervormde Kerk". In this chapter it will be referred to as the "Dutch Reformed Church" or "Reformed Church". After 1842 it was known as the "Nederduits-Gereformeerde Kerk" (NG Church). A few years after this, however, this church split into three sections, respectively known as the "NG Church", "Gereformeerde Church" and "Hervormde Church".

20 See Pillay and Hofmeyr *Perspectives* 236-239.

21 See Booyens *Verhouding tussen Kerk en Staat (1652-1795)* 26.

religion. However, these measures were not strictly enforced.²²

In 1651 "De Groote Vergadering" (a meeting of representatives of the different states after the death of Prince William) confirmed that the true Christian Reformed religion, as defined by the Synod of Dordrecht 1618-1619, would be the state religion of the states of the Netherlands.²³

In terms of the charter granted by the States-General to the Dutch East India Company, the company was duty bound to promote and extend the true Christian Reformed religion in the areas under its jurisdiction. The Reformed Church was therefore the only Church recognised by the Government, and only members of the Reformed religion could hold public office. This was the state of affairs when Jan van Riebeeck left the Cape. The East India Company supported the Dutch Reformed Church and afforded them preferential treatment at the Cape.²⁴ For several years (until 1779) the Reformed Church was the only acknowledged church at the Cape.²⁵

2.1.3 The position of Christian minorities

(a) The Lutheran Church

The first reference to Lutherans occurs in a decision by the Cape Church Council in 1665.²⁶ They were initially permitted to participate in Holy Communion in the Reformed Church. In 1742 the first attempt was made to constitute a Lutheran church, but the Church Council of (the Reformed Church of) Cape Town strongly opposed the attempt.

22 Pillay and Hofmeyr *Perspectives* 239.

23 See quotations from the decisions of the "Groote Vergadering" to this effect in Jooste *Verhouding tussen Kerk en Staat* 31-33.

24 See Booyens *Verhouding tussen Kerk en Staat (1652-1795)* 25-30 for a discussion of the preferential treatment afforded the Dutch Reformed Church.

25 The Lutheran church was not allowed to exercise their religion in Batavia until 1743. It took much longer at the Cape, where the Lutheran church was only acknowledged in 1779.

26 Quoted in Jooste *Verhouding tussen Kerk en Staat* 220.

In Batavia, the Lutheran Church obtained permission to exercise their religion freely in 1743. After several attempts by the Lutherans in the Cape, the Council of Seventeen decided in 1778 that they could exercise their religion publicly, on the same footing as in Batavia. The Political Council was therefore instructed to recognise the Lutheran Church in the Cape.²⁷ Du Plessis²⁸ writes:

...in 1780, the Lutherans in Cape Town, after a contest which had lasted more than half a century, at length succeeded in obtaining permission to erect a church and call a minister of their own...The principle of "Cuius regio, illius religio" had thus received its death-blow, and the way was open for other church denominations than the Dutch Reformed Church to enter South Africa.

Although the Political Council had the say on how the Lutheran church Council had to be composed,²⁹ a Political Commissioner was not appointed. Since the Lutherans exercised their religion at the Cape on the same footing as in Batavia, the provision that certain offices were reserved for members of the Reformed Church, the "praedomineerende kerk",³⁰ also applied to them. Attempts were made to prevent the operation of this provision in the Cape, but eventually members of the Lutheran church had to resign from the Political Council and Council of Justice. These provisions remained in force until the Church Order of De Mist changed the position.³¹

(b) The Roman Catholic Church

The situation in Europe and in the Netherlands, where a number of adverse provisions regarding Roman Catholic citizens had been proclaimed, also influenced the position of the

27 On the Lutheran Church at the Cape during this period, see Jooste *Verhouding tussen Kerk en Staat* 218-232; Booyens *Verhouding tussen Kerk en Staat (1642-1795)* 25-30; Pillay and Hofmeyr *Perspectives on Church History* 239-241.

28 Du Plessis *History of Christian Missions* 71.

29 One of the elders had to be in the service of the Dutch East India Company and the Lutheran Council had to submit an annual financial report to the Political Council.

30 The predominating church.

31 See the discussion in the next paragraph on the Church Order of De Mist.

Roman Catholic church in South Africa. For instance, in the Netherlands, "De Grote Vergadering" decided in 1561 that the Placards which had previously been proclaimed against Roman Catholics would stay in force. Jooste³² states that this decision most probably referred to a placard of 1573 which provided that the exercise of the Roman Catholic religion should be prohibited.³³ However, there are no indications that, during the period 1652-1795, the Roman Catholics were asked to keep their religious exercises separate at the Cape. Jooste, for example, refers to a decision by the Cape Town Reformed Church Council of 1674 that children of Roman Catholics could be baptised by them on certain conditions. It should be noted, however, that the Roman Catholics did not have their own church at the Cape at that stage.

2.2 The Batavian Republic (1803-1806)

2.2.1 The relationship between church and state

In 1795, as a result of the civil war being waged in their country since 1785, the Netherlands asked Britain to protect the Cape. The Cape remained under British protection until 1803 when the administration of the Cape was returned to Dutch rule for a few years. In 1806 the second British occupation occurred, and the Cape was formally ceded to Great Britain in 1814.

In 1803, when the Cape had been returned to Dutch rule under the Batavian Republic,³⁴ commissioner-general JA de Mist was sent to effect certain reforms with regard to the relationship between church and state. Although Dutch rule of the Cape ended in 1806, the Church Order of De Mist, formally known as the "Provisional Ecclesiastical Decree of the Batavian Settlement at the Cape of Good Hope",³⁵ effectively regulated the relationship

32 *Verhouding tussen Kerk en Staat* 233.

33 The placard of 1573 provided "dat men de uitoefening der roomsche religie zou schorsen en verbieden" (as quoted in Jooste *Verhouding tussen Kerk en Staat* 233).

34 The Dutch East India Company, who had administered the colonial possessions of the Netherlands for 200 years, was dissolved by the Constitution of 1798 in the Netherlands.

35 The Church Order of De Mist was called "provisional" since it still had to be finally approved by the
(continued...)

between church and state by statute, until 1843.

Separation of church and state was, in principle, part of the new dispensation in the Netherlands.³⁶ De Mist, in his own words, supported this principle.³⁷ But, contrary to the principle of separation of church and state, he imposed a church order on the churches at the Cape on behalf of the government without consulting them.³⁸ Despite the so-called freedom of the church, the state could now interfere substantially with church affairs. This was especially curious in view of the fact that the "old" relationship of church and state had been dissolved in Holland in 1795.

Furthermore, according to the new guiding principle of separation of church and state, the privileged position of the Reformed Church would no longer prevail.³⁹ But, this was in part obviated by the fact that the Church Order singled the Reformed Church out for special treatment.⁴⁰

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- 35 (...continued)
Batavian Republic. The original Dutch name is "Provisionele Kerkenordre voor de Bataafsche Volksplanting aan de Kaap de Goede Hoop".
- 36 Jooste *Verhouding tussen Kerken Staat* 80 quotes Ypey en Dermput *Geschiedenis der Nederlandsche Hervormde Kerk* Deel IV 147: "Men moest een Staatsregeling ontwerpen, gegrond op ware beginselen, en onder dezelve ook op dat der scheiding van Staat en Kerk".
- 37 Jooste *Verhouding tussen Kerk en Staat* 82 quotes De Mist as stating: "Zoo wij vasthouden, en wie onzer zou daaraan kunnen of durven twijfelen dat geene staat zonder Godsdienst bestaan kan, is het onzer eerste, onzer duurste verplichting voor de instandhouding en bevordering van den Godsdienst te zorgen. Of die na de wijze en byzondere begrippen van den Roomschen Stoel, van Calvijn, Luther, Menno Simons of Arminius geleerd wordt - daar mag ik als Christen myne eigene keuze omtrent maaken - maar als Staatsman mag ik na de thands aangenomen beginsel aan geene deezer verschillende begrippen eenige voorkeur geeven."
- 38 See Jooste *Verhouding tussen Kerk en Staat* 78-92.
- 39 De Mist also gave the Reformed Churches at the Cape their independence from the Classis of Amsterdam.
- 40 De Mist's Provisional Church Order of 1804 consists of two parts: The first part (18 sections) regulates general matters relating to church and state; the second part (sections 19-52) contains special provisions on the Reformed Church.

This dichotomy is evident in the whole of De Mist's church order. The first three sections of the Church Order guarantee adherence to the principles of separation of church and state, free exercise of religion, equality and (limited) pluralism. Section 1⁴¹ provides for equal protection by the law of all church groups; section 2⁴² provides for the free exercise of religion in the sense that every church group would be allowed to freely confess its own beliefs; and section 3⁴³ provides that no special civil privileges would be connected with any religious belief or confession (as had previously been the case). The order of De Mist thus officially ended the position of the Dutch Reformed Church as the established church.⁴⁴

However, the remaining provisions in part 1 of the church order (sections 4 to 18) refute these objectives *in toto*.⁴⁵ Section 4 provides that church groups, other than those which existed at the time of the repossession of the Cape, could not perform public religious exercises nor assemble for religious purposes without the express permission of the Governor. It appears that the state aimed to regulate the number and kind of religious associations which were formed at the Cape, thereby restricting free religious exercise. Section 5 reflects the dichotomy which typifies this church order to an even greater extent. The first part of section 5 guarantees government neutrality with regard to religious doctrine, but the second part stipulates that the state retains the inalienable right to evaluate the effect of a religious doctrine, and should it be found to be detrimental to society, the state would be forced to either oppose, prohibit or moderate it.⁴⁶ In terms of this section, the state usurped the doctrinal power of the church and

41 "Alle Kerk-genoodschappen, welke ter bevordering van deugd en goede zeden een Hoogst Wezen eerbiediegen, genieten in deze volksplanting eene gelyke bescherming der Wetten."

42 "Elk Kerk-genoodschap belydt desselfs gevoelens opentlyk, zonder die van andere onbehoorlyk te taxeeren, en vergunt aan een iegelyk den vrye toegang tot desselfs byeenkomsten."

43 "Geene uitsluitende voorrechten in de Burger-Maatschappy zyn aan eenige Godsdienstige Geloofsbelydenis verbonden."

44 Later cases found that the Dutch Reformed Church was never regarded as an established church in the Cape Province. This could only refer to the position under British rule. See *Loedolff and Smuts v Robertson* (1863) 4 S 128 143; *Burgers v Murray* (1865) I R 258 265; *De Waal v Van der Horst* 1918 TPD 277 281; *Bredell v Pienaar* 1922 CPD 578 581-582.

45 See Jooste *Verhouding tussen Kerk en Staat* 93-99 on the first part of De Mist's church order.

46 Ministers were, for example, specifically instructed to subject themselves (in their teachings) to the
(continued...)

in effect nullified the first three sections of the Church Order.

The remainder of the first part of the Church Order continue in this vein. Sections 6-7, for example, provide that existing buildings cannot be used for religious gatherings nor new ones erected except with the express permission of the Governor and that no religious gathering can be held on days other than Sundays or religious feast days without the express permission of the Governor. These sections reinforce the restrictions on new church groups, as expressed in section 4. Sections 8-15 contain numerous provisions for ministers⁴⁷ of churches other than the Reformed Church.⁴⁸ It is clear that part I of the Church Order by no means complied with the principles of separation of church and state and free exercise as set out in sections 1 to 3.

Part II regulated matters pertaining to the Reformed Church.⁴⁹ This in itself was unacceptable, since a degree of favouritism on the part of the state was evident from the fact that a specific church was singled out for special regulation and protection.⁵⁰ From the church's point of view, such regulation was not necessarily favourable since this implied a degree of state intervention in religious matters. It was, in addition, in direct contrast with section 1 which guaranteed equal protection by the law of all churches. On the one hand, there was the establishment of the Reformed Church by the state, thereby excluding other religious groups from recognition

46 (...continued)
government's decisions and it was provided that all opposition in this regard would be in contravention of the law.

47 It was, for example, provided that the practice of remunerating ministers with state funds was abolished without, however, extending this principle to the Reformed church, the largest church at that stage; that a church group could only increase the number of ministers in its service with the express permission of the Governor; that ministers wishing to do service at the Cape should first obtain a right of residence from the Governor; and that people wishing to do religious work at the Cape were not allowed to do so unless they had obtained a right of residence and passed an acknowledged examination.

48 As mentioned, matters relating to the Reformed church are contained in the second part of the church order.

49 See Jooste *Verhouding tussen Kerk en Staat* 99-107 on the second part of De Mist's church order.

50 S 20 stipulates: "Het Hervormd Kerk-genootschap, by verre het talrykste, en ten platten Lande in deze Volksplanting het eenigste zynde, behoeft overzulks byzondere voorsieningen, bepalingen, en hulpe van het Gouvernement."

and support, while on the other hand, the state limited the free exercise of religion by the Reformed Church by intervening freely in church matters.⁵¹

The position of ministers of the Reformed Church was, for example, regulated in detail in part II.⁵² Without discussing all these provisions here, one can conclude that the position of the ministers under the Batavian Republic did not differ much from their position under the East Indian Company, where they had in effect been nothing more than civil servants.⁵³

De Mist had tried to create some order in church matters, especially in the Reformed Church. However, his efforts culminated in a dichotomous, anomalous document in which the promises of a separation of church and state, equal protection of the law and free exercise of religion made for "paper law". Although this Church Order attempted to officially end the unequal treatment afforded to other churches, it in fact perpetuated this inequality by singling out the Dutch Reformed Church for special regulation. It is furthermore impossible to reconcile his goal of a separation of church and state in sections 1-3 with the total subjection of the church to the state in the rest of the Church Order. He in fact created a state-church and restricted free exercise of religion to the extent explained above.

51 See, for example, sections 19, 37-45 and 46-51 of the Church Order in this regard. In sections 46-51 De Mist provisionally approved of the holding of a combined church meeting, but the meeting had to serve the government, and was only permitted to convene on a probationary basis at first. Moreover, all the items on the agenda for such a meeting had to be submitted for approval by the Governor, the Governor had to be represented by two representatives at such a combined meeting, and their opinion had to be obtained before any decision could be taken.

52 S 21, 22, 25-33.

53 Ministers were, for example, to be appointed by the state, remunerated by the state and, according to s 5 (as discussed above), could even be reprimanded by the state for the doctrine they preached. The church councils were to be chosen in a manner determined by the church order (the church order of Dordrecht, s 20) but subject to the approval of the Governor who could reject someone and appoint another person, and in new congregations the church councils were to be appointed by the magistrate of the district.

2.2.2 The position of Christian minorities

(a) The Lutheran Church

As seen above, section 1 of De Mist's Church Order provided that all church groups would enjoy equal protection of the law, and section 3 provided that no exclusive privileges would be afforded to anyone merely by reason of his or her religious affiliation. These provisions ended the unequal treatment of (amongst others) the Lutheran church.⁵⁴ Nevertheless, the other provisions mentioned above in the first part of De Mist's Church Order also applied to the Lutheran Church and interfered with its ecclesiastical affairs.

(b) The Roman Catholic Church

The Roman Catholic Church also received the above mentioned rights and was subjected to the same interference under the Church Order of De Mist.⁵⁵ The Roman Catholic Church had not, however, constituted their own church at the Cape at that stage. The Governor appointed two chaplains to conduct services for Roman Catholic soldiers, and later a third was appointed for services to the burghers.

2.3 British rule (1806-1910)

2.3.1 Separation of church and state

When the British occupied the Cape in 1795, they undertook to recognise the Dutch Reformed Church as the official religion. In 1806, when the Cape was annexed by British forces for the second time, the Capitulation, under which the Cape was surrendered, guaranteed the preservation of existing religious rights. Consequently there were initially no drastic changes with regard to the relationship between church and state. In fact, the English applied the church

54 See Jooste *Verhouding tussen Kerk en Staat* 227-231.

55 See Jooste *Verhouding tussen Kerk en Staat* 232-236.

order of De Mist even more strictly than their Dutch predecessors.⁵⁶ This demonstrated their obligation towards maintaining the existing religious establishment, and perpetuated the principle of established religion into the nineteenth century. However, practical acceptance of religious pluralism had the effect of widening the narrow establishment principle.

The church started to assert itself against this form of Erastianism. At the first combined church meeting of the Dutch Reformed Church with the status of a synod in 1824 (65 years after the previous combined meeting), the synod integrated all the Reformed congregations and, in the light of the deficiencies of De Mist's church order, designed and adopted a General Regulation.⁵⁷ This document mainly regulated internal church matters, according to the example of the general regulation of the Reformed Churches in the Netherlands of 1816. Yet De Mist's church order remained the legal and lawfully enacted code of the Reformed churches at the Cape and could not be set aside by the churches. The synod attempted to overcome the problem by declaring the order of De Mist as the basic order, and the later General Regulation as a modification and amendment thereof. This did not solve the problem, since some of the provisions of De Mist's order conflicted with the General Regulation. The main point of contention was the fact that, according to the General Regulation, the Synod had the highest

56 The British governors, for example, insisted upon the appointment of a Commissary Politic over church affairs, a practice which had not been enforced under Dutch rule. In fact, after a dispute over this fact with the church council of Cape Town, the Governor brought out twelve more instructions on the role of the Commissary Politic which further limited the powers of the church council. These instructions, inter alia, proclaimed the Political Commissioner to be the Church Master, under the superior authority only of the Governor, who was to be the upper Church Master. After 1814, the Governor appointed the magistrates of districts as Political Commissioners in all the other church councils. The British Governor thus exercised his power over the Reformed Church by placing the church councils under strict control of the Political Commissioners. He even enforced his powers under De Mist's Church Order of selecting appropriate deacons himself. The other provisions of De Mist's Church Order ordering the appointment of church council members in new congregations by magistrates and submitting of financial statements to the Governor annually, were also strictly enforced. He also exercised his right to allocate congregations to the ministers who arrived at the Cape, and even transferred them to other without consulting the churches. In a few instances he went so far as to suspend ministers, which right he did not have under the church order. See Jooste *Verhouding tussen Kerk en Staat* 108-133, 151-173 for a discussion of the application of De Mist's church order under British rule; also see Norman *Christianity* 104 for examples.

57 For the provisions of the General Regulation, see Jooste *Verhouding tussen Kerk en Staat* 142-150.

authority in church matters⁵⁸ whereas, according to De Mist's order, the Governor was the head of the church.⁵⁹ During the synods of 1837 and 1842 the church increasingly asserted their rights against the state.

At the 1837 synod a commission was appointed to revise the existing church laws, including the church order of De Mist. However, since this Church Order was a normal civil act, none of the commission's decisions could affect its validity. The commission⁶⁰ nevertheless let themselves be led by a declaration⁶¹ of the Governor in 1840, and consequently revised and even omitted certain parts of De Mist's order which conferred rights on the Governor.

After a meeting between the Governor, the Political Commissioners and a deputation of the Dutch Reformed Church, the synod was duly authorised to revise the existing Church Regulations, including the Regulations promulgated by De Mist. The parties agreed that any

58 S 16 provides: "Het hoogste Kerkelyk Bestuur is opgedragen aan het Synode".

59 This point of contention was clearly illustrated by the Shand case. After disciplinary proceedings against a certain rev. Shand (of Scotland), according to which the church suspended him, he was reinstated by the church, but the Governor upheld his suspension. The answer of the Governor to a letter written by Shand clearly sets out the position: "The Scottish Ministers of the South African Church do not bear in mind the material difference between that Church and the Kirk of Scotland. *Here* they are stipendiaries of the Government of the Colony, *there* they are maintained out of the Revenue of the Church itself. The Colonial Clergy have a code for their own guidance - the Regulations of De Mist - quoted by Mr. Shand; and it is clear that by that code the Governor by virtue of the power vested in him by the Sovereign, is the Head and Chief of their Church. It is by his permission alone, that the Synod assembles, and without his consent and approval, no question can be introduced or debated at its sittings." See Jooste *Verhouding tussen Kerk en Staat* 151-173 for a discussion of this case.

60 See the report of the commission as quoted by Jooste *Verhouding tussen Kerk en Staat* 178-179.

61 The Governor namely stated: "His Excellency ... so far from desiring to lessen the authority of the Church in its internal management - he is indeed most anxious to free it from the trammels of secular interference, in all spiritual or purely Ecclesiastical matters, - and of substituting in all other matters, of which she cannot dispose of her own sole authority, *that* of the highest Civil Tribunal for the authority, which he conceives to have been so undesirably continued in the Governor, the abolition of whose appellate Jurisdiction in Civil and Criminal procedures, ought in his opinion to have been followed up by the extinction of that anomalous relation, in which he still appears to be placed by the ancient Regulations of a Church whose principles repudiate all interference in matters concerning its own internal Ecclesiastical Concerns."

regulations which the synod might prepare and propose to substitute for all or any of the existing regulations could not, through this act of the synod, obtain any intrinsic legal force and that they would therefore require the prior sanction of government in so far as the new regulations changed the law as spelt out in the old Order.

The most important change that the new revised⁶² regulations would bring about was that the highest authority of the Reformed Church in church matters would vest in the General Meeting (Algemene Kerkvergadering) which replaced the synod. This was contrary to De Mist's order which appointed the Governor as the highest authority in church matters.

The result was Ordinance 7 of 1843 which abrogated De Mist's church order and created a new relationship between church and state.⁶³ Section 8 recognised the voluntary nature of religious associations,⁶⁴ and section 9 the independent spiritual jurisdiction of the church.⁶⁵ It did not, however, effect a complete separation of church and state. This is evident from the following facts:

- (i) The law freeing the church from state interference and enacting the church laws was, ironically, a civil law. This was inevitable to the extent that the previous church order of De Mist, an enacted civil law, could only be repealed by another law.
- (ii) The state (Crown) retained the power to appoint ministers of the church.⁶⁶

62 See Jooste *Verhouding tussen Kerk en Staat* 181-188 for an abridged version of these revised church laws.

63 Although the Ordinance of 1843 had already been in force at the Cape, it was only confirmed by the Queen in 1851 (with Ordinance 2 of 1851).

64 See Pienaar's view *Gemeenregelike Regspersoon* 12-51, 207-216, 245, 255.

65 Norman *Christianity* 106 comments that this was "a measure of disestablishment without raising the ultimate principles of constitutional theory".

66 S 5 of Ordinance 7 of 1843 awards the Crown the "sole and unrestricted right of filling up such vacancy ...", but it also acknowledges the church to some extent by further providing: "... may select from amongst the number of such ministers as shall by the rules and regulations of the said church for the time being be competent to be appointed to supply vacancies in the ministry thereof".

- (iii) Even though the Ordinance provided that the state would have no financial obligations to any religious community or denomination, and that all sums granted from time to time would be deemed to be merely voluntary and revocable, the state did not, in fact, withdraw their financial support to the church.⁶⁷
- (iv) The most important provision of the Ordinance granted the church the right to formulate their own internal rules and regulations, but it did not have unlimited authority. The Ordinance provided that any rule or regulation repugnant to or inconsistent with any of the provisions of the Ordinance would be null and void.⁶⁸ This applied even if the provisions in question concerned church matters.
- (v) Section 6 determined the fundamental principles of the Dutch Reformed Church by stating that this Church should remain a Presbyterian church in both doctrine and discipline.⁶⁹ This restricted the authority of the Synod to change the constitution of the Church in either doctrine or discipline. In addition, it seems that the power to enforce this section was awarded to the highest civil tribunal. In case of a conflict between two parties, such a court would have to investigate the whole doctrinal dispute in order to make a pronouncement on the question as to which party complied with the section.

67 In a letter to the Colonial Secretary, the Governor wrote: "To prevent, however, any misunderstanding of the intentions of Government ..., I judged it expedient to issue, simultaneously with the Ordinance a Proclamation ... declaring that the aid and support hitherto granted to the church will not be withdrawn, but all the payments will continue to be made from the Colonial Treasury until her Majesty shall see fit to direct the contrary" (quoted by Jooste *Verhouding tussen Kerk en Staat* 207). It should be noted that grants were also made to other denominations.

68 S 4 of Ordinance 7 of 1843 provides: "And be it enacted, that it shall be lawful for the General Assembly or Synod of the said Church...to add to, annul, alter, enlarge or improve the rules and regulations contained in the said Schedule, and any further or other rules and regulations which may, from time to time, be successively established: Provided, always, that any rule or regulation of the said General Assembly or Synod repugnant to, or inconsistent with any of the provisions of this Ordinance shall be null and void."

69 S 6 provides: "And be it enacted that the Dutch Reformed Church shall be and remain a church exercising its discipline and government by consistories, presbyteries, and a general assembly or synod and acknowledging, receiving, and professing in regard to the doctrine thereof the doctrines contained in the confession of the Synod of Dort and in the Heidelberg catechism..."

Such interference in doctrinal matters did not signify a true separation of church and state.

During the period of English rule between 1806 and 1875, the Reformed Church (NG Church), the Anglican Church and certain other churches were supported by and subordinate to the Cape government,⁷⁰ thereby widening the basis of the establishment. But, even on this basis, it was becoming plain to many that the establishment principle was an anomaly. A series of confrontations between the civil and ecclesiastical jurisdictions convinced most parties that total separation of church and state was desirable.⁷¹

In 1875 the Voluntary Bill was finally passed which made all the churches in the Cape free churches.⁷² All state payments to religious bodies were to cease, although existing life interests were to be preserved.

70 The British gave financial assistance to different denominations: a pragmatic concurrent endowment of the larger churches. In the 1830's the Cape Dutch Reformed Church received over £4,000 in payments for the maintenance of its clergy, the Church of England (Anglican Church) got nearly £2,000 and the Roman Catholics and Presbyterians received £200 each. By the 1860's the allocation to the Dutch Reformed Church had risen to nearly £9,000. In Natal similar state payments were made to the clergy. The government also gave substantial financial subsidies to the churches to conduct education, especially in missionary districts. It was not until 1841 that the state began to undertake direct educational work and even then it was restricted to the white populations. The Ordinance of 1843 slowly changed this position. At the Cape, after 1851, and in Natal, after 1866, no new grants were made to pay the clergy of the different denominations, although existing arrangements were respected. See Norman *Christianity* 106-109.

71 For example, a court ruling that a decision of the Dutch Reformed Synod of 1862 to admit clergy from outside the borders of the Cape Province was *ultra vires*, had a far-reaching effect on church-state relations. It was clear that the civil courts had overruled the spiritual autonomy of the church as defined in the 1843 Ordinance. This was followed by complex heresy trials involving both the Anglican and Dutch Reformed churches - the Colenso, Kotzé and Burger trials. In these cases the Supreme Court ruled that the expulsion by the Synod was illegal. These churches became increasingly uncomfortable with the close relationship with the state and supported Saul Solomon who promoted legislation for a complete separation of church and state in the Cape Parliament.

72 Pillay and Hofmeyr *Perspectives on Church History* 260.

2.3.2 The establishment of Christianity by law

Many laws were enacted at the Cape aimed at the establishment of Christianity,⁷³ as illustrated by the many instances of Sunday observance legislation.⁷⁴ Not all of this pre-Union legislation has been repealed.⁷⁵

The first Sunday observance enactment under British rule at the Cape⁷⁶ appears to be a section of the Game Law of 1822, which imposed a penalty on "the employment of the Sabbath day for the amusement of shooting".⁷⁷ In 1828 the Governor passed an ordinance⁷⁸ instructing the

73 Van der Vyver *Religion* par 223 states that "The rules of Roman-Dutch law that have their base in religion have since 1652 been supplemented by a variety of statutory enactments which purported to uphold, through the agency of legal coercion, certain particular tenets of reformed Christianity."

74 On pre-Union Sunday observance legislation, see the thorough exposition of Downer *Sundays* par 145-149 and critical observations of Van Niekerk 1969 *SALJ* 33-50.

75 Van der Vyver *Religion* par 223 maintains that these Sunday observance laws have been repealed by the Pre-Union Statute Laws Revision Act 24 of 1979. However, this act repealed most pre-Union legislation in s 1(1) by providing that "... all laws enacted before 31 May 1910 by any legislative authority in any area which at present forms part of the Republic, are hereby repealed" but, in s 1(2) certain laws, as specified in the schedule, are explicitly stipulated to remain in force to the extent set forth. The acts which are still in force will be mentioned below where they are discussed. Although some of the legislation to be referred to has not been repealed, none of the pre-Union Sunday observance legislation has been assigned to the provinces nor adopted by any province under the 1996 Constitution. Downer *Sundays* par 145 remarks: "If regard is had to the wording of the Constitution (108 of 1996, schedule 6), the prudent approach to adopt is to treat the legislation as current, binding and enforceable, but at the same time to have regard realistically to the fact that they have long ceased to be applied."

76 Pre-Union Sunday observance legislation in the Cape will be discussed in this paragraph and in the Boer Republics in par 2.4. In pre-Union Natal the position was regulated by the Natal Law to Provide for the Better Observance of the Lord's Day Act 24 of 1878 s 1-2, as amended by the Lord's Day Act (Natal) Amendment Act 8 of 1917. The pre-Union Statute Laws Revision Act provided that Act 24 of 1878 (Natal) remains in force, but both these Natal acts have subsequently been repealed by the Businesses Act 71 of 1991 s 7(1)(b) read with sch 3. Post-Union Sunday observance legislation will be discussed below in par 2.5.

77 S 13 of the Game Law, proclamation of 21st March, 1822. Repealed by Act 36 of 1886.

78 Ordinance of His Honour the Lieutenant-Governor in Council establishing an Executive Police in Cape Town and the districts thereof and for consolidating and amending the laws and regulations
(continued...)

Superintendent of Police to see to it that no trading took place on a Sunday (with certain exceptions),⁷⁹ prohibiting public amusement on Sundays, authorising the police to disperse people gathered for playing or gambling on a Sunday⁸⁰ and restricting fish sales on a Sunday to before nine o' clock.⁸¹ Contravention of these measures was punishable with a fine.

In 1837, an Ordinance of Sir Benjamin D'Urban was passed to promote even stricter observance of the Sunday.⁸² However, this Ordinance encountered opposition and was not, in the final instance, approved by the Queen.⁸³ It was repealed in the following year, but another Cape Ordinance,⁸⁴ containing much the same provisions, was passed by Sir George Napier in 1838. It prohibited the conclusion of certain contracts of sale and the offer for the sale of certain merchandise on Sundays. It was a crime to "cut or carry any fuel or to engage in field labour, except for the preservation of the fruits of the earth in cases of urgent necessity, or (except on some lawful occasion) to discharge any gun or other fire-arm on the Lord's Day".⁸⁵

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- 78 (...continued)
relating thereto. The Cape of Good Hope Government Gazette No 1174 of 11 July 1828. This ordinance was later repealed.
- 79 S 14.
- 80 S 15.
- 81 S 16.
- 82 Ordinance 4 of 1837 (Cape). It is quoted in full by Jooste *Verhouding tussen Kerk en Staat* 248-251.
- 83 This was mainly on account of the severe punishment prescribed by the Ordinance, namely, hard labour and whipping.
- 84 Ordinance 1 of 1838 (Cape) formally known as the Ordinance for repealing the Ordinance entitled "An Ordinance for the better Observance of the Lord's Day in the Colony" and dated the 23rd day of August, 1837. See Jooste *Verhouding tussen Kerk en Staat* 250-253 on the origin of this Ordinance. Ordinance 1 of 1838 (Cape) has (curiously) not been repealed. The Pre-Union Statute Laws Revision Act 24 of 1979 s 1(2) read with the schedule explicitly states that the whole of this act remains in force. It thus theoretically remains in force and applicable. However, as mentioned, it has not been assigned to the new provinces. Van Niekerk 1969 *SALJ* 34 states with regard to this ordinance: "It has the distinction of having substantially survived the moral vicissitudes of over 40 percent of European history in South Africa and ... eloquently bears out Goethe's truism that it is a tragedy 'to be a grandchild at a time when laws apply which were enacted in our time' " (from Goethe's *Faust* I, Act 1 Scene 4).
- 85 S 2-4, as amended by the Cape Lord's Day Observance Act 35 of 1888 s 2.

It was also an offence for the owner or occupier of a place of public amusement or recreation to permit any person to use these facilities on a Sunday. The enactment demanded the closing of places of public amusement and entertainment on Sundays and, except in certain specified circumstances, prohibited public performances and exhibitions on Sundays.⁸⁶

2.3.3 The position of Christian minorities

(a) The Lutheran Church

As explained above, the Church Order of De Mist remained in force after the second British occupation, with the result that the position of the Lutheran Church remained basically the same. Although the section in De Mist's Order which compels the church to submit the names of elected church council members and annual financial statements to the governor applied only to the Reformed Church, the Lutheran Church also complied with them. In 1839 the Governor informed the Lutherans that they were not required to do so. Subsequently there was very little contact between the state and the Lutheran church, and after Ordinance 7 of 1843 repealed De Mist's Order, even nominal state control disappeared.⁸⁷

(b) The Roman Catholic Church

In 1806, members of the Roman Catholic church, who numbered 200 at that stage, requested permission from sir David Baird to erect a church building at their own cost in which they wished to hold services conducted by their three priests. In that very year, however, Sir Baird ordered the Roman priests to leave the Colony. The reasons for this conduct are not clear since, under the Act of Capitulation, Roman Catholics were entitled to existing rights because they had already been established at the Cape when it was taken over by the British. They were therefore fully within their rights to ask permission from the Governor to erect their own church building. Despite the outrage caused by this injustice, nothing was done to rectify

86 S 6 read with Cape Lord's Day Observance Act 19 of 1895 s 3.

87 See Jooste *Verhouding tussen Kerk en Staat* 231-232; Pillay and Hofmeyr *Perspectives on Church History* 255-257.

matters. It took until 1820 before another Roman Catholic priest arrived in the Cape.

Another injustice to Roman Catholics was that they were barred from certain offices in accordance with a specific English law, said to be applicable to the Cape as well. It eventually transpired that the act no longer applied. This situation continued until 1830, when sir Lowry Cole proclaimed Ordinance 68 which provided that it would be lawful for anyone professing the Roman Catholic religion "to hold, exercise, and enjoy all military offices, and places of trust or profit...".⁸⁸

(c) The Anglican Church

With the arrival of the English in 1795, many Anglicans entered the colony.⁸⁹ Services were initially conducted by chaplains. With the arrival of the British settlers in 1820, the number of Anglicans increased substantially. Between 1829 and 1846, nine separate congregations were founded by special Ordinances,⁹⁰ which contained detailed provisions on the formation of the congregation, vestry and its powers. Only in 1848 did the Cape get its own diocese and Bishop. Under Bishop Gray, the Anglican congregations were soon organised to form "The Church of the Province of South Africa". The state remunerated the ministers, but the Church decided not to apply to the Government for a Church Ordinance. Bishop Gray⁹¹ stated that they did not wish to admit that the Colonial Government had any right to legislate on the internal affairs of the church.

(d) Other Christian Churches

In terms of the Toleration Act of England, all other church groups obtained the right to exist

88 Jooste *Verhouding tussen Kerk en Staat* 234-236; Pillay and Hofmeyr *Perspectives on Church History* 255.

89 See Jooste *Verhouding tussen Kerk en Staat* 236-240; Pillay and Hofmeyr *Perspectives on Church History* 252-253.

90 For example, Ordinance 4 of 1829 (Cape) founded the Anglican Church in Cape Town.

91 From a document by Bishop Gray, the first Anglican Bishop, as quoted by Jooste *Verhouding tussen Kerk en Staat* 240.

undisturbed and independent of the state. A Presbyterian Church was founded in 1829, and by 1832 they had one cleric in the Colony and received a small government subsidy. A Wesleyan Church was also formed at the Cape, and the Methodists had commenced work in Cape Town and among the 1820 Settlers. By 1860 there were 132 Methodist missionaries and ministers in the Eastern Cape and Natal. English immigrants in the Kimberley and Reef areas increased the number of Methodists, and the Methodist Church became the largest of the English-speaking churches in South Africa. The beginnings of the Baptist Church were modest and consisted primarily of establishing fellowship groups among the 1820 Settlers.⁹²

2.4 The Boer Republics

2.4.1 Church and state

In the eighteen thirties, a large exodus of settlers of Dutch and French decent, known as the "Great Trek", took place. The response of the Dutch Reformed Churches of the Boer Republics to sociopolitical factors differed completely from that of the Church of the Cape⁹³, and the degree of these differences resulted in schisms.⁹⁴ The external sign of this difference was the setting up of state churches in the Boer Republics in the second half of the nineteenth century; precisely at the time when the official recognition of established churches was being withdrawn elsewhere in European societies.⁹⁵

92 On these churches, see Pillay and Hofmeyr *Perspectives on Church History* 253-255.

93 It can be said that the separation of church and state in the Cape Province and Natal closely paralleled British colonial experience in general during the nineteenth century. See Norman *Christianity* 103.

94 The second half of the nineteenth century saw rifts within the Reformed Church. Today there are three "branches" of this church in South Africa. The "Nederduits-Gereformeerde Kerk" was born in South Africa as a historical continuation of the Reformed Church in the Netherlands. The "Nederduits Hervormde Kerk van Afrika" also lays claim to this continuation but was in fact a new church which originated in the Transvaal with the arrival of the Rev Dirk van der Hoff (1814-1881) in 1853. The "Gereformeerde Kerk" was founded in 1859 by Rev Dirk Postma (1818-1890).

95 Norman *Christianity* 99.

The constitution of the first Voortrekker State,⁹⁶ the Constitution of Winburg of 1837, established the Dutch Reformed faith as the national church.⁹⁷ In 1846 it was declared⁹⁸ in Natal that financial aid and legal recognition would only be given to the Dutch Reformed Church, and in 1850 it was decided that only members of the Reformed Church could serve in the Volksraad. In the Free State, the Constitution of 1854 proclaimed the Reformed Church to be the established church of that Republic.⁹⁹ The Constitution of the Zuid-Afrikaansche Republiek of 1858 provided that the Reformed Church ("Nederduitsch Hervormde Kerk") was the established church of that Republic.¹⁰⁰ The state remunerated the ministers and undertook to protect the doctrines of the Synod of Dort.¹⁰¹ The franchise was reserved for members of the Reformed Church, but this provision was short-lived.¹⁰² Roman Catholics and other persons who did not subscribe to the tenets of the Heidelberg Catechism were denied rights of residence in the Republic (until 1870);¹⁰³ only members of the Dutch Reformed Church were permitted to take part in political life;¹⁰⁴ and only the ecclesiastical jurisdiction of this state-church was recognised. However, there was soon a dire need for certain amendments to be

96 With regard to the relationship between church and state outside the Cape, it should be kept in mind that Ordinance 7 of 1843 was a Cape Ordinance, thus applying only to the Cape and not to the Boer Republics.

97 Piet Retief, in the oath administered to him, undertook to "protect and defend the Christian Creed" according to "the Catechism and liturgies of the Dutch Reformed Church". See Norman *Christianity* 110.

98 "Dat door het Publiek of uit Publiek kas niets tot eenige andere godsdienstige stigting zal worden toegedaan dan alleen tot de waare Gereformeerde Kerk, en dat ook geen andere Godsdienst onder ons zal getollereerd dan alleen de zuivere gereformeerde leer". See Scholtz *Nederduitse Hervormde Kerk* 48.

99 S 22 of the Constitutie van den Oranjevrijstaat of 1854; s 24 of the Gewijzigde Constitutie of 1866. The "Nederduitse Gereformeerde Kerk" was the established church until 1866 and the "Nederduitse Hervormde Kerk" until 1902.

100 S 2 of the Grondwet van die Zuid-Afrikaansche Republic of 1858. This was the position until 1889.

101 S 20.

102 S 32. This was the position until a decision by the "Volksraad" on 20 September 1858.

103 S 21. This was the position until the decision by the "Volksraad" on 1 June 1870.

104 S 22.

made to this strict confessionalism.¹⁰⁵

2.4.2 Establishment of Christianity by law

In pre-Union Transvaal and the Free state, as in the Cape, several statutory measures were adopted which were aimed at the establishment of Christianity in these Republics. This is illustrated by the considerable amount of legislation concerned with Sunday observance.¹⁰⁶ In both Republics the conclusion of certain contracts of sale and the offer for sale were also prohibited.¹⁰⁷ A Transvaal law prohibited gardening, public amusement or recreation,¹⁰⁸ the discharge of a gun¹⁰⁹ and the shooting of wild and other animals on Sundays.¹¹⁰ It likewise prescribed punishment for "a transport-driver or overseer of a transport wagon who enters the boundaries of a town on a Sunday, or, being in a town, travels through the town with his wagon, or loads or off-loads or causes to be loaded or off-loaded freight on a Sunday".¹¹¹ Provision was also made for the dispersion of persons gathered on a Sunday for the purpose of playing or gambling, or to hold dogfights or cockfights or races, or to pit animals to run against each other for the purpose of betting, or to attend any such sport or amusement.¹¹² The prohibition was extended to include beer and dance parties held on Sundays by blacks.

105 At the start of the twentieth century, Paul Kruger's government actually gave financial aid to a Catholic educational institution.

106 See Van der Vyver *Religion* par 223; Downer *Sundays* par 145, 147-148; Van Niekerk 1969 *SALJ* 27 at 41-50.

107 The Police Offences Ord 21 of 1902 (OFS) s 19. This provision has been repealed. Sections 4, 5, 21 and 26(1) remained in force according to the Pre-Union Statute Laws Revision Act 24 of 1979, and the General Law Third Amendment Act 129 of 1993 s 84 read with schedule repealed s 26(1); Transvaal Sunday Law 28 of 1896 s 2-4. The whole of this Transvaal act, formally known as "Wet tot Vervanging van Wet No.2-'88 en Wet No. 16-'94", remained in force according to the pre-Unions Statute Laws Revision Act 24 of 1979. Although apparently in force, neither of these laws have been assigned to the new provinces under the 1996 Constitution.

108 Tvl Law 28 of 1896 s 7.

109 Tvl Law 28 of 1896 s 1(b).

110 Tvl Law 28 of 1896 s 1(c).

111 Tvl Law 28 of 1896 s 1.

112 Tvl Law 28 of 1896 s 8.

2.5 Post-Union South Africa

2.5.1 Church and state

In surveying the relations of church and state in this period, one difficulty is the difference in experience of the Afrikaans- and English-speaking religious bodies.¹¹³ Nevertheless, Norman¹¹⁴ divides the history of church and state relations in this period into two distinct sequences:

the nineteenth-century movement of the constitutional separation of religion and government, and the nineteenth- and twentieth-century acceptance by the churches, of both political groups, of a mission to political society - an identification with national ideology in the one case, and a criticism of it in the other.

The last constitutional establishment of a state church ended in 1910. Thereafter, the practice of state religion in South Africa had an informal existence.¹¹⁵ It is significant that the religious and moral nature of the Nationalist political ideology coincided with that of the Reformed Church (especially the NG Church). Norman notes that, just as the three Reformed Churches were settling down and beginning to institutionalise into parallel denominational roles, the drift of people to the gold and diamond fields placed a large number of people outside the established ecclesiastical structures. Also, in the twentieth century with its increasing industrialisation, many Afrikaners found themselves as "poor whites" within an urban, English-dominated society. The Dutch Reformed Churches responded by providing the moral and spiritual cohesion for people who required an identity, thereby preserving their "cultural purity". The commencement of National Party rule in 1948 placed the Dutch Reformed Church

113 See the remarks of Nürnberger *Impact of Christianity* 152-156 on Christianity and the Dutch and British settlers respectively.

114 Norman *Christianity* 103. For a discussion of the first sequence, see pp 103-109, and for the second, see pp 109-115.

115 Norman *Christianity* 114 notes that this is quite common in societies where there is a "continued public religiosity and determination to preserve religious equality between the competing denominations".

within "a friendly world of temporal reference"¹¹⁶ and the Reformed churches slowly started to institutionalise.¹¹⁷

The race question,¹¹⁸ especially after 1948, caused tension between most denominations and the state, and the "church-clause"¹¹⁹ caused a major clash between church and state. The original clause empowered the government to restrict the attendance of blacks at public worship in white areas. This was regarded as a straightforward infringement of freedom of worship. The clause was modified and passed by Parliament, but as far as could be determined, never implemented.¹²⁰

2.5.2 Establishment of Christianity by law

After 1910 there were no legal endorsements of specific denominations, but there were several provisions¹²¹ which endorsed the particular creed of Christianity. The Constitution of the

116 Norman *Christianity* 100.

117 Nürnberger and Tooke *Reconciliation* 32 states: "The DRC (NG Church) began its history as a non-racial church, acquired a clearly racial stance towards the end of the 19th century, developed a legitimising theology based on ethnic romanticism during the first half of the 20th century and became one of the pillars of apartheid ideology under nationalist rule." This attitude was bitterly criticised by other churches both within the country and world-wide, and also by its "daughter churches" among the coloured community. These criticisms, the voices of reforming theologians within the church and the ideological shift in the National Party all contributed to a reassessment of its classical stance. Its earlier official statement "Ras, volk en nasie" (race, ethnic group and nation) was replaced by a completely new formulation called "Kerk en Samelewing" (church and society).

118 See Norman *Christianity* 119-145 on "The Churches and the Race Question".

119 S 9(7) of the Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended by s 29(d) of the Native Laws Amendment Act 36 of 1957. See the commentary of Van der Vyver 2000 *Emory Int'l L Rev* 788-789.

120 See the discussion below on racial issues and provisions applicable to blacks.

121 Van der Vyver *Religion* par 235 classifies rules of law with a religious foundation into three categories: "(a) rules of law that in spite of their religious base maintain a certain neutrality in relation to denominational differences; (b) rules of law with a religious base and which entail a definite bias in favour of a particular creed; and (c) rules of law the religious foundation of which amounts to differentiation for legal purposes based on faith." He distinguishes between (b) and (c) on the basis
(continued...)

Republic of South Africa of 1961,¹²² for example, described South Africa as a Christian country.¹²³ Several other rules of law that reflected a bias in favour of the Christian faith also existed. Van der Vyver¹²⁴ identifies provisions of publications control, education policy, Sunday observance, the crime of blasphemy¹²⁵ and the oath in criminal proceedings¹²⁶ which reflected a Christian orientation. Provisions also existed which were intended to protect the religious beliefs of all sections of the community¹²⁷ but, where a choice in favour of a certain

- 121 (...continued)
that the provisions in (b) have a sectional religious base, but apply to all subjects within a particular territorial jurisdiction, whilst provisions in (c) are attended by a religiously-based classification of persons where certain provisions apply to one group and a different set of rules apply to the other. The provisions referred to in (b) are discussed in this dissertation under the heading "Establishment of Christianity by law" and the provisions in (c) under the paragraph dealing with religious discrimination.
- 122 The repealed Republic of South Africa Constitution Act 32 of 1961 s 2 contains a reference to the Trinitarian God. Van der Vyver *Juridiese Funksie* 148-157, *Religion* par 236 however questions the juridical relevance of such a religious "confession" in a legal document.
- 123 The 1983 constitution (which has also been repealed), however, refers only to the "Almighty God", which Van der Vyver *Religion* par 236 argues "was intended to denote a kind of 'pot-pourri god' that can be interpreted by all and sundry to suit their own personal conception of the deity".
- 124 Van der Vyver *Religion* par 241-246.
- 125 See the comparative analysis of Wulfsohn 1964 *SALJ* 93-96 regarding the crime of blasphemy. The leading case in South Africa on the crime of blasphemy is *R v Webb* 1934 AD 493.
- 126 A witness in civil proceedings is permitted to take an oath in the form that most clearly conveys to him the meaning of the oath and which he considers to be binding on his conscience (Civil Proceedings Act 25 of 1965 s 39(2)). Before 1977 a witness in a criminal trial was likewise simply required to take the oath in a form which he considered binding to his conscience. Now, the Criminal Procedure Act 51 of 1977 s 162(1) prescribes the following oath: "I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God". Van der Vyver *Religion* par 246 states that this act makes allowance for the Christian form of the oath only. It could however be argued that "God" could refer to any deity. Also see Wulfsohn 1964 *SALJ* 96-99 on oaths.
- 127 S 25(2) of Ordinance 14 of 1931 provided that a butcher who respects the Jewish Sabbath by closing his butchery is entitled to open his business till 9 a.m. on Sundays to sell kosher meat. Van Niekerk 1969 *SALJ* 36 states that this is the only major exception in South Africa's provincial enactments as regards members of other faiths observing a different day of rest. Before the Union there had been s 3 of Law 24 of 1878 (Natal) which permitted dealers in Indian foodstuffs to sell such foodstuffs until 9 a.m. on Sundays; and the Natives Territories' Penal Code 24 of 1886 (Cape) s 120, without mentioning Sundays, prescribed punishment for a person who disturbed a meeting of people "lawfully
(continued...)"

religious belief had been made, it was in favour of Christianity. Many, but not all, of the provisions "endorsing" Christianity have been repealed, as will be shown in the discussion below. Brief reference will be made to a number of significant "choice of religion" provisions which concerned publications control, education and Sunday observance. Although this chapter only covers the period prior to 1993, reference will be made to the current position for the sake of completeness.

(a) Publications control

Section 1 of the Publications Act¹²⁸ provided: "In the application of this act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognized." The criterion of "undesirability" in terms of this act¹²⁹ entailed two tests, namely: "if it is blasphemous or is offensive to the religious convictions or feelings of any section of the inhabitants of the Republic".¹³⁰ The second has been held¹³¹ to apply to the religious convictions or feelings of all sections of the community and not only to Christians, but the first was interpreted to have a definite Christian bias. The publications appeal board relied, amongst other things, on the first clause for its conclusion that the proscription of blasphemy in censorship legislation related to the slandering of the God professed by Christians only.¹³² This act has been repealed *in toto*.¹³³ The position is now regulated by the Films and Publications Act¹³⁴ which only provides for the imposition of certain conditions if

127 (...continued)
assembled for religious worship" or disturbed or molested the officiating minister. It also applied to the Transkei territories.

128 42 of 1974.

129 S 47(2)(b).

130 See Van der Vyver *Religion* par 238, 242 for comments on the interpretation of these phrases, and references to decisions of the publications appeal board in this respect.

131 *Die Brandwag* PAB 6 of 1975 .

132 *Die Brandwag* PAB 6 of 1975. See Van der Vyver *Religion* par 245 and the cases he cites there.

133 By the Films and Publications Act 65 of 1996, s 33 read with schedule 12.

134 65 of 1996 s 29(1)(c), 29(2)(c), 29(3)(c), 29(4)(b), 29(6)(c) and schedule 10. Also see s 6(4)(a) which
(continued...)

a publication or film "advocates hatred that is based [*inter alia*] on religion, and constitutes incitement to cause harm...".

(b) Education

There have been and still are several references to the exercise of religion in schools.¹³⁵ Christian National Education for white children was proclaimed in 1967¹³⁶ and Christian education for black children in 1979¹³⁷. Subsequently, in what seemed to be a contrary manner, it was provided in 1984¹³⁸ "that recognition shall be granted both to that which is common and to that which is diverse in the religious ... way of life of the inhabitants of the Republic". The latter section¹³⁹ was repealed in 1996¹⁴⁰ and replaced with directive principles of national education policy which now direct such things as, "the right of every student to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions"¹⁴¹ and "the right of every person to establish, where practicable, education institutions based on a common language, culture or religion, as long as there is no

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- 134 (...continued)
provides that members of the board and review board to be appointed by the president shall have knowledge of one or more of certain matters, one of which is a knowledge of religion.
- 135 The most important (general) references to religion in the education acts (to be discussed in more detail below in this paragraph) are to be found in Act 70 of 1988 s 62; Act 90 of 1979 s 8; Act 101 of 1997 preamble; Act 27 of 1996 s 4; Act 84 of 1996 s 7. There are a total of 23 references to religious matters in educational acts, many of which are contained in private acts of universities or schools. There are only two references to Christian education: Act 39 of 1967 s 2 and Act 80 of 1993 s 25(1).
- 136 The Education Policy Act 39 of 1967 s 2(1)(a)-(b), as amended by the National Education Policy Amendment Act (HA) 90 of 1991 s 10.
- 137 Education and Training Act 90 of 1979 s 3(a). See Van der Vyver *Religion* par 239 and 243.
- 138 National Policy for General Education Affairs Act 76 of 1984 s 2(1).
- 139 S 2. The whole of Act 76 of 1984 was repealed by the Education Laws Amendment Act 100 of 1997.
- 140 The National Education Policy Act 27 of 1996 s 2.
- 141 S 4(a)(vi).

discrimination on the ground of race".¹⁴² The 1979 provision applicable to black children was also repealed,¹⁴³ but the 1967 provision applicable to white children¹⁴⁴ was replaced¹⁴⁵ and now reads: "that the education in schools maintained, managed and controlled by the Department shall have a Christian character, but that the religious convictions of the parents and the pupils shall be respected in regard to religious instruction and religious ceremonies".¹⁴⁶ This reference to a Christian character seems to be in conflict with the Education Affairs Act¹⁴⁷ which provides: "No doctrine or dogma which is peculiar to a particular denomination or sect shall be instructed or promoted at a public school during school hours".¹⁴⁸ Yet, in the same act¹⁴⁹ it is provided: "In every public school there shall daily be a religious ceremony which shall

142 S 4(a)(vii).

143 The above-mentioned s 3(a) of act 90 of 1979 was repealed by s 63(1) of the South African Schools Act 84 of 1996. Some portions of the act are however still in force. It also still contains references to black education. S 8(1) provides that "Any person who wishes to provide education to a Black person, except at a public school, shall apply to the Department for the registration of a school, and shall not provide such education before the school has been registered in terms of this section". One of the exceptions to this section is religious schools as described in s 8(3)(b): "a school established, maintained or controlled by a church solely for the purpose of providing purely theological training to prospective ministers of religion or evangelists and any school providing exclusively religious tuition".

144 The long title of this act, however, still reads: "To confer upon the Minister of Education and Culture certain powers in respect of the policy to be pursued in providing education to white persons in certain schools and technical colleges..." (my emphasis). This reference to "white children" seems curious in view of the new constitutional dispensation, but it seems to be still in force. In view of the reference to white persons in this act and the reference to black persons in the previous footnote, it seems that a distinction is still drawn in educational matters between white and black education.

145 By the National Education Policy Amendment Act 90 of 1991 s 4.

146 The only other reference to Christianity is to be found in the Potchefstroom University (Private) Act 80 of 1993 s 25(1) which provides: "In appointing academic and non-academic staff, the council shall ensure that the Christian historical character of the University is maintained: Provided no test with regard to membership of a specific church shall be applied to any person as a condition of his becoming or continuing to be a member of the academic or non-academic staff at the university or of his holding any office or receiving any emolument or exercising any privilege therein."

147 70 of 1988. S 62 is about "Religion in public schools".

148 S 62(3).

149 In s 62(1).

consist of the reading of a portion from the Bible and the saying of a prayer". It is not clear how these provisions can be reconciled.¹⁵⁰

The South African Schools Act¹⁵¹ provides: "Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under the rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary." The preamble to the Higher Education Act¹⁵² also states that it is desirable to respect freedom of religion, belief and opinion.

(c) Sunday observance

The Christian bias of certain branches of the law is also evidenced by a series of Sunday observance laws covering a wide range of prescriptive and regulative measures. Even though the law relating to Sundays¹⁵³ and religious public holidays¹⁵⁴ embodies a common law tradition, it is wholly statutory in South Africa. As seen above, Sunday observance legislation started with a placard of Jan van Riebeeck,¹⁵⁵ and continued with pre-Union legislation¹⁵⁶

150 The laws on Education are in need of a thorough "cleaning-up" exercise.

151 84 of 1996 s 7. The Act was initially introduced as a Bill of the Gauteng legislature but was subsequently enacted as an Act of Parliament to apply nationally. The constitutionality of the Gauteng School Education Bill 1995 was challenged in *Ex Parte Gauteng Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill 1995*, 1996 (3) SA 165 (CC). See the discussion of this case in ch 5.

152 101 of 1997.

153 The law relating to Sundays is summarised in Downer *Sundays* par 129-162.

154 The law relating to public holidays is summarised in Downer *Sundays* par 163-188.

155 Of 4 Oct 1652 prohibiting absence from Sunday worship on pain of punishment. Also see Downer *Sundays* par 129 n 5.

156 For an exposition of pre-union legislation relating to Sundays, see Downer *Sundays* par 145-149; Van Niekerk 1969 *SALJ* 33-50.

(some of which is apparently still valid, but not strictly enforced)¹⁵⁷ and with Union legislation at national and provincial level.¹⁵⁸ The former provinces (Cape of Good Hope, Transvaal, Orange Free State and Natal) all had Sunday observance legislation until recently.¹⁵⁹ The most important acts containing provisions on Sundays and public holidays are the Business Act,¹⁶⁰ Minerals Act,¹⁶¹ Public Holidays Act,¹⁶² Liquor Act,¹⁶³ Prohibition of the Exhibition of Films on Sunday Act,¹⁶⁴ Basic Conditions of Employment Act¹⁶⁵ and the Interpretation Act.¹⁶⁶ There

- 157 See, however, the cases of *S v Macdonald en Atherstone (Edms) Bpk en andere* 1968 (2) SA 236 (T) and *S v Steffini* 1968 (3) SA 163 (T). In the first case the accused had been found guilty in a magistrate's court of contravening s 7 of Act 28 of 1896 (Tvl) by holding a concert on a Sunday. On appeal the accused contended that the music played had been "sacred" music which would render its performance lawful. Hiemstra J found that tunes such as "Dream lover", "Don't steal my heart away" etc are *prima facie* not "sacred" and because the accused had not shown that they were he dismissed the appeal. In the second case the conviction of a manager of a restaurant was set aside for allowing a public dance on a Sunday in contravention of s 7 of Act 28 of 1896 (Tvl). Rabie J in an attempt to mitigate the harsh effect of the act, held that because it had not been proved beyond all reasonable doubt that the accused had not tried to stop the dancing, the appeal had to succeed, quite apart from the fact of whether it was public or not.
- 158 For an exposition of post-Union provincial legislation, see Downer *Sundays* par 150-162; Van Niekerk 1969 *SALJ* 32-33.
- 159 The Natal Law to Provide for the Better Observance of the Lord's Day, commonly called Sunday Act 24 of 1878 was recently repealed by the Businesses Act 71 of 1991. The old ZAR Zondagswet 28 of 1896 has not been repealed, but is not enforced. Furthermore, shop hours ordinances, horse-racing and betting ordinances (such as the Regulation of Racing and Betting Ordinance 28 of 1957 (Kwazulu-natal) s 4(3)) and other archaic ordinances (such as the Control of Dancing Ordinance 12 of 1957 (OFS) s 1,2) exist which have not been repealed. The ordinances relating to horse racing and betting and control of dancing were re-enacted by way of assignment to the "new provinces", but no assignment took place in respect of the shop hours ordinances, nor the colonial or other pre-Union legislation. See Downer *Sundays* par 130.
- 160 71 of 1991.
- 161 50 of 1991.
- 162 36 of 1994.
- 163 27 of 1989.
- 164 16 of 1977.
- 165 3 of 1983.
- 166 33 of 1957. S 4 contains provisions on the exclusion of Sundays in the reckoning of a prescribed (continued...)

is also a volume of provincial legislation which concerns Sundays.¹⁶⁷ Brief reference will be made to the significant provisions.¹⁶⁸

Commercial law contains many statutory provisions restricting business transactions and work or retail on Sundays and on religious holidays.¹⁶⁹ A Sunday is deemed to be a "nonbusiness" day within the meaning of any law relating to bills of exchange or promissory notes.¹⁷⁰ The law relating to mineral rights contained restrictive provisions pertaining to activities on a Sunday,¹⁷¹ but these provisions have been repealed.¹⁷² Sunday is one of the "closed days" in

166 (...continued)
number of days.

167 The position with regard to the provincial ordinances is somewhat complicated owing to the transitional arrangements in the Constitution 108 of 1996 (section 2 of schedule 6). New provinces were created by the Constitution. Provincial ordinances enacted prior to the advent of the new constitution are assigned to the provinces (where new provinces have been created) which then administer those ordinances. The position with regard to ordinances that have not been assigned is not clear since "all law that was in force when the new Constitution took effect, continues in force". See Downer *Sundays* par 130.

168 As already pointed out, this chapter actually covers only the period prior to 1993 but, for the sake of completeness, the current state of the legislation will be mentioned briefly.

169 The Business Act 71 of 1991 currently regulates the position. The distinction between religious and secular public holidays was abolished with the introduction of the Businesses Act, and some of the shop hours ordinances have been suitably amended: Schedule 3 amended the Cape Shop Hours Ordinance 16 of 1976 (Cape) s 4(1)(a) to also include "religious public holidays"; it also amended the Licences and Business Hours Ordinance 11 of 1973 (Natal) s 34(1)(a) to include "Christmas Day, Good Friday, Easter Sunday, Ascension Day and the Day of the Vow"; the Shop Hours Ordinance 19 of 1952 (OFS) s 3(a) remained unchanged; and the definition of "normal trading times" in the Shops Hours Ordinance 8 of 1986 s 1 was amended to mean "any other weekday and any other Saturday than Good Friday, Ascension Day, Day of the Vow or Christmas Day". The Business Act 71 of 1991 also repealed the Law to provide for the Better Observance of the Lord's Day, commonly called Sunday (Natal).

170 Public Holidays Act 36 of 1994 s 3. See Downer *Sundays* par 143.

171 Mining Rights Act 20 of 1967 s 48(4)(a), 143(4) and Precious Stones Act 73 of 1964 s 91.

172 The Minerals Act 50 of 1991 s 68 repealed the Mining Rights Act 20 of 1967 save for a few definitions and Chapter XVI; and the Precious Stones Act 73 of 1964. The 1991 act does not contain provisions on Sunday observance. See Downer *Sundays* par 140 for the previous position on the pegging of claims on Sunday and par 142 for the previous prohibition of certain transactions in
(continued...)

terms of the Liquor Act,¹⁷³ together with Good Friday and Christmas Day.¹⁷⁴

Labour legislation contains many provisions that set aside a day of rest and favours the one singled out by the Christian religions. The enactments concerned protect workers as far as work on a Sunday is concerned.¹⁷⁵ The Basic Conditions of Employment Act,¹⁷⁶ for example, regulates when factory and shop workers may work on Sundays and what payment they are to receive.

As far as entertainment and recreation are concerned, the exhibition of any film on any Sunday or public holiday at any place to which admission is obtained for a consideration is prohibited, unless the relevant local authority has consented to it.¹⁷⁷ The amendment of the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act¹⁷⁸ by the Prohibition of the Exhibition of Films on Sundays and Public Holidays Amendment Act¹⁷⁹ rendered the distinction between secular and religious holidays nugatory.¹⁸⁰ Other restrictions (in terms of

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- 172 (...continued)
unwrought precious metals or rough and uncut diamonds on Sundays.
- 173 27 of 1989 s 1.
- 174 See Downer *Sundays* par 141. In *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC) the closed-day provisions were challenged (*inter alia*) under the freedom of religion clause. The constitutional court, however, held that closed-day provisions were not unconstitutional. See the discussion below in ch 6. This act is currently being revised.
- 175 See Agriculture Labour Act 147 of 1993 s 4; Labour Appeal Court Sitting as Special Tribunal Act 30 of 1995 s 1, sch 1; Manpower Training Act 56 of 1981 s 1; Mines and Works Act 27 of 1956 preamble, s 9; and Unemployment Insurance Act s 1. Also see Downer *Sundays* par 135-139.
- 176 Basic Conditions of Employment Act 3 of 1983 s 1, 2, 9, 10, 11, 15, 16, 33.
- 177 Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 1977 s 1 and 2(1) as amended by the Prohibition of the Exhibition of Films on Sundays and Public Holidays Amendment Act 102 of 1991 s 2. See Downer *Sundays* par 131-134.
- 178 16 of 1977.
- 179 102 of 1992.
- 180 The Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 1977 provides that Sunday includes any public holiday mentioned in the second schedule to the Public Holidays Act 5 of 1952. The latter act has, however, been repealed by the Public Holidays Act 36 of 1994 and no
(continued...)

the Public Holidays Act¹⁸¹) on public entertainment, games contests and functions at places where admission fees are charged were repealed.¹⁸²

3. The position of religious minority groups before 1994

3.1 Introduction

The purpose of this paragraph is to evaluate the existence of religious freedom in South Africa before 1994. It therefore focuses on the position of black (Christian) religious groups, Muslim and Jewish groups and on their right (or restrictions on their right) to freely exercise their religious beliefs in South Africa before 1994. It will be shown that the law discriminated in various ways against these groups: in the case of black Christian groups, primarily on racial grounds; in the case of Jewish groups, on religious grounds and in the case of Muslims, on racial and religious grounds.

It is very difficult to limit the scope of such a discussion in view of the plethora of discriminatory statutory provisions which previously existed in South Africa. In addition, racial and religious discriminations were so closely interlinked that it is difficult to discuss the one without the other. Much has been written on this subject. However, the purpose of this paragraph is to briefly set out the relevant legal discriminations against these religious groups to show that religious pluralism, although it existed *de facto*, was not protected *de jure* in South Africa before 1994.

180 (...continued)
longer contains a second schedule. The distinction previously drawn between religious public holidays (as set out in the second schedule) and secular public holidays no longer exists. At present only Christmas Day and Good Friday among the present 12 public holidays can possibly be seen as religious holidays and fall within the ambit of protection. See Downer *Sundays* par 134.

181 36 of 1994. Some measure of conformity has been obtained through the introduction of this act.

182 The Public Holidays Act 5 of 1952 was repealed and replaced by the Public Holidays Act 36 of 1994 (as amended by the Public Holidays Amendment Act 48 of 1995). See s 2 and 3, sch 1 and 2.

3.2 Black Christian groups

3.2.1 The development of separate black churches in South Africa

The African Independent Church (AIC) movement was started by Nehemiah Tile¹⁸³ when he founded the Thembu Church in 1884. This movement proliferated¹⁸⁴ among blacks and developed an "Ethiopian" section, a "Zionist" section and a "Messianic" section at the end of the nineteenth century.¹⁸⁵ Today there are more than three thousand¹⁸⁶ independent Christian churches, all with a huge membership.¹⁸⁷

The reasons for the rise of the independent black churches are rather complex. With the meeting of white Christians and Africans, two fundamentally different systems of ideas came into contact.¹⁸⁸ The result of Christian missions¹⁸⁹ under Africans eventually resulted in the "emergence of an African Christianity" which "as it evolve[d], correspond[ed] neither to

183 See Oosthuizen *Christianity's Impact* 102-104.

184 According to Pillay and Hofmeyr *Perspectives* 260, there were only three recognised independent groups with about 25 000 adherents in 1904. In 1925 there were about 130 groups and in 1946, 1300 groups with 1 100 000 adherents. In 1980 there were about eight million adherents which constituted about 35% of the black population.

185 Some recent scholars have questioned the accuracy of these categories.

186 Oosthuizen *Christianity's Impact* mentions 4000.

187 The rather complex nature of the formation and theologies of these churches falls outside the scope of this thesis. For an overview, see Pillay and Hofmeyr *Perspectives on Church History* 260-262.

188 See Kiernan *African and Christian* 9-27 for an analysis. He states that essentially, Christianity propagates a God-centred view of the universe whereas an African view of the universe is basically man-centred.

189 For an overview of the early missionary work and the work of missionaries like Schmidt, Van Lier, Marsveld, Schwinn, Kühnel and Kohrhammer during the 17th and 18th centuries, see Pillay and Hofmeyr *Perspectives* 233-234, 241-245. See Saayman *Christian Missions* 35 who concludes: "A stocktaking of the past history and achievements of the Christian mission in South Africa leaves us therefore with a chequered picture. No single judgement of either good or bad can do justice to this history".

missionary nor indigenous hopes or expectations".¹⁹⁰ Kiernan¹⁹¹ states that:

In short, there was a complex exchange of influence between the two. Christianity has modified the African worldview: on the other hand, Africans have reinterpreted the Christian message.

In addition to certain ideological differences, the policy of apartheid had a definite influence on the development of separate black churches in South Africa. A distinct black theology developed in South Africa which was closely linked with the commitment to political change.¹⁹² Maimela¹⁹³ describes three themes that were prevalent in black Christian theology during the last century in reaction to white domination in the churches, namely to experience the message of the Gospel in their own idiom, culture, liturgy and world view and make it relevant in the sociopolitical struggle; to recover black identity; and to achieve black liberation.

It is impossible to discuss the subject of black Christian groups in South Africa within the confines of this thesis.¹⁹⁴ It is, moreover, not the purpose of this study to analyse the theological and ideological foundations of these movements nor to analyse the subject of "Christians and apartheid" from a theological perspective.¹⁹⁵ Note should, however, be taken

190 Kiernan *African and Christian* 13 quotes Ranger T "An Africanist Comment " 1987 *American Ethnologist* 14(1) 182-185.

191 Kiernan *African and Christian* 13.

192 See Mofokeng *Black Theology* 38, who quotes Itumeleng Mosala asserting that black theology has to be a theoretical weapon of struggle in the hands of the exploited black masses.

193 Maimela 12 *Scriptura* 40-53 as quoted by Oosthuizen *Christianity's Impact* 116.

194 For an overview and the historical context, see Pillay and Hofmeyr *Perspectives on Church History* 232-273, 290-300.

195 See for example Kinghorn *Theology of Separate Equality* 57-80; Cochrane *Christian Resistance to Apartheid* 81-100; Oosthuizen *Christianity's Impact* 101-121; and Prozesky *Implications of Apartheid for Christianity* 122-148. Villa-Vicencio *Civil Disobedience and Beyond* 14-61 sketches the history of more than three hundred years of struggle (which started long before 1948). Against this historical context he sets out certain theological responses (64-117) and evaluates ecclesiastical responsibility.

of the influence of apartheid laws¹⁹⁶ on black Christian groups and of the polarisation caused by these laws in and among the churches in South Africa.

3.2.2 The effect of apartheid on religious freedom

(a) The first signs of apartheid in religious matters

Initially, colour played no role in religious matters. During the seventeenth and eighteenth centuries, indigenous peoples and slaves were baptised. In fact, the Synod of Dordrecht in the Netherlands had decreed that baptised slaves were to have the same rights of freedom as all other Christians. The principle was that every Christian, irrespective of colour, was to enjoy the same religious and civil advantages. Marriage between whites and baptised slaves was initially permitted. But although a union between whites and baptised coloureds was still allowed, marriages between whites and local black people were prohibited in 1685.

Until 1857 no official distinction was made between black and white parishioners at the sacrament of the Holy Communion, but separate services were then instituted as a concession, in order to make missionary work among the "heathen" more effective. This practice soon became the norm, and the church of the time was institutionalised in separate, parallel congregations, namely a white mother church on the one hand and black, Khoisan and coloured daughter churches on the other hand.¹⁹⁷

(b) The effect of institutionalised apartheid on religious freedom

The history of apartheid cannot be traced in this study, but it is clear that apartheid laws legally discriminated against black people on the grounds of race. As mentioned, the consequences of this discrimination also influenced the religious sphere and constituted state interference in

196 Such as the Prohibition of Mixed Marriages Act 1949; Population Registration Act 1950; Immorality Amendment Act 1950; Group Areas Act 1950; Bantu Education Act 47 of 1953; Bantu Authorities Act 1956; Separate Representation of Voters Act 1956, and the Natives Resettlement Act 1954.

197 See Pillay and Hofmeyr *Perspectives on Church History* 237, 251.

religious affairs. The Blacks (Urban Areas) Consolidation Act,¹⁹⁸ contained a clause, known as the "church clause", which authorised a minister to prohibit blacks from attending church services or functions in any urban areas other than those set aside in terms of the Group Areas Act¹⁹⁹ for the black people. In terms of this act, the criterion for such a decision was whether the presence of blacks in the (white) urban area would constitute a nuisance to residents or whether their presence would be undesirable in view of the location of the premises where the church service or function was to be held. As far as could be established, this clause was, however, never invoked.²⁰⁰

Religious bodies were not exempt from security legislation.²⁰¹ In terms of the Internal Security Act,²⁰² the minister of law and order could ban any organisation which engaged in activities which were deemed to endanger the security of the state or the maintenance of law and order or if he was satisfied that an organisation had ties with communism. The Christian Institute of South Africa was, for example, banned for political reasons.²⁰³

Religious bodies were not exempt from the Affected Organisations Act²⁰⁴ either which empowered the state president to proclaim an organisation an "affected organisation" if he was

198 25 of 1945 s 9(7). This act has been repealed by the Abolition of Influx Control Act 68 of 1986 s 17.

199 36 of 1966. This act has been repealed by the Abolition of Racially Based Land Measures Act 108 of 1991 s 48(1)(a).

200 For the reaction of the DRC on this clause, see Oosthuizen *Christianity's Impact* 109-111.

201 Security legislation did not apply exclusively to blacks but is discussed under this heading since they were frequently affected by it. See the discussion of Van der Vyver 2000 *Emory Int'l L Rev* 789-795 on the repression of religious institutions and persecution of religious leaders under security legislation.

202 Internal Security Act 74 of 1981 s 4, 6, 7, 11, 14. Sections 6-7, 11 have been repealed and s 4 has been replaced by the Internal Security and Intimidation Amendment Act 138 of 1991 ss 6 and 5. See also *United Methodist Church of Southern Africa v Methodist Church of Southern Africa* 1991 (2) SA 138 (Tk).

203 GN R287 Gazette 5784 of 19 October 1977. For the circumstances surrounding the establishment of the Christian Institute in 1963, with CF Beyers Naudé as its first director, see Pillay and Hofmeyr *Perspectives on Church History* 291-292.

204 31 of 1974 s 2.

satisfied that it engaged in politics with the aid of or in cooperation or consultation with an overseas organisation or person. The overall effect of such a proclamation was that the organisation concerned forfeited all foreign financial support. The Christian Institute of South Africa was declared an "affected organisation" prior to its banning.²⁰⁵

(c) The responses of religious groups to apartheid

The responses of religious groups to apartheid and state intervention in matters of religion do not fall within the scope of this thesis.²⁰⁶ Brief reference is, however, made to the view of Norman who provides a general perspective in this regard. It has become conventional among interpreters of South Africa's complicated history to equate the attitudes of the Dutch Reformed Churches²⁰⁷ with racial intolerance and, by contrast, the attitude of English-speaking missionaries and churches as having shown consistent respect for the indigenous population. Norman²⁰⁸ presents a helpful perspective by stating that the history of religious opinion in relation to race issues is better expressed in three stages (subject to a number of chronological disparities and some individual exceptions):

In the first half of the nineteenth century the English and Dutch churches were indeed opposed to each other in their different (and often exaggerated) responses to the native populations - largely because of the existing political and cultural, as

205 GN R132 Gazette 4728 of 30 May 1975.

206 For an overview of the responses of religious institutions to state intervention in religious matters during the apartheid era, see Van der Vyver 2000 *Emory Int'l L Rev* 795-812.

207 The DRC (or "NG Church"), the largest of the Afrikaans Calvinist churches, "... began its history as a non-racial church, acquired a clearly racial stance towards the end of the 19th century, developed a legitimising theology based on ethnic romanticism during the first half of the 20th century and became one of the pillars of apartheid ideology under nationalist rule" (Nürnberg K and Tooke J (eds) *The Cost of Reconciliation in South Africa* (1988 Cape Town) 32). This attitude was bitterly criticised by other churches both within the country and world-wide, and also by its "daughter churches" among the coloured community. These criticisms, the voices of reforming theologians within the church and the ideological shift in the National Party all contributed to a reassessment of its classical stance. Its earlier official statement "Ras, volk en nasie" (race, ethnic group and nation) was replaced by a completely new formulation called "Kerk en Samelewing" (church and society).

208 On the churches and the race question, see Norman *Christianity* 119-145, quotation on 120.

well as religious, antipathies within their joint European inheritance. But attitudes at that time were really still fairly fluid on some race questions, and within the churches there was probably less difference of view than in general society. Between the mid-nineteenth century and the middle of the succeeding one, however, the white population groups moved towards sharing a common approach: separation of the races for both humanitarian and cultural reasons. Then, in a third development, they diverged again, as the ideology of Nationalism externalized the inherent social and economic insecurities of the urbanized poor whites, and as the sectarianism of the Dutch Reformed churches, in the areas of urban growth, drew the Afrikaner element in one direction, and the defeated English nationalism, together with knowledge of overseas developments and ideas, inside the English-speaking churches, drew them in another. Mutually exclusive views on the basis of society and government then emerged.

3.3 Muslims

3.3.1 Muslims in South Africa

The first Muslims to arrive in South Africa were slaves who were imported into the Cape Colony from the Malayan Archipelagos.²⁰⁹ South African Indians, in their turn, trace their historical origins to two immigrations. The first is the immigration of indentured labourers who came to the country in 1860 to work on the Natal sugar cane farms. The second wave was that of "free passage" Indians, consisting of traders and professionals from Gugerat, Surat and Porbander, who paid their own way. In 1927, the colonial governments of India and South Africa concluded the Cape Town Agreement, which allowed for the repatriation of Indians who chose to return to their country, while an upliftment scheme was introduced for those who chose to remain in South Africa - provided they *assumed Western standards of living*.²¹⁰

3.3.2 Discrimination against Muslims

The Statutes of India (a law of the Netherlands) were in force at the Cape until the reforms of De Mist in 1804. These statutes prohibited Muslims from propagating Islam or practising their

209 See Islamic Council of South Africa *Meet the Muslims* 14.

210 See also Bhana and Pachai *Indian South Africans* 150.

religion in public on pain of punishment by death. Of particular interest is the clause stating:

Offenders are to be punished with death, but should there be amongst them those who had been drawn by God to become Christians, they were not to be prevented or hindered from joining Christian churches.²¹¹

Since the majority of Muslims²¹² were members of "nonwhite races" in terms of the old apartheid laws in South Africa, they suffered the same civil and political injustices as the black majority in South Africa.²¹³ Muslims therefore never enjoyed equal rights of citizenship and have been discriminated against on racial grounds.

The religious discrimination against Muslims manifested mainly in the area of family law. According to *Sharia*, the religious law of Islam, a man may take as many as four wives. Marriages in accordance with Islamic law were denied recognition on the basis that they were "potentially polygamous".²¹⁴ This was the case even if the person was *de facto* married to only one wife. The reason advanced is one of public policy. Although the Marriage Act²¹⁵ provides for the recognition of marriages concluded according to the *rites* of Christian, Jewish, Muslim and other Indian religions, a marriage could not be concluded according to another system of *religious law*. The monogamous marriage of Roman-Dutch law was the only form of marriage recognised under South African law.²¹⁶ Furthermore, contracting a second marriage in

211 Quoted by Lubbe *Religious Pluralism* 210.

212 According to the Muslim Council of South Africa there are approximately 500 000 Muslims in South Africa today.

213 Cachalia 1993 *THRHR* 392, 398 states that the majority of Muslims have participated in the antiapartheid struggle for equality, democracy and national unity but that they have also been involved in a struggle for the assertion of Muslim identity. He states that: "The non-recognition of Muslim personal laws by the South African law has long been a source of grievance. Thus two potentially, but not necessarily, conflicting strands of political thought have arisen within the Muslim community: one emphasizes the struggle for the rights of all citizens, and denounces separate rights; and the other asserts the rights of the Muslim, *qua* Muslim."

214 *Seedats Executors v The Master of Natal* 1917 AD 302.

215 S 3(1) of Act 25 of 1961.

216 South African courts have followed the celebrated definition of a marriage enunciated by Lord
(continued...)

contravention of the prohibition of polygyny would constitute a crime.²¹⁷ The effect was that South African law viewed marriages contracted according to Islamic religious law as void and did not attach the usual civil law consequences of a marriage to such "unions". Religious discrimination thus translated to gender discrimination by excluding Muslim women and dependants from the protection afforded to other married women²¹⁸ and dependants in South Africa.²¹⁹

3.4 Jews

3.4.1 Jews in South Africa

The history of the South African Jewry runs parallel with that of the white settlement.²²⁰ The earliest association of Jews with South Africa has been traced to the Jewish cartographers, astronomers, navigators and sailors who assisted the Portuguese in their sea voyages to India and the East around South Africa.

The first permanent congregation named "The society of the Jewish Community of Cape Town, Cape of Good Hope" or *Tikvath Israel* was established in 1841. The congregation was almost entirely English and German.

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- 216 (...continued)
Penzance in *Hyde v Hyde and Woodmanse* (1886) LR IP AD 130: "Marriage, as understood in Christendom, may...be defined as a voluntary union for life of one man and one woman, to the exclusion of all others".
- 217 See Van der Vyver and Joubert *Persone en Familiereg* 467.
- 218 To name but a few: the wife has no claim for financial support, she has no right to claim any property from her husband, and she cannot inherit from him unless he benefits her in his will.
- 219 For the present position under the new Constitutional dispensation, see the discussion of *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D) 1726C-E in ch 5.
- 220 See Saron and Hotz *The Jews in South Africa* for the story of the growth and development of South African Jewry from the earliest days until about 1910. See also Herrman *History of the Jews in South Africa*; Hertz *The Jew in South Africa*; Bernstein *My Judaism, My Jews* 116-178; and Cohen *Historical Background* 1-18. For a contemporary survey, see Arkin *South African Jewry* and Hoffman T and Fischer *Jews of South Africa: What Future?*

There were Jews among the settlers who settled at the Cape under British rule. As the extent of British influence increased with the annexation of Natal (1843) and the Orange River Sovereignty (1848), Jewish pioneers were among those who settled in these territories. With the discovery of diamonds and gold between 1867 and 1886, people from all over the world were drawn to South Africa, including many Jews, mainly from Great Britain and Central Europe. The real influx, however, came from eastern Europe, particularly Lithuania, at the end of the nineteenth century. This affected the size, structure and direction of the Jewish community. The influx of Jews from eastern Europe also eroded the equilibrium that had existed between the Jewish community and the Afrikaner and English population.²²¹ The immigration of eastern European Jews continued into the twentieth century and was added to by the refugees from Nazi Germany. These immigrations were, however, not viewed favourably.²²²

3.4.2 Discrimination against Jews

When the Dutch East India Company established a permanent settlement at the Cape in 1652, it adhered to a policy of only admitting Protestant Christians into its service. This discrimination against the Jewish religion persisted at the Cape until 1804 when the principle of religious tolerance was established under the Batavian Republic, as discussed above. This policy was continued under British rule from 1806.

In the Zuid-Afrikaansche Republiek, Jews were subject to certain civil discriminations, although the same measures applied to non-Protestant Christians as well.²²³ They were not allowed to hold public office or attend government schools. These discriminations disappeared

221 See Dubb *Demographic Picture* 23-44 for a discussion of the development, size and characteristics of the South Africa Jewish population. Also see Goldberg *Community Infrastructure* 45-55.

222 For example, when a ship arrived with refugees from Nazi Germany there were demonstrations at the dock-side against the landing of such refugees; and shortly after the incident the law was changed to prevent more such refugees coming in meaningful numbers. See Schwarz *Political attitudes* 133.

223 A policeman had the right to arrest anyone who was not of Protestant faith and to bring him before the landdrost as a rogue and vagabond (s 41 of the 1864 Act). See Saron and Hotz *The Jews in South Africa* 185, 197-198. Also see Cohen *Historical Background* 4; Schwarz H *Political attitudes* 133.

after the Anglo-Boer War in 1902, when the whole of South Africa came under British rule.

The main body of discriminatory measures against Jews can be found in a succession of immigration laws.²²⁴ The Cape Legislative Council passed an Immigration Registration Act in 1902 which insisted that applications be written out and signed by an immigrant in a European language. The chief object was to control the influx of Asians but also to curtail Eastern European immigration. A similar law was enacted in Natal. Although these laws did not apply in the Transvaal and Free State, they made it difficult for Jews to settle in the interior. Admission to the Transvaal was further complicated by the requirement of an entry permit and the difficulties of the subsequent naturalisation procedures. Through the efforts of two Jewish Boards of Deputies,²²⁵ the authorities in the Cape and Natal amended their Immigration Acts and accorded Yiddish the status of a European language. A similar clause was incorporated in the Transvaal Immigration Restriction Act of 1907. After unification, the Immigration Regulation Act²²⁶ specified that, for the purposes of the Act, Yiddish would be regarded as a European language.

In 1923 there was once again general dissatisfaction with certain discriminatory aspects of the Immigrant Act. The Act included certain Jewish immigrants on economic grounds in spite of the Government's promises that it would not be applied to Jews. In 1930, Dr DF Malan introduced the Immigration Quota Act which imposed restrictions on Eastern European Jewish immigration. Dr Malan contended that uncontrolled immigration of Jews from Eastern Europe would disrupt the racial homogeneity (*sic*) of the country and create serious economic problems.

In 1937, the Alien Act was passed which effectively curtailed the immigration of German Jews. The stance taken by Dr Malan and his supporters was that until Jewish involvement in commerce had been checked and Afrikaners had gained a foot in the business world, the

224 See Cohen *Historical Background* 3-12.

225 Following the unification of South Africa in 1910, the two Boards merged to form the South African Jewish Board of Deputies. The board fought, *inter alia*, for the right of Jews to immigrate.

226 22 of 1913

problem of "poor whites" would remain.

The attitude of the National Party towards Jews during this period was clearly illustrated by the official decision of the Transvaal branch to disqualify Jews from membership of the party. The Free State branch soon followed suit. In 1950 the last restriction on Jews to become members of the National Party was removed.²²⁷ Cohen²²⁸ ascribes the shift in policy after 1948 to such local political considerations as the political empowerment of the Afrikaners, and to the fact that the creation of the state of Israel at the time was believed to have solved the immigration problem.²²⁹

In the nineteen seventies and eighties, instances of anti-Semitism were incorporated in the policies of ultraconservative parties like the HNP (Herstigte Nasionale Party) and the AWB (Afrikanerweerstandsbeweging), a racist right-wing organisation. Another factor that influenced and still influences the position of the Jewish community is the conflict in the Middle East.

In other words, the Jews in South Africa have to a great extent been part of the privileged white minority within the country and benefited from the opportunities that this status afforded

227 This attitude of the government could be seen from the example of the Defense Force, which showed a willingness to care for the spiritual needs of Jewish national servicemen, including leave on religious holidays, and postings to units where kosher food was available.

228 Cohen *Historical background* 10.

229 It is difficult to classify the Jewish response to political events in South Africa. It can actually be said that there is no common Jewish response to political issues. Individual Jews have participated in political life in accordance with various political convictions. It has been the policy of the Jewish Board of Deputies since 1903 (as formulated by its president in 1903) that "...it has no intention to control your political opinions, nor has it the intention at any time to influence a single Jew in the exercise of such political opinions as he is sure to hold with his co-citizens in this Colony"; but the constitution of the Board adopted in 1903 stated: "The Board shall make observations of all proceedings relating to legislation and municipal enactments and shall use such means as they may deem requisite in order that no infraction of the religious rights, customs and privilege of the Jewish community may ensue therefrom" (as quoted in Schwartz *Political attitudes* 135).

them.²³⁰ Unlike most of the white population, however, they occasionally had to endure discrimination based on religion.

3.4.3 Concessions to Judaism

Certain concessions to Judaism can be found in South African law. For example, in the Cape Province an ordinance²³¹ permitted butchers who sold kosher meat and satisfied the local authorities that they kept their butcher shops closed throughout the year from sunset on Fridays to sunset on Saturdays to make deliveries of kosher meat at any time before 09h00 on Sundays.

A further example, as mentioned above, is to be found in the Marriage Act²³² which provides that marriages must be solemnised according to Christian, Jewish or Islamic rites or according to the rites of any Indian religion.²³³ The effect of this provision is that South African law recognises the formalities for the solemnising of marriages of, *inter alia*, the Jewish religion.²³⁴

4. Conclusion

4.1 The separation of church and state

In South Africa there are parallels to the histories of church-state relations elsewhere in the

230 It is difficult to make general remarks on the Jewish experience. Cohen *Historical background* 13 for example quotes Shimoni G *Jews and Zionism: The South African Experience, 1910-1967* (Cape Town 1980) 302 who states that while "it is correct to say that many white liberals and radicals were Jews, it is equally correct that not many Jews were liberals and radicals."

231 Shop Hours Ord 16 of 1976 (Cape) s 13.

232 Act 25 of 1961 s 3(1).

233 Note that this section only applies to the *rites* of these different religions, not religious legal systems. The marriage still has to be concluded according to South African law. In other words, the solemnising of marriages according to a system of religious law other than the monogamous (Christian) concept of marriage is not recognised.

234 Van der Vyver *Religion* par 247, 248, 250 however, shows that rules of law which are "premised upon the religiously defined classification of persons" signify the legislature's attempt at religious tolerance, but ironically, can in a sense also be seen as instances of discrimination based on religion.

modern world but, as Norman²³⁵ puts it, they exist on a modest scale. Theoretically, our dual heritage from the Netherlands and Britain ought to have enhanced the prospect of a complex and rich development of religious involvement in the political experience of the country. Norman ascribes the "relatively quiet history of Church and State relations" in part to a feature in our political development: throughout the formative period in the nineteenth century, there was no clearly defined state structure with which the churches were likely to come into conflict, while, at the same time, there was growing pluralism on the side of the churches.

The Dutch Reformed Church itself was reconstituted, as it were, around three distinct historical changes: at the Cape after 1800, in the new world of religious pluralism; in the Boer Republics of the nineteenth century, as a response to the Voortrekker ideals of an order free of British influence; and in the urban industrialisation of the twentieth century Transvaal, as symbols of the spiritual authority of Afrikaner cultural purity.²³⁶

It was shown that the relationship between church and state slowly developed in a direction away from the idea of a state church. Initially (from 1652 to 1779), the Reformed Church was the only recognised church at the Cape. In 1780 the Lutheran Church was allowed to erect a church building and to have a minister of their own. De Mist's reforms in 1804 formally recognised the idea of a separation of church and state, although he still singled the Reformed Church out for special treatment and regulation. Ordinance 7 of 1843 recognised the voluntary nature of religious associations and the independent spiritual jurisdiction of the church, but did not yet effect a complete separation of church and state. Complete separation of church and state was attained in 1875 with the introduction of the Voluntary Bill which stopped all payments to religious bodies. During the second half of the nineteenth century, the Constitutions of the Boer Republics once again reverted to the idea of a state church, but with the Union of South Africa in 1910 the last constitutional establishment of a state church disappeared.²³⁷ It could therefore be stated that, in so far as institutional separation of church

235 Norman *Christianity* 96.

236 Norman *Christianity* 100-101.

237 In *Aronson v Estate Hart* 1950 (1) SA 539 (A) 561 Van den Heever JA stated: "We have no established church which enjoys preferential treatment" and in *R v Webb* 1934 AD 493 at 496 Wessels (continued...)

and state is a requirement for the protection of religious rights, this requirement was met in South Africa after 1910.

4.2 Law and religion

After the concept of a state-church in South Africa had been abandoned Christianity as such was, to a certain extent, the religious basis for political society. Although a legally endorsed choice for Christianity was made in South Africa, a definite denominational choice was not made. Since the nineteenth century, cultural and ethnic conditions had established a pattern of Christian variation (or limited religious pluralism) which did not allow the acceptance of an agreed denominational basis for political society. English civil religion was rejected as a possible rational expression of religion by Afrikaner society, and the religion of the Afrikaner, though powerful, was never allowed to go so far as the establishment of a formal connection between church and state after the Union. This statement might be challenged in view of the "institutionalised" character of the NG Church during the second half of the twentieth century, but this was more a case of identification with national ideology on the part of the church than an establishment by law.

It was shown that a variety of statutory enactments protected particular tenets of Reformed Christianity.²³⁸ This was illustrated in different periods with reference to Sunday observance legislation, provisions of publication control and education policy. It is thus clear that there was not a separation of law and religion in pre-1994 South Africa. However, after 1910, the establishment of religion by law did not extend to denominational favouritism.

4.3 Religious pluralism

The French Huguenots who arrived at the Cape in 1688 and 1689 (approximately 24 percent

237 (...continued)
CJ stated that Christianity is not part of the law of this country "where we tolerate all religions". Also see *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 (1) SA 379 (C) 419.

238 For an overview of the laws and state action with "establishment implications" see Van der Vyver 2000 *Emory Int'l L Rev* 783-795.

of the European population by 1691) were allowed to have their own congregation, but had to conform to the language and worship of the Dutch Reformed Church. The German settlers, however (approximately 30 percent of the population), retained their Lutheran faith. The first sign of religious pluralism was evident in 1780, when the Lutherans were permitted to build their own church and appoint their own pastor. But, even under British occupation, attempts were made to enforce the unitary nature of religion by law by preventing churches other than the Dutch Reformed Church from establishing congregations. De Mist's Ordinance of 1804 with its official policy of toleration and the arrival of the 1820 British Settlers, themselves of mixed denominational allegiance, represent definite steps towards the recognition of a practical religious (Christian) pluralism.²³⁹ In addition, the Dutch Reformed Church split up into three different denominations. After these initial steps, South Africa experienced a prolific growth of denominationalism, and by the middle of the twentieth century there were about eighty recognised denominations and missionary societies in South Africa.

In the history of South Africa, people of the Christian faith have come to represent the majority of worshippers, not only among whites but also among blacks.²⁴⁰ With the arrival of Muslim slaves and indentured labourers from the Islamic parts of the East Indies and India from the middle of the seventeenth century, adherents to the Hindu religion from India in the second half of the nineteenth century, eastern and western European Jews who made their way to South Africa at the turn of the nineteenth century, and immigrants from China and elsewhere, religious pluralism²⁴¹ became more pronounced.²⁴² Prozesky²⁴³ states:

239 Lubbe *Religious Pluralism* 209 quotes Chidester (1987:10) pointing out: "The existence of multiple Christianities is certainly obvious in South Africa".

240 According to the 1980 census 77 percent of the population associates itself with Christianity.

241 In ch 2 it was demonstrated that, in terms of the reigning attitude of the Western (Roman Catholic) Church before the Enlightenment, "other" religions were regarded as enemies of Christ. After the Reformation, the idea of the one true faith to the exclusion of all others, remained, albeit in a different form. It is thus to be expected that the response of the Westerners on encountering the indigenous peoples on the shores of South Africa was to regard them as "pagan". In this respect, South African history followed the tradition of the West.

242 Lubbe *Religious Pluralism* 209.

243 Prozesky *Introduction* 3.

In fact the diversity is so great that of the so-called great world religions only Buddhism has not had a numerically significant and long-standing following in South Africa.

The *de facto* existence of religious pluralism was, however, not protected *de jure*.²⁴⁴ In South Africa, a rigid group differentiation, enforced by law, obscured the accommodation of pluralism and equal protection of the religious beliefs of all people.

4.4 Equality of religions before the law and nondiscrimination on the grounds of faith

We have seen the choice of Christianity by the legislature in this chapter. The Statutes of India (a law of the Netherlands) were in force at the Cape until De Mist's reforms in 1804. These statutes prohibited Muslims from propagating Islam or practising their religion in public on pain of punishment by death.

This reflected the definitive attitude of the state with regard to people of "other" religious traditions. And the views of the state corresponded with the prevailing attitude of the Reformed Church at the time. An added difficulty in the South African context was that political (racial) and religious discrimination overlapped to a great extent:²⁴⁵

The most unique aspect of religious pluralism in the South African context is that, with the exception of the relatively small number of Jews, white Muslims and white Buddhists, all the adherents of religions other than Christianity are black, that is, African, coloured or Indian.

In terms of the apartheid policy, people of "nonwhite" races were classified as such and excluded from certain political rights and privileges. And, as people from "other" religions were almost always "nonwhite", such groups were in effect politically and religiously shunned.

244 Whether or not religious pluralism was (or is) accepted by the dominant religious group is a different question, which will not be addressed here. See Van der Vyver 2000 *Emory Int'l L Rev* 795-812 in this regard.

245 Lubbe *Religious Pluralism* 211.

That political rather than religious considerations dominated in this respect is clear from the fact that the Jewish presence was tolerated within white political society; and that black Christians remained, on the basis of their colour. This led to the ironic situation where adherents of one religion discriminated against one another because "vertical divisions of confessional allegiance are intersected horizontally by the creation of separate churches for the different ethnic groups".²⁴⁶ Oosthuizen²⁴⁷ remarks:

In any multi-racial society potential conflict could become a disturbing issue; this applies also to a multi-religious situation. The difficulties in this connection are even more complex when racial groups adhering to the same religion discriminate against one another, as is the case in South Africa. Pseudo-theological arguments are utilised to rationalise segregated churches within the context of segregated political structures. White Christianity and racial prejudice have become practically synonymous in South Africa, especially in the South African brand of Calvinism.

The Group Areas Act and other apartheid measures had the effect of eliminating any real awareness of religious pluralism, and precluded equality of religions before the law and nondiscrimination on the basis of faith.

4.5 Freedom of conscience and free exercise of religion

Persecution based on faith is unknown to South Africa. It could thus be stated that freedom of conscience has always existed in this country.

The answer to the question of whether the right to exercise religious beliefs freely existed in South Africa before 1994 would, however, depend on the person who answered the question.²⁴⁸ On the one hand it could be said that no restrictions were placed on white religious groups as far as worship and practice of religion were concerned; they could erect buildings of worship; they were accorded the right to assemble for religious purposes; and there were no objections

246 Norman *Christianity* 98.

247 Oosthuizen *Christianity's Impact* 115.

248 See Lubbe *Religious Pluralism* 213.

to missionary or proselytising efforts of different religions. However, the position of "nonwhite" religious groups was different:

Most minority religions find themselves so closely linked to racial issues that virtually every experience of racial prejudice is also understood and interpreted as an experience of religious prejudice. The general feeling among adherents of these religions is that as long as they are not free racially and politically they are not free religiously.

It could therefore be stated that the racial nature of South African law before 1994 limited the right of "nonwhite" religious groups to exercise their religion freely: Muslims were denied the right to live according to the principles of their religious personal and family law and black religious groups were restricted in their free exercise rights by apartheid laws.

It is therefore concluded that the essential rights and freedoms of religion were not adequately protected in South Africa prior to 1994.

4.6 Threshold conditions for the emergence of religious freedom

Apart from the fact that the essential rights and freedoms of religion were not adequately protected in South Africa prior to 1994, this chapter also showed that, although no aggressive religious persecution or extreme religious intolerance occurred in South Africa during that time, the essential threshold conditions for the emergence of true religious liberty, as set out by Durham, were not adequately represented. Although *de facto* religious pluralism existed, it was not legally protected.²⁴⁹ In fact, there were several legislative enactments intended to protect the tenets of Reformed Christianity. There was not sufficient economic stability in all spheres of society so that it could not be said that this condition was fully complied with. The likelihood of achieving religious liberty was furthermore reduced to the extent that the

249 Du Plessis 2001 *BYU-LR* 102 states: "Religious pluralism, in and of itself, has never been a major source of inter-individual and inter-group intolerance in South Africa. However, racial and ethnic conflict (including tensions between modernism and traditionalism), class tension, and political strife have found expression in the religious life of a nation where the vast majority profess some kind of religious affiliation."

apartheid government lacked political legitimacy. In the last instance, it was shown that the apartheid laws obscured a real awareness of religious pluralism and the need for religious tolerance. It is therefore clear that the necessary conditions for the emergence of true religious freedom did not exist in South Africa prior to 1994.

4.7 Evaluation of religious freedom in pre-1994 South Africa

This chapter showed that, despite the existence of freedom of conscience, the institutional separation of church and state and some degree of separation of law and religion, it cannot be said that adequate protection of religious freedom existed in South Africa prior to 1994. The principles of pluralism, equality and nondiscrimination were in fact seriously compromised by existing laws and policies. It is therefore clear that various factors in South Africa's history necessitated the constitutional entrenchment of fundamental human rights which would *inter alia* promote the fulfilment of the threshold conditions for the emergence of religious liberty and afford protection of the essential rights and freedoms of religion.

CHAPTER 4

THE EMERGENCE OF CONSTITUTIONAL PROTECTION OF RELIGIOUS RIGHTS AND FREEDOMS IN SOUTH AFRICA

1. Introduction

In the previous chapter the history of discrimination and repression in South African and the impact on the relationship between church and state and law and religion were analysed. Van der Vyver¹ points out that this history "serve[s] as a telling example of the consequences that might emerge in a society where the government *qua* repository of *political* power proclaims a mission to preserve the national, ethnic, cultural, or religious identity of the peoples under its political control." The new constitutional dispensation² which took effect on 27 April 1994 was designed in reaction to that history with the specific object of implementing social, political and legal structures to address the "evils" of the preceding era.³

This chapter deals briefly with the emergence of the new constitutional era and the constitutional guarantees of religious rights. A few preliminary observations will be made about the fulfilment of the threshold conditions of religious freedom in this new constitutional dispensation. The interpretation of a constitutional text will furthermore be discussed broadly by way of an introduction to the discussion of the constitutional guarantees of religious rights in chapters 5 and 6.

1 See Van der Vyver 1999 *BYU LR* 643.

2 The new South Africa is depicted in the 1996 Constitution as "an open and democratic society based on human dignity, equality and freedom". See s 7(1), 36(1) and 39(1).

3 This is supported by several judgments of the Constitutional Court. See, for example, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) par 822-828. See also *Ferreira v Levin* 1996 (1) BCLR 1 (CC) par 51.

2. The emergence of constitutionalism and the constitutional protection of religious rights and freedoms in South Africa

2.1 The interim Constitution

South Africa's first justiciable Constitution with an entrenched bill of rights⁴ came into force on 27 April 1994⁵ - the product of a long and intense process of negotiation.⁶ It was clear from the outset that the protection of fundamental human rights would be an integral part of any new peaceful dispensation in South Africa. When the Congress for a Democratic South Africa (CODESA I) was convened for the first time on 20 December 1991, the majority of political parties and major role players signed a declaration of intent to draw up a democratic constitution which *inter alia* ensured:

that all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.

After the failure of Codesa,⁷ the multiparty negotiation process (MPNP) began at Kemptonpark in March 1993. Seven technical committees, including a constitutional committee and a fundamental rights committee, were appointed to assist the Negotiating Council during the

4 The Constitution of the Republic of South Africa 200 of 1993, which is referred to as the "interim Constitution" or "1993 Constitution".

5 On the same date the country's first fully democratic elections were held.

6 See De Klerk *The process of political negotiation* 1-11 who identifies the following main events in the official process of negotiation: The speech made by President FW de Klerk on 2 February 1990; the Groote Schuur Summit between the government and the ANC in May 1990; the National Peace Accord of 14 September 1991, CODESA I (20 and 21 December 1991), CODESA II (16-17 May 1992); the Minute of Understanding of 26 September 1992; and the Multi-Party Negotiating Process (MPNP) which, on 28 November 1993, accepted the interim Constitution. See also Eloff *The Process of Giving Birth* 12-19; Du Plessis 1994 *SAPL* 1-21; Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 1-59; Van Wyk 1994 *THRHR* 361-366.

7 See Eloff *The Process of Giving Birth* 12-13 for possible reasons for the failure of Codesa.

transition.⁸

The primary responsibility of the Technical Committee on Fundamental Rights was to compile a list of rights which were to be included in the interim Constitution.⁹ It is noteworthy that, from the outset, and despite deep-seated ideological tensions, there was a marked degree of agreement on the inclusion of religious rights in a bill of fundamental rights. This is illustrated by the clauses which were proposed and submitted to the Technical Committee by various political and religious groups for inclusion in the bill of rights:¹⁰

- (i) The Freedom Charter (adopted in 1955) referred to religious freedom in two clauses which provided that "All laws which discriminate on the grounds of race, colour or belief shall be repealed" and that "The Law shall guarantee to all their right to speak, to organise, to meet together, to publish, to preach, to worship and to educate their children."
- (ii) The African National Congress's 1988 Constitutional Guidelines for a Democratic South Africa called for a bill of rights which would guarantee fundamental rights, irrespective of, *inter alia*, creed and worship, and which guarantee would only be qualified by a prohibition of activities which, although ostensibly religious, would in practice advocate or promote racism, Naziism, fascism, or incitement of hatred or ethnic or regional exclusiveness. This qualification was later omitted from the 1993 draft Bill of Rights of the ANC.
- (iii) The Bill of Rights drawn up by the South African Law Commission in 1989 stated in article 2 that "there shall be no discrimination on the grounds of religion". Article 21 lay down the right of every person, individually or with others, to practise their culture

8 See Rautenbach *General Provisions 2*; see also Eloff *The Process of Giving Birth* 14-19.

9 See Du Plessis *A Background to drafting the Chapter on Fundamental Rights* 89-91; Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 39-46.

10 See Abraham 1994 *SALJ* 345.

and religion freely and to use their language.¹¹

- (iv) The National Party Government's proposals of 2 February 1993 regarding a Charter of Fundamental Rights likewise included the general protection of religious rights. The proposals made express provision for the rendering of, for example, chaplaincy services to persons in the service or care of the state and for religious broadcasts by a body instituted by law, such as the South African Broadcasting Corporation. Provision was also made for the protection of religious instruction in schools where this was so desired.
- (v) The Democratic Party's draft Bill of Rights of May 1993 prohibited discrimination on the grounds of "religion, creed or conscience", and it guaranteed the right of "freedom of conscience and religion" to everyone and prohibited the State from "favour[ing] one religion over another".
- (vi) As far as submissions from religious groups were concerned, the Technical Committee was assisted in its task of drafting a clause by a submission from the South African Chapter of the World Conference on Religion and Peace (WCRP-SA) under whose auspices a diversity of organised religious communities in South Africa held a National Inter-Faith Conference in Pretoria from 22 to 24 November 1992. This conference agreed on a "Declaration on Religious Rights and Responsibilities" and submitted it to the Technical Committee; the following clause was proposed for inclusion in a South African bill of rights:¹²

1 All persons are entitled:

- 1.1 to freedom of conscience,
- 1.2 to profess, practise, and propagate any religion or no religion,
- 1.3 to change their religious allegiance;

11 Also see articles 17 and 22.

12 See Abrahams 1994 *SALJ* 344-359 for a critical evaluation of the draft declaration of June 1992 and the declaration of November 1992.

- 2 Every religious community and/or member thereof shall enjoy the right:
 - 2.1 to establish, maintain and manage religious institutions;
 - 2.2 to have their particular system of family law recognised by the state;
 - 2.3 to criticise and challenge all social and political structures and policies in terms of the teachings of their religion.

The Technical Committee therefore included religious freedom in all three of its progress reports.¹³ In the first report it was included under "minimal or essential rights which...had to be accommodated", in the second report under "basic rights necessary to ensure democracy during the transition" and in the third report under "rights (which) would of necessity, qualify for entrenchment".¹⁴ It is clear that, in principle, there was no doubt at any stage about the inclusion of religious rights and freedoms in South Africa's bill of rights.

After the Negotiating Council had reached agreement on a new constitutional text, Parliament adopted the Constitution of the Republic of South Africa 200 of 1994 in December 1993 which came into force on 24 April 1994. This Constitution was an interim or transitional one, but marked the beginning of an area of constitutionalism in South Africa.¹⁵ It "provid[ed] a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".¹⁶

13 The Technical Committee, in its First Progress Report, listed the rights which it regarded as basic to the functioning of a democratic system of government. In its Second and Third Progress Reports it formulated criteria for the inclusion of rights in the transitional Constitution. The Negotiating Council at no stage really approved of these criteria, but agreed to the inclusion of the list of rights recommended for inclusion in the Technical Committee's Third Progress Report.

14 See Du Plessis 1994 *SAPL* 8-11.

15 See Olivier *Constitutionalism and the new South African Constitution* 50-74.

16 S 251 of the interim Constitution. These words occurred in the Postscript or Postamble to the 1993 Constitution.

The interim Constitution contained an explicit guarantee of religious rights¹⁷ in section 14:

- (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognising -
 - (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

This Constitution also made provision for the protection of other fundamental freedoms conducive to the realisation of religious rights, such as the right to equality,¹⁸ freedom of expression,¹⁹ freedom of association,²⁰ the right of every person to use the language and to participate in the cultural life of his or her choice,²¹ and the right to establish, where practicable, educational institutions based on a common culture, language or religion.²²

17 For an overview of the protection of religious rights under South Africa's 1993 Constitution, see Du Plessis *Religious Rights* 441; See also Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 155-158.

18 S 8.

19 S 15.

20 S 17.

21 S 31.

22 S 32(c). This right was qualified by the phrase "provided that there shall be no discrimination on the ground of race or colour."

Religious rights were immune from suspension during a state of emergency²³ and the limitation of these rights was subject to a stricter form of scrutiny than the limitation of most other rights.²⁴

2.2 The final Constitution

The final Constitution was agreed on by the Constitutional Assembly and adopted by Parliament after which, as prescribed by the interim Constitution, it had to be certified by the Constitutional Court in accordance with the XXVI Constitutional Principles contained in Schedule 4 of the interim Constitution.²⁵ The Constitutional court referred the text back to the Assembly because it was of the opinion that the text did not fully comply with the Constitutional Principles.²⁶ An amended text was submitted to the Constitutional Court and was accepted.²⁷ The final Constitution²⁸ came into force on 4 February 1997.

Religious rights are explicitly protected in section 15 of the final Constitution, under the heading "Freedom of religion, belief and opinion", which provides:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
 - (a) those observances follow rules made by the appropriate public authorities;

23 S 34(5).

24 S 33(1)(b)(aa).

25 S 71(2). See De Villiers *The Constitutional Principles: Content and Significance* 37-49.

26 See the judgment of the Constitutional Court: *In re Certification of the Constitution of the Republic of South Africa* 1996, 1996 (10) BCLR 1253 (CC).

27 *In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996, 1997 (1) BCLR 1 (CC).

28 The Constitution of the Republic of South Africa 108 of 1996.

- (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Other sections of the final Constitution also contain guarantees of religious rights²⁹ as well as guarantees of rights which are conducive to the realisation of religious rights, such as the right to equality,³⁰ freedom of expression,³¹ freedom of assembly³² and association,³³ and the right to establish independent educational institutions.³⁴ Religious rights are, however, no longer regarded as nonderogable rights in times of emergencies.³⁵

Despite its transitional nature, the interim Constitution effectively protected a considerable range of rights and thus laid the foundation for the eventual protection of rights, including religious rights, in the final Constitution. Since the interim Constitution has been replaced by the final Constitution, the further discussion in this chapter will be limited to the provisions

29 See s 9(3) which provides for nondiscrimination on grounds of religion, conscience, and belief and s 31 which provides for rights of religious communities to practise their religion and to form religious associations. See also s 6(5) which provides that a Pan South African Language Board must promote respect for languages used for religious purposes and s 35(2) which provides that every sentenced prisoner has the right to communicate with his or her chosen religious counsellor.

30 S 9.

31 S 16.

32 S 17.

33 S 18.

34 S 29(3) and (4).

35 S 37.

contained in the final Constitution.

3. Preliminary observations on the fulfilment of the threshold conditions of religious freedom in the new South African constitutional context

3.1 Introduction

Durham's threshold conditions which have to exist before religious freedom can truly emerge in a society, were mentioned in chapter 1. He maintains that there have to be "some measure of (1) pluralism, (2) economic stability, and (3) political legitimacy within the society in question ...[and] some willingness on the part of differing religious groups and their adherents to live with each other"³⁶ before religious freedom can emerge.

With reference to the first condition, Durham states that "until some measure of divergence in fundamental belief systems emerged in a society, the question of religious liberty does not even arise". He shows, on the one hand, that "group differentiation" may obscure the emergence of incipient pluralism. This is possible in a society which maintains its sense of homogeneity by perceiving dissenters to be strangers or foreigners. On the other hand, however, he shows that "cultural blindness" can play an analogous role in obscuring the need for the protection of religious freedom. In the latter case he cites the example of colonial European groups that often failed to show adequate respect for the belief systems of indigenous groups.

With reference to the second condition, Durham shows that under difficult circumstances, religious freedom concerns seem to have lower priority than basic economic needs. He explains that the likelihood of achieving religious freedom becomes smaller the weaker a regime's political legitimacy. An illegitimate regime is likely either to exploit the legitimising power of a dominant religion, or to view religion in general as a threat. In either case, complete religious freedom is out of the question. Durham maintains, finally, that religious freedom for all is only possible in a society in which religious groups tolerate the beliefs of other groups and are willing to live with one another. In other words, aspects of religious traditions

36 See Durham *Perspectives* 13.

themselves which call for toleration and respect for other people's divergent beliefs are of cardinal importance in guaranteeing religious freedom.

As explained in chapter 1, this thesis does not address the *de facto* presence of these social, political and economic conditions. However, it is submitted that the constitutional entrenchment and implementation of certain fundamental human rights can enhance the achievement or fulfilment of Durham's threshold conditions which are conducive to the ideal of religious freedom. Without drawing any final conclusions, this paragraph will deal briefly with the manner in which the current constitutional context facilitates the fulfilment of these threshold conditions for religious freedom. The constitutional and legal protection of the essential rights and freedoms of religion can in turn have a positive or negative impact on patterns of tolerance, economic stability and political legitimacy in a country.³⁷

It is also necessary to take note of the "threshold conditions" in so far as they reflect the South African reality in which religion and, therefore, religious rights are exercised. The state of the social, political and economic reality and patterns of religious intolerance should be used to give content to the essential religious rights and freedoms entrenched in the South African Constitution in a manner which is necessitated by and particularly suited to South African history and conditions.

3.2 Pluralism

The *de facto* pluralism, including religious pluralism, which has always existed in South Africa, is now protected *de jure* by the Constitution. The specific provisions for the particular concerns created by a diversity of religious individuals and communities are indicative of the Constitution's recognition of a religious plurality in South Africa. In section 6(5)(b)(ii) the Constitution provides that a Pan South African Language Board must promote and ensure respect for languages used for religious purposes in South Africa. Section 15(3) is a further example of an attempt to accommodate the plurality of religious beliefs and practices in the

37 See Du Plessis and Gouws 2000 *Emory Int'l L Rev* 657- who state: "In a constitutional state (*Rechtsstaat*), guarantees of religious rights and freedoms constitute the highest common 'peace keeping force' that conditions proselytization."

South African context. Sections 29(3), 29(4) and 31 also protect the rights of different religious groups to practise their religion and to form and maintain religious associations and independent educational institutions. Although pluralism is concerned with the protection of a number of "different" religions, it is to a certain extent also protected by the equality provisions in the Constitution which ensure religious rights to everyone and preclude unfair favouring of one religion by the state.

3.3 Political legitimacy

Political legitimacy within the South African society has been introduced by the constitutionally entrenched, democratic process representing all citizens of South Africa.³⁸ In addition, the promotion of constitutionalism and democratic values by the Constitution aims to enhance political legitimacy and stability.³⁹

3.4 Economic stability

The constitutional entrenchment of socioeconomic rights⁴⁰ and the statutory reform measures which have been implemented since the promulgation of the Constitution have raised awareness of the plight of the poor in South Africa and could be instrumental in promoting economic stability so as to meet the (low⁴¹) threshold of this condition.

3.5 Tolerance

The fourth condition set by Durham is that there must be some willingness on the part of the various religious groups and their adherents to live with each other. As shown in chapter 3,

38 See s 1(d) of the Constitution which provides for "universal suffrage, a national common voters roll, regular elections and a multi-party system of democratic government ... ". See also s 19 which guarantees political rights for all citizens.

39 See for example ss 1, 2, 7, 36 and 39.

40 See for example ss 22, 23, 26, 27 and 29.

41 Durham *Perspectives* 14 has pointed out that the threshold of this condition is not very high.

South Africa has never been subjected to the kind of religious oppression and strife found in certain contemporary or past fundamentalist societies. However, the political climate of apartheid fostered an unwillingness on the part of religious groups to live with one another. That system has been abolished, and although a legal system of equality cannot per se change attitudes of intolerance, it could definitely contribute to a culture of respect for and tolerance of differences.⁴² The final Constitution has, in many respects, been designed to inculcate tolerance among South Africans. Some of the general value statements make it clear that reconciliation of individuals, groups and communities with potentially conflicting interests is one of the Constitution's priorities. The preamble,⁴³ for example, recognises the injustices of the past and states that the Constitution is adopted *inter alia* to "heal the divisions of the past", thereby recognising the political necessity of tolerance. The constitutional protection of rights is furthermore premised on "human dignity, equality and freedom", which foundational values are mentioned in section 1 and 7 of the Constitution as well as in the general interpretation⁴⁴ and limitation⁴⁵ clauses. The central place accorded to human dignity emphasises the importance of promoting respect and tolerance between different peoples. This is also borne out by some of the substantive rights provisions in the Constitution. For instance, section 16, which guarantees the right to freedom of expression, is expressly limited by section 16(2) which provides that this right does not extend to "propaganda for war", "incitement of imminent violence" or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". These limitations are, arguably, aimed at promoting tolerance.

It therefore appears that, as far as the threshold conditions for religious freedom are concerned, the new South African Constitution has paved the way for achieving the ideal of religious freedom.

42 See Du Plessis and Gouws 2000 *Emory Int'l L Rev* 657-698.

43 The reference to "God" in the preamble will be dealt with in ch 5.

44 S 39(1)(a). See the discussion below in this chapter.

45 S 36(1). See the discussion in ch 6.

4. Interpretation of the constitutional text

4.1 Introduction

Before interpreting the religious rights provisions in the South African Constitution,⁴⁶ a few introductory remarks on the subject of constitutional interpretation are necessary. This subject is, however, one of vast proportions and no attempt will be made to discuss it exhaustively within the confines of this thesis. The aim here is to highlight the most important indications of how the Constitution should be interpreted before proceeding to interpreting the religious rights provisions in the South African Constitution.

4.2 General remarks on the interpretation of the Constitution

4.2.1 The uniqueness of the constitutional text

It is clear that the interpretation of a constitutional text differs from the interpretation of legislation drafted in the common law tradition.⁴⁷ This has much to do with the uniqueness of the constitutional text:⁴⁸ the Constitution is the supreme law of the Republic,⁴⁹ it is the standard for the assessment of the validity of law and conduct⁵⁰ and it is drafted in language which is

46 See the discussion below in ch 5 and 6.

47 See the informative discussion of Du Plessis *Lawsa* par 281.

48 See in this regard the *dictum* in the Canadian case of *Hunter v Southam* (1985) 11 DLR (4th) 641 (SCC) 649 which has been approved in *S v Mhlungu* 1995 (7) BCLR 793 (CC) par 84; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 208G-H; *De Klerk v Du Plessis* 1994 (6) BCLR 124 (T) 128A-C.

49 See s 2 of the Constitution 108 of 1996 which provides that "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." S 4(1) of the interim Constitution provided that "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of its inconsistency."

50 See, in addition to s 2, ch 8 of the Constitution which contains provisions which are indicative of the justiciability of the Constitution.

characteristically broad, inclusive and open-ended.⁵¹ These features of the Constitution are indeed unique in view of the legal system premised on parliamentary sovereignty which existed in South Africa prior to the commencement of the interim Constitution.

As will be shown below, these characteristics of constitutions and bills of rights could cause serious interpretative problems if the conventional approach to the interpretation of "ordinary" statutory interpretation is followed.⁵² A few observations will be made below on possible approaches to or methods of constitutional interpretation which could assist the reader of the constitutional text.

4.2.2 The constitution as a text

One should not be blinded by the unique nature of the Constitution in the interpretive process.⁵³ Although different views have been and shall be expressed on how creative the courts⁵⁴ may be in interpreting the Constitution, and exactly how a bill of rights should be read, given effect to or "concretised", the fact remains that the process of interpreting and applying

51 Stern, as quoted by Rautenbach *General Provisions* 22, identifies five special characteristics of constitutions, which could be summarised as follows: (a) legal rules in a constitution embody the foundations of the state and the community and therefore the text has higher legitimacy than other legal rules; (b) the legal rules in a constitution regulate political action and political decisions and function within political reality; (c) the interpretation and application of a bill of rights can influence all aspects of a legal system; (d) the interpretation and application of these texts by the courts are of conclusive importance; and (e) bills of rights contain many general and undefined words and phrases.

52 For a critical assessment of the Appellate Division's interpretation of constitutional provisions before April 1994, see Du Plessis *The Interpretation of Bills of Rights in South Africa: Taking Stock* 1; Du Plessis and De Ville 1993 *Stellenbosch Law Review* 63; Forsyth 1991 *SAJHR* 1; Kruger *Towards a new Interpretive Theory* 103.

53 See Rautenbach *General Provisions* 30-34 who points out that "general concepts in a bill of rights are binding and enforceable like any other provision of an entrenched and justiciable constitution ... the norms contained in the general concepts of a bill of rights have to be refined and developed by the courts. This amounts to creating legal rules."

54 It is obviously not only the courts which interpret the constitution; all state organs and all concerned individuals are occupied with this.

a constitution proceeds from the constitution as an authoritative text.⁵⁵ As Du Plessis⁵⁶ puts it, "the Constitution as text is a linguistic creation ... a law text, that provides data pertaining to facets of the law and rendering the law intelligible and thus interpretable." This view⁵⁷ has been endorsed by the Constitutional Court in *S v Zuma*⁵⁸ where Kentridge J⁵⁹ stated:

The Constitution does not mean whatever we might wish it to mean. Even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination ... I would say that a constitution embodying fundamental principles should as far *as its language permits* be given a broad construction.⁶⁰

4.2.3 Intention of the legislature and clear language

This view should not be confused with the conventional "intention of the legislature" and

55 This is also the case "...in American political-legal culture [where] it is axiomatic that the constitutional text is authoritative - indeed, supremely authoritative in constitutional adjudication. That is, it is axiomatic that constitutional cases should be decided on the basis of, according to, the Constitution." See Perry, as quoted by Rautenbach *General Provisions* 17 note 6.

56 See Du Plessis *Lawsa* par 260.

57 See also Du Plessis 2000 *Stell LR* 201; Müller 1999 *Stell LR* 269.

58 *S v Zuma and others* 1995 (2) SA 642 (CC) at 650H-651I.

59 In this regard and with reference to these "values" enshrined in the text of the Constitution, it should be pointed out that, although one could agree with the remark of Kentridge J that the language of the Constitution has to be respected, the same is not to be said of his remark that if the language used is ignored in favour of a general resort to "values" the result is not interpretation but divination. It is, of course, clear that the language of the Constitution not only writes moral principles into the law, but also refers explicitly and repeatedly to the need to make value judgments in identifying the law.

60 With regard to the "broad construction", it has been held in several cases that the Bill of Rights, formulated as it is in expansive terms, has to be interpreted purposively which, although not synonymous with the most generous meaning, often calls for a generous interpretation. See for example *S v Makwanyane and another* 1995 (3) SA 391 (CC) par 9, 325; *S v Williams* 1995 (3) SA 632 (CC) par 51-54; *Ferreira v Levin NO and others v Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC) par 171, 180, 182, 250, 252 and 257; *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 356-360; *Reitser Pharmaceuticals (Pty) Ltd v Registrar of Medicines and Another* 1989 (9) BCLR 1113 (T) 1124I-1126E.

"clear language" point of departure in statutory interpretation.⁶¹ The conventional approach is based on the assumption that the intention of the legislature is to be found in the words or language used in the particular statute. If the language is clear and unambiguous, there can be no doubt about what the legislature intended, but if the meaning is not apparent from the language because it is vague and ambiguous, the common law rules and presumptions of statutory interpretation should be resorted to.

In the constitutional context, an approach of attempting to discover the original intent of the framers of the Constitution cannot do justice to the constitutional text, "for the simple reason that the Constitution is sovereign and not the legislature".⁶² Moreover, crucial provisions⁶³ in the South African Constitution are couched in all but clear and unambiguous language. Du Plessis points out that the Constitution is a value-laden text and that values can hardly be expressed in clear and unambiguous language. It is moreover a text which is meant to cater for a host of possibilities over an extended period of time.

In addition to being unsuitable in the constitutional context, the traditional approach would, in view of the new constitutional dispensation, no longer be adequate for purposes of statutory interpretation.⁶⁴ Such an approach would be incompatible with the supremacy of the Constitution and the constitutional imperative that all law inconsistent with the Constitution

61 For a general discussion on and an analysis of the decisions of the Constitutional Court in this regard, see Du Plessis *Lawsa* par 285.

62 See Froneman J in *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 (3) BCLR 80 (SE) 87E-G.

63 For example, the foundational values of the Constitution are reflected in section 1 in vague and undefined terms and the central position of the Bill of Rights and its foundational values are likewise expressed in vague and undefined terms in section 7(1). Section 39(1) provides that "When interpreting a Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and section 39(2) refers to the "interests of justice".

64 See Du Plessis *Lawsa* par 281 for a discussion of the impact of constitutional interpretation on statutory interpretation. This subject does not, however, fall within the scope of this thesis.

should be declared invalid.⁶⁵ The core question in interpreting a statute would now be: Which of the possible meanings of the statutory provision conforms with the Constitution?

4.3 Interpreting the South African Constitution

4.3.1 Stages of interpretation

Du Plessis⁶⁶ points out that, owing to its peculiar structure and the presence of a general provision for the limitation⁶⁷ of fundamental rights, the interpretation of the Bill of Rights proceeds through a number of stages. He believes that these stages need not follow neatly and rigidly but are actually elements rather than stages of interpretation, which he recounts as follows:

- (i) Definition of the rights or entitlements entrenched in the Bill of Rights and determination of their scope.
- (ii) Understanding the (statute, common or customary) law or conduct (administrative action) subordinate to the Constitution. This includes:
 - (a) construing "ordinary" legislation and applicable common and customary law to determine their scope, and
 - (b) comprehending the effects of administrative action.
- (iii) Determining whether the said law or conduct *prima facie* limits rights or entitlements entrenched in the Bill of Rights.
- (iv) Adjudicating the constitutional tenability or justifiability of the limitation with reference to, amongst others, the general limitation clause as well as other relevant provisions of the Constitution. The general limitation clause

65 In s 2 of the 1996 Constitution. In cases where the constitutionality of a provision is not challenged, the Constitution remains relevant on account of s 39(2) which provides that statute law must be given effect to in a manner promoting the spirit, purport and objects of the Bill of Rights.

66 *Interpretation of the Constitution* par 5.

67 The limitation clause will be dealt with in detail in ch 6.

contains significant normative formulae for constitutional interpretation and, in particular, for construing rights guaranteed in the Bill of Rights, and is therefore a significant factor in constitutional interpretation.

In the first phase of defining the entrenched right referred to by Du Plessis, the methods of interpretation described below could be helpful. These methods of interpretation, first described by Von Savigny, are accepted techniques for constitutional interpretation in many European jurisdictions. They have been summarised by Rautenbach⁶⁸ as follows:

- the *grammatical and logical* approaches, whereby the linguistic meaning of words and concepts is determined;
- the *systematic* approach, whereby a provision is interpreted with reference to all the provisions of the statute and the existing legal order;
- the *historic and genetic* approach, whereby the circumstances in which the provision was adopted, and the meaning which its creators intended, are determined;
- the *teleological* approach, whereby the underlying purpose and objectives of the provisions are taken into account; and
- the *comparative* approach, which applies provisions and case law from other systems.

These methods will be used in this thesis to define the meaning of the constitutional clauses which protect religious rights in the South African Constitution.

4.3.2 Interpretive indications in the Constitutional text

The Constitution itself contains significant indications as to how it should be construed. Explicit indications occur in sections 239 and 39 of the Constitution. Section 239, the definitions clause, contains certain definitions which, in the absence of contextual indications

68 A modern and extended version of Von Savigny's rules of interpretation of the first part of the nineteenth century, as summarised by Rautenbach *General Provisions* p 20. Also see Du Plessis *Constitutional Interpretation* par 8.3.

to the contrary, would apply. Section 39, the interpretation clause, contains open-ended guidelines in the interpretive process. It provides:

- (1) When interpreting a Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law;
 - (c) may consider foreign law.

- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote⁶⁹ the spirit, purport and objects of the Bill of Rights.

- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill.

Du Plessis⁷⁰ points out that the Constitution also contains indirect and implicit indicia with regard to its construction. In the category of indirect indicia, he includes the preamble and sections 1 and 7 which contain various value statements, as well as the principles of cooperative government and the basic values and principles governing public administration. In the second category of implicit indicia, he includes the application clause and the implicit principles relating to the vertical and horizontal division of powers in the state.⁷¹

Du Plessis also refers to the indications for interpretation to be found in sources other than the Constitution, such as precedent and statutes which have been designed to give effect to certain constitutional provisions. The conventional rules and presumptions of statutory interpretation

69 It has been held that "promote" in this context means to further or to advance. See *S v Letoana* 1997 (11) BCLR 1581 (W) 1591B-D.

70 Du Plessis *Interpretation of the Constitution* par 6.2 and 6.3.

71 To illustrate this statement, the author refers to the fact that nowhere in the Constitution is *trias politica* explicitly mentioned as a constitutional value, but that it is clear from the scheme of the Constitution that legislative, executive and judicial powers are defined and treated separately in separate chapters.

could obviously be invoked as well.

4.3.3 Judicial restraint

Reference should briefly be made to two important principles associated with constitutional interpretation which have been endorsed in various decisions of the Constitutional Court. Although both of them are actually concerned with the interpretation of impugned statutory provisions and not with the interpretation of the Constitution as such, they are nevertheless consequences of the justiciability of the Constitution.

The first principle is that constitutional review is to be exercised with restraint.⁷² This principle has been confirmed by the Constitutional Court in several decisions.⁷³ The main reason for judicial restraint is the importance of maintaining a balance between the respective spheres of authority of the legislature, executive and the judiciary (*trias politica*). There would be an imbalance if an unelected judge could assess and strike down a law adopted by a democratically elected legislature without the necessary self-restraint. In *S v Lawrence*⁷⁴ the Constitutional Court stated:

A Court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overbroad. It may have to fashion orders to give effect to the rights protected by the Constitution, but what it cannot do is legislate.

72 See the discussion of Du Plessis *Lawsa* par 260; Davis, Chaskalson and De Waal *Democracy and Constitutionalism* 6-19.

73 It was held in *S v Mhlungu and Others* 1995 (3) SA 867 (CC) par 59 *per* Kentridge AJ (in a minority judgment) that "I would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed". Also see *Zantsi v the Council of State and Two Others* 1995 (10) BCLR 1424 (CC) 1429A-C; *S v Vermaas* 1995 (7) BCLR 851 (CC) 858F-H; *S v Bequint* 1997 (2) SA 887 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) par 21; *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) par 15. See also the discussion of Du Plessis *Lawsa* par 260 of the notion of subsidiarity and the distinction between jurisdictional and adjudicative subsidiarity.

74 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (2) SACR 540 par 80.

There must, however, be a balance between this principle and "the interests of justice". This was pointed out in the *Zantsi* case⁷⁵ by Chaskalson P who observed that the Constitutional Court would constitutionalise an issue whenever it was necessary to dispose of the matter on appeal and that that principle could not stand in the way of "the interests of justice".⁷⁶ Goldstone J in *Harksen v Lane NO*⁷⁷ stated that there was no "hard and fast rule to the effect that in no case should referrals be made to this Court where non-constitutional remedies have not been exhausted".⁷⁸

4.3.4 Reading in conformity with the Constitution

In the second instance, the principle of "Verfassungskonforme Auslegung", that is, the reading of a statute in conformity with the Constitution, is an accepted interpretative technique.⁷⁹ It is an instrument of judicial restraint which allows a Court to interpret a statute in such a way that it will avoid a breach of the Constitution.⁸⁰

75 *Zantsi v the Council of State and Two Others* 1995 (10) BCLR 1424 (CC) 1429A-C. See also *S v Manamela and Another* 1999 (9) BCLR 994 (W) 618B-E.

76 It is interesting to note that the interim Constitution (s 102(8)) gave the court the power to refer a matter to the Constitutional Court when the court "is of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon." This provision has, however, been deleted in the final Constitution.

77 1998 (1) SA 300 (CC) par 27.

78 Also see the judgment in *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) where Chaskalson P proclaimed the sovereignty of the Constitution where and whenever the exercise of any form of public power became susceptible to judicial assessment. It was held that issues directly or indirectly related to the exercise of such power were invariably constitutional issues.

79 See the general discussion in Du Plessis *Lawsa* par 284. Du Plessis states that this principle is related to the injunction in section 39(2) of the final Constitution that the spirit, purport and objects of the Bill of Rights must be promoted by the Courts as well as to the conventional presumption of statutory interpretation that the legislature is presumed not to enact invalid or purposeless provisions.

80 See, for instance, *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC) where the Constitutional Court "read down" the provisions of section 189(1) of the Criminal Procedure Act, 1977 and *Ynuico Ltd v Minister of Trade and Industry and Others* 1995 (11) BCLR 1535 (T) 1468 where Van Dijkhorst R preferred the term "constitutional pruning" to the "awkward foreign" term "reading down". Also see (continued...)

In *De Lange v Smuts NO and Others*,⁸¹ Ackermann J states that the principle of reading in conformity does -

No more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution.⁸²

In *The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others*⁸³ the Constitutional Court, however, referred to the limits of this principle:

Limits must, however, be placed on the application of this principle.⁸⁴ On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling

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- 80 (...continued)
Investigating Director: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2000 (10) BCLR 1079 (CC) par 24-26.
- 81 1998 (3) SA 785 (CC) par 85.
- 82 The interim Constitution explicitly authorised the reading down of statutes in s 35(2) which provided that "No law which limits any of the Rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation." The final Constitution does not contain a similar clause. It is, however, clear from this decision that the principle of reading in conformity with the Constitution has remained an accepted and valid interpretative technique.
- 83 2001 (1) SA 545 (CC).
- 84 See *S v Bhulwana*; *S v Gwadiso* 1995 (12) BCLR 1579 (CC) par 28; *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC) par 32; and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (10) BCLR 39 (CC) par 23-24.

citizens and officials to understand what is expected of them.⁸⁵ A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.

In *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*⁸⁶ the Constitutional Court extended the scope of this principle to a reading of words into statutory provisions so as to render them constitutional. Ackermann J held that there was no difference, in principle, between an actual or notional severance of words from an offending provision and reading words into the provision to the same end.⁸⁷

The problem with "reading in", as opposed to "reading down", is that by reading words into a statutory provision to render it constitutional, the court assumes a legislative role. Such an approach appears to be in conflict with the above-mentioned statement in the *Lawrence* matter and could blur the separation of legislative and judicial powers. The courts will, most probably, still lay down guidelines for the proper use of this interpretive strategy.

5. Conclusion

It was shown in this chapter that South Africa's interim Constitution with an entrenched bill of rights had not come into existence overnight but was preceded by a long process of negotiation. However, despite deep-seated ideological tensions in the negotiation and drafting

85 See *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) par 47-48.

86 2000 (1) BCLR 39 (CC) par 23-24.

87 This statement appears to have been accepted by the Constitutional Court in the *Hyundai* matter *supra* where it was stated that: "It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance." Also see the approach of the majority of the Constitutional Court in *S v Manamela and others* 2000 (5) BCLR 491 (CC) par 52-599.

processes, there had been a marked degree of agreement on the inclusion of religious rights. Religious rights were consequently entrenched in section 14 of the interim Constitution and, eventually, in section 15 of the final Constitution. Certain aspects of religious rights are also protected by other clauses in the Constitution.

The constitutional protection of religious rights is part of the broader new constitutional context introduced by the interim and final Constitutions. It was shown, at least provisionally, that the threshold conditions for the emergence of religious freedom are now formally complied with as a result of the entrenchment of a number of fundamental human rights in the Constitution.

In this new constitutional dispensation introduced by South Africa's interim and final Constitutions, the constitutional text constitutes the supreme law of South Africa and the standard for the assessment of the validity of all law and administrative conduct. It was shown that constitutional interpretation in this context is therefore fundamentally different from the traditional concept of statutory interpretation rooted in a system of parliamentary sovereignty and that it requires different theoretical points of departure and different methods. These fundamental differences and the interpretive indications in the Constitution form the framework within which the religious rights provisions in the South African Constitution will be interpreted and assessed in the next two chapters.

CHAPTER 5

ASSESSMENT OF THE FREEDOM DIMENSION OF RELIGIOUS RIGHTS IN THE SOUTH AFRICAN CONSTITUTION

1. Introduction

Chapters 5 and 6 will investigate whether the South African Constitution protects the essential rights and freedoms of religion which were identified in chapter 2¹ and how these rights, as standards, should be interpreted and implemented in the South African constitutional context to ensure adequate protection of religious rights and freedoms.

This chapter focuses on the specific (essential) rights to freedom of conscience, free exercise of religion and religious pluralism, and the next chapter deals with the separation of state (or law) and religion, equality of religion, and the institutional separation of church and state. This manner of organising the discussion of the essential rights and freedom could be seen as coinciding with the United States's approach of distinguishing between "free exercise" and "disestablishment" of religion, as a consequence of the wording its Constitution. The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof". "Free exercise" essentially entails the "right to be left alone" or the freedom to engage in religious conduct without hindrance and the issue in this context is whether government action is directly or indirectly impinging on freedom of religion. In the "establishment" cases the issue is whether a religion is being accorded preferential treatment by the state and, therefore, whether coercion or endorsement of a religion is present.

However, confining the discussion to "free exercise" and "establishment" of religion would

1 It was demonstrated in ch 2 that the development of religious rights in the West culminated in theories of religious rights which included concepts of freedom of conscience, free exercise of religion, religious pluralism, equality, institutional separation of church and state and some separation of state and religion, and it was argued that adequate constitutional protection of religious freedom includes these essential rights and freedoms of religion.

constitute too narrow an approach and would detract from the scope of religious rights protection. Therefore, all the essential rights and freedoms of religion are discussed in chapters 5 and 6. Although it could be stated in general that in the case of the rights which are discussed in chapter 5 the question is often to which extent the state is allowed to interfere with religious convictions and practices; and in the case of the rights discussed in chapter 6 to what extent the state is permitted to endorse or support religion, it should be kept in mind that many issues may involve both free exercise and establishment concerns or that, in specific cases, the state may be expected either to act or not to act.

The difficulty of categorising the essential rights and freedoms can be illustrated with reference to the similarly problematic classification of religious rights as a particular "generation" of human rights, which classification is based on the kind of role the state plays in respect of a particular right. Religious rights could hardly be classified under a particular category or generation of human rights. In so far as these rights are accommodated and vouched for politically and constitutionally, they are civil rights and could, from this perspective, be seen as first-generation rights. However, the exercise of religious rights in a way that will help alleviate the socioeconomic plight of the marginalised and oppressed could well be understood as supporting the realisation of second-generation rights. From yet another perspective, religious rights may be perceived as cultural rights and therefore qualify as second-generation rights. On the other hand, religious rights as group rights, especially as protected in section 31, could also be regarded as third-generation rights. However, certain types of religious rights could more aptly be enforced in a "negative" ("first-generation") fashion, prohibiting the state from interfering with these civil rights, whilst the realisation of other religious rights is achievable through their active promotion (in a "second-generation" fashion) by the state. Although these dimensions are complementary and often overlap, they do not always yield the same result.

In this chapter, the essential rights of freedom of conscience, free exercise of religion and religious pluralism will be discussed under the freedom dimension of religious rights since these rights are mostly formulated and protected in a "negative" or freedom-oriented manner. As stated above, the question in these cases is often the extent to which the state is allowed to interfere with religious matters since the state is expected to permit the holding of a plurality

of religious beliefs and practices and not forbid religious practices without justification.. It will be investigated whether the essential rights and freedoms are protected by the South African Constitution and how they should be interpreted in view of the particular history and circumstances of the country. The principles of separation of state and religion, equality and institutional separation of church and state will be discussed in the next chapter. As stated, in the case of these principles, the issue is often whether or not the state is expected to actively (positively) protect religious rights and, if it is permitted to protect religious rights, to what extent it is permitted to endorse or support religion or a particular religion. However, as already pointed out, this classification is broad and general. The point of departure of the thesis is that the principles discussed in these chapters are "mutually supportive and mutually subservient to the highest goal of guaranteeing 'the essential rights and liberties of religion' " and that, since "no single principle could by itself guarantee such religious liberty",² religious freedom in the South African constitutional context should be interpreted to incorporate these multiple principles.

2. Defining "religion" in the South African Constitutional context

As this thesis is concerned with the constitutional protection of the essential rights and freedoms of religion, the first question to be addressed is what meaning should be assigned to the word "religion"³ in the South African constitutional context. Underkuffler-Freund⁴ states:

This is the first, most difficult and (perhaps) most avoided question. It is first, because until we know what 'religion' (for constitutional purposes) is, any discussion of its protections or prohibitions is nonsensical. It is most difficult, because the formulation of a coherent, abstract definition of religion is very difficult. It is most avoided because the difficulty in defining religion is often a mirror of deep cultural, social, and political divisions within a society.

2 Witte and Green *American Constitutional Experiment* 530.

3 See Labuschagne 1997 *De Jure* 118-134 for a discussion of the development of the concept "religion".

4 1997 *SAPL* 45. See also Witte *Introduction* xxii-xxvii who illustrates the definitional problems with the phrase "religious human rights"; and Shelton and Kiss *A Draft Model Law on Freedom of Religion* 559-592.

Consideration of this question tends to illuminate dark corners that we would rather not consider - it forces acknowledgment of the breadth, power, and divisive potential of conflicting religious and cultural claims.

In a society where different religious identities are old, established, and well tolerated, the formulation of a definition of religion for constitutional purposes may not be that difficult. However, in today's heterogenous world such a society is increasingly unlikely to exist; and it seems equally unlikely that any universal definition can readily accommodate today's religious heterogeneity. As Choper⁵ remarks,

[t]he scope of religious pluralism ... alone has resulted in such a multiplicity and diversity of ideas about what is a "religion" or a "religious belief" that no simple formula seems able to accommodate them all.

The terms "religion" and "religious" must, however, be assigned some limiting and enforceable meaning to be useful in the constitutional context, otherwise it could be asked why religious rights are protected at all.⁶ Underkuffler-Freund⁷ points out that such rights cannot encompass - even as a *prima facie* matter - all claims by individuals to act autonomously; she maintains that there must be some exclusive, distinct meaning for "religious" rights. Witte⁸ states that:

If religion is to be assigned a special place in the human rights pantheon - if religion is in need of special protections and privileges not afforded other rights provisions - some means of distinguishing religious rights and claims from all others must be offered.

5 1982 *University of Illinois LR* 579 .

6 Before the promulgation of the interim Constitution, "religion" was defined very broadly by the Appeal Board of Publications as "... the relationship between an individual or group and a personal god or gods in the wide sense of the word, or a godly power or object of a material or spiritual nature, which has, according to the view of the adherents, supernatural powers." Also see *Hartman v Chairman, Board for Religious Objection* 1987 (1) SA 922 (O) 933-935 where the nontheistic Theravada Buddhism was acknowledged as a religion. As will be shown below, in view of the constitutional guarantees including of freedom of conscience, belief, opinion, such a broad definition of "religion", does not seem necessary any more.

7 1997 *SAPL* 46.

8 *Introduction* xxiii. Also see Smith *Religion* 19-1.

The question is how wide such a definition should be. On the one hand, it needs to be broad and inclusive enough so that no legitimate religious claim is excluded. On the other hand, it should not be so broad that every claim becomes a religious claim with the possible result that no claim deserves special religious rights protection.⁹ A traditional theistic definition might be sufficient for the protection of "traditional" religions but does not account for nontheistic religions as well. Yet to accommodate both as was attempted in the United States¹⁰ by defining religious belief as one that is "sincere and meaningful",¹¹ might result in such a broad definition that it would afford no protection at all to religious groups as it could include almost *any* belief. To complicate matters, "religion" is, by its very essence, a matter of personal determination.¹²

9 See Witte *Introduction* xxiii.

10 In the United States the Supreme Court has not been able to explain the meaning of this critical term conclusively and it persists to be a difficult area of controversy. Through the years the courts in the United States have accepted numerous definitions of "religion". See for example the cases referred to by Underkuffler-Freund 1997 *SAPL* 36-37 and her remarks on some of the definitions by the United States Supreme Court. Also see the cases referred to by Labuschagne 1997 *De Jure* 124-128. However, many of these definitions are a result of the particular formulation of the First Amendment of the United States Constitution and, apart from pointing out various definitional problems, would not necessarily contribute towards reaching a constitutional definition of religion in South Africa.

11 *United States v Seeger* 380 US 163 at 176 (1965). In addition to stating that religious beliefs are those that are "sincere and meaningful", the United States Supreme Court stated that they "occup[y] in the life of [their] possessor[s] a place parallel to that filled by...God." In *Wisconsin v Yoder* 406 US 205, 215-216 (1972) it has been held that "religious" beliefs must be distinguished from "philosophical" ones, with protection for the former but not the latter.

12 Compare in this regard, for example, the view of JN Pandey, in his work *Constitutional Law of India* who, in his commentary on art 25(1) of the Constitution of India which guarantees the freedom of conscience and religion, comments that: "Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in 'a system of beliefs or doctrines which are regarded by those who profess that religion as conclusive to their spiritual well being'; but it will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by
(continued...)

A number of authors have attempted to define "religion". Witte¹³ defines religion, in its widest sense, as follows:

[Religion] embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to what Rudolf Otto once called, the 'idea of the holy'. The Protestant theologian Paul Tillich in similar fashion defined religion as 'One's religion is what gives one's life ultimate meaning. The ultimate meaning may be different at different times for the same individual, but, at any given instant, one has, by definition, one and only one ultimate concern.'¹⁴

Swidler¹⁵ defines religion in a narrower institutional sense:¹⁶

At the heart of each culture is what is traditionally called a Religion, that is: An explanation of the ultimate meaning of life, and how to live accordingly. Normally all religions contain the four C's: Creed, Code, Cult, Community-structure, and are based on the notion of the Transcendent.¹⁷

He explains that "creed" refers to the cognitive aspect of religion whereby the ultimate meaning of life is explained. "Code" includes all the rules and traditions which flow from aspects of the "creed". "Cult" is the rituals or activities which bind the followers of a particular religion to their Supreme Being, for example prayer, worship or other formal acts of the clergy. "Community-structure" refers to the relations which exist between followers of a particular

12 (...continued)
such overt acts which are sanctioned by his religion."

13 *Introduction* xxv.

14 See also Abraham 1994 *SALJ* 346.

15 Swidler *Religious Liberty and Human Rights in Nations and Religions* 143, 153-165.

16 Witte *Introduction* xxv states that "the functional and institutional dimensions of religion deserve the strongest emphasis in defining the province of religious human rights" and is of the opinion that religious claims that meet the Swidler definition deserve the closest consideration.

17 See *Fellowship of Humanity v County of Alameda* 315 P 2d 394 406 (Cal Dist Ct App 1957) where a Californian Court required these four conditions for qualifying as a religion.

religion. The "Transcendent" to which Swidler refers can be any spirit, god, personal god, impersonal god or emptiness. Explanations of the ultimate meaning of life which do not rest upon the idea of a transcendent or supreme being are called "ideology" by Swidler, for example secular humanism and Marxism.

Underkuffler-Freund,¹⁸ on the other hand, supports a functional approach to defining religion. She states:

We should move beyond definitions which are based upon traditional notions of religious content, and toward an understanding which is based upon the *function* and *purpose* of religious freedom guarantees...

It is the protection of the exercise of individual conscience - the ability, and responsibility, of individuals to make personal, reasoned, moral inquiry - that is the core value of religious freedom guarantees. Accordingly, religious guarantees should focus less on the nature of the asserted belief as conventionally 'religious', 'philosophical', or what-have-you, and more on the *protection of acts of conscience*, generally defined, and on the *protection of the process of conscience formation*.

Such a functional definition of religious freedom guarantees, with its focus on the protection of conscience and on the purpose served by the freedom of conscience, might very well contribute more to understanding the scope of the constitutional rights and freedoms of religion and belief than the "traditional" definitions do. However, in the South African context, and in so far as the definition of the word "religion" as used in section 15(1) is concerned, the endorsement of such an approach would mean that the meanings of the words "religion" and "belief" coincide. This is unnecessary, since section 15(1) protects not only freedom of "religion", but also the freedoms of "conscience" and "belief". According to the presumption of statutory interpretation that different words have different meanings,¹⁹ it would not be a

18 1997 *SAPL* 46. Also see Underkuffler-Freund 1995 *William and Mary LR* 827 and Underkuffler 1992 *DePaul LR* 93.

19 See Du Plessis *Interpretation of Statutes* 128-129 who states that it is characteristic of statutory language that words and phrases are not employed unnecessarily. Each unit of meaning must therefore be afforded its own meaning and given effect to. He points out that this rule is related to the (continued...)

logical interpretation for all these words to have the same meaning.²⁰ Thus if the word "religion" is interpreted to include only traditional theistic religions, other nontraditional, nontheistic or atheistic beliefs could still qualify for protection under the freedoms of belief or conscience in certain circumstances.²¹ It therefore appears that the definition of "religion" in the South African constitutional context does not extend beyond the Swidler definition to "what-have-you" beliefs, since the right not to hold a religion or the right to hold other sincere beliefs would in any event be protected under freedom of belief, conscience or opinion.²² It is therefore submitted that, although the terms "conscience, religion, thought, belief and opinion"²³ in the South African Constitution overlap to some degree they are by no means

- 19 (...continued)
presumption that no enactment contains invalid or purposeless provisions.
- 20 In the current context this view is supported by the following statement in the Canadian case of *Morgentaler and Others v R* (1988) 31 CRR 1 at 91 per Wilson J: "It seems to me, therefore, that in a free and democratic society 'freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality. Indeed, as a matter of statutory interpretation, 'conscience' and 'religion' should not be treated as tautologous if capable of independent, although related, meaning."
- 21 It is interesting to note that section 4(1) of the German Constitution (*Grundgesetz*) provides that freedom of religion and conscience as well as the freedom of religious and philosophical ("weltanschauliche") beliefs are inviolable. By equating religious and philosophical beliefs, the section has such a wide scope that "religion" may be accorded the traditional theistic meaning without limiting the scope of the rights entrenched in section 4(1).
- 22 Such an approach would not be in conflict with international human rights law. The broad definition in art 18 of the ICCPR has left it largely to individual states and individual claimants to define the limits of religious rights. Van Boven *Economic and Social Council: Working paper prepared pursuant to Commission Resolution 1988/55 and Sub-Commission decision 1988/122* (11 July 1989) states in general that "... the expression 'religion or belief' is used as including theistic, non-theistic and atheistic beliefs". Also see October 1992 *Belief and State* (Published by project Tandem) "Reporting on issue relating to Article 18 of the United Declaration of Human Rights and to the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief." Initially the 1981 declaration only contained the word "religion" but after the socialist states raised the issue of atheism, the word "belief" was added. See in this regard Lerner *Group Rights and Discrimination in International Law* 80-81.
- 23 For protection of these rights in international human rights instruments, also see: Art III of the American Declaration of the Rights and Duties of Man (1948); Art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Art 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); Art 18(1) and (2) of
(continued...)

synonymous and that each of these terms should be accorded a separate meaning.

This approach is supported by the decision in *Wittmann v Deutscher Schulverein, Pretoria*²⁴ as evidenced by the following remarks of Van Dijkhorst J:

The concept 'religion' when used in s 14 of the interim Constitution and s 15 of the Constitution is not neutral. It is loaded with subjectivity. It is a particular system of faith and worship. It is the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship (The Concise Oxford Dictionary). It 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. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion. Remarks in United States constitutional case law which tend to describe atheism or agnosticism as religion are in our context inapplicable.

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 (Afrikaans: 'godsdiensbeoefening') 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 findings of the judge in the latter paragraph highlight an important consequence of accepting the Swidler definition of religion: if it is accepted that the word "religion" in section 15(1) is to be interpreted in terms of the Swidler definition, it would follow that the word

23 (...continued)
the International Covenant on Civil and Political Rights (1966); Art 12(1) and (2) of the American Convention on Human Rights (1969); Principle VII of the Final Act of the Conference on Security and Co-operation in Europe (1975); Art of the African Charter on Human and People's Rights (1981); Art 1, 6, 7, and 8 of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981); and Principle 11 and 16 of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989).

24 1998 (4) SSA 423 (T) 449.

"religious" as used in the phrase "religious observances" in section 15(2) of the Constitution, should be given a similar meaning.²⁵ On the other hand, if this definition of religion is not accepted and if all beliefs, thought and opinions were to qualify as "religions", it would be difficult to explain why different words were used to express the same idea.

The same issue arises in interpreting section 31 of the Constitution which refers to "persons belonging to a cultural, religious, or linguistic community" who have the right to "enjoy their culture, practise their *religion* and use their language". The right to "practise ... religion" as protected in section 31(1) appears to be closely tied to defined cultural or religious identities²⁶ and therefore reconcilable with a reading which restricts the meaning of "religion" to the Swidler definition or Van Dijkhorst's statements in the *Wittman* case. According to this construction, the holding of sincere beliefs (or nonbeliefs) which are not of a religious nature would be protected under freedom of belief, opinion or conscience, but manifestations thereof would not likewise be protected by sections 15(2) and 31. The manifestation or practising of beliefs which do not qualify as religious beliefs as explained above would probably still qualify for protection under freedom of expression which is entrenched in section 16 of the Constitution.

The functional approach described above could play a valuable role in so far as it provides some measure of limitation in order not to include all claims by individuals to act autonomously under the guise of freedom of religion or belief. It, however, only becomes relevant in determining the factual question in each case of whether a person in fact holds a particular religious or other belief.

In *In re Chikweche*,²⁷ a case decided under the Zimbabwean Constitution, the court adopted a functional approach by concentrating on the applicant's sincerity rather than on the content of the belief. The applicant (Chikweche) had applied for his registration as a legal practitioner

25 In accordance with the presumption that the same words in the same enactment bear the same meaning. See Du Plessis *Interpretation of Statutes* 127.

26 Underkuffler-Freund 1997 *SAPL* 46.

27 1995 (4) BCLR 533 (ZS); 1995 (4) SA 284 (ZS).

in terms of the Legal Practitioners Act 15 of 1981 (Z). It appeared that the applicant possessed all the necessary qualifications required by the appropriate regulations and that he had satisfied the additional requirements laid down in s 5(1) of the Act. When the applicant appeared in court on the day of the application, the presiding Judge considered him to be "unkempt" and not "properly dressed", as the applicant, a Rastafarian, habitually wore his hair in the style known as "dreadlocks". The presiding Judge accordingly declined to permit the applicant to take the oath of loyalty and office in terms of section 63 of the Act as a preliminary to registration. As a result of this refusal, the applicant's counsel successfully sought the referral of the matter to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe. In the proceedings before the Supreme Court the applicant deposed that the wearing of dreadlocks was a symbolic expression of his religious and philosophical world view which was inspired by Rastafarianism.²⁸

It was held²⁹ that the reference in section 19(1) of the Zimbabwean Constitution to freedom of conscience was intended to encompass and protect systems of belief which were not centred on a deity or were not religiously motivated, but founded on personal morality.³⁰ It was further held³¹ that the status of Rastafarianism as a "religion" in the wide and nontechnical sense had to be accepted and that the applicant's manifestation of his religion by the wearing of dreadlocks fell within the protection afforded by section 19(1) of the Constitution. The court, following a functional approach, pointed out that:³²

28 Gunnay CJ referred to a number of cases (at 288-290) as authority for the claim that the wearing of dreadlocks is a symbolic expression of the religious beliefs of the Rastafarians. In the leading US case, *Reed v Faulkner* 842 F 2d 960 (7th Cir 1988) the judge entertained no doubt that Rastafarianism is a form of religion. In *People v Lewis* 510 NYS 2d 73 (Court of Appeals of New York, 1986) it was held that a prison regulation which required male inmates to receive an initial haircut infringed on the beliefs of the Plaintiff, a Rastafarian. In Britain Rastafarians are respected as a religious sect and are permitted to keep their dreadlocks. Also see the English case where Rastafarianism was debated, *Crown Suppliers (Property Services Agency) v Dawkins* (1993) 1 CR 517 (CA).

29 290H-I.

30 See also Hogg *Constitutional Law of Canada* 947.

31 290G.

32 289.

This Court is not concerned with the validity or attraction of the Rastafarian faith or beliefs; only with their sincerity.

In this respect the court referred³³ to the words of Justice Douglas in *United States v Ballard*:³⁴

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law.³⁵

Although section 19(1) of the Zimbabwean Constitution only protects freedom of conscience, and the definition of "religion" was therefore not relevant, it is of interest for current purposes to note that McNally JA (one of the three judges who heard the case) expressed his reservations about the classification of Rastafarianism as a *religion*; however, he had no doubt that it was a genuine philosophical and cultural belief, and as such fell under the protection of s 19(1) of the Constitution. Such an approach would also be appropriate in the South African constitutional context, provided that the belief is sincerely held.³⁶

33 290.

34 322 US 78 (1944) 86-87.

35 In the same vein, the Smith *Religion* 19-2 also points out that the courts must not require religious beliefs to be reasonable or sophisticated in terms of an objective standard. In this respect he refers to Ludwig Wittgenstein and the fact that it may be futile to search for a common denominator in all religions. He states that it may be more useful to think of the word "religion" as denoting a *family resemblance* amongst different systems of religion, much as the word "game" does in respect of activities which constitute the referents of that word, although we cannot define any feature which is common to all games.

36 A similar matter came before the Cape High Court and later before the Supreme Court of Appeal and the Constitutional Court in South Africa. In *Prince v President of the Law Society* 1998 (8) BCLR 976 (C) the court held that the statutory prohibition on the use of dagga was meant to protect public safety, order, health and morals and that these considerations outweighed the right of Rastafarians to practice their religion though the use of dagga. The Appeal was dismissed in *Prince v President of the Law Society* 2000 (3) SA 845 (SCA). Judgment is still awaited in the Constitutional Court. In both the Cape High Court and the Supreme Court of Appeal the matter was decided on the basis of the limitation clause without giving much regard to what the free exercise rights of a Rastafarian by definition entailed. These matters will be discussed in more detail in ch 7 which deals with the limitation clause.

3. Freedom of conscience

Section 15(1) of the final Constitution protects "the right to freedom of conscience". It is therefore clear that the first essential right of religion, which lies at the heart of religious freedom protection,³⁷ is protected by the South African Constitution.

Smith³⁸ states that, in the South African context,

[t]he freedoms of thought, belief, opinion, and conscience were made largely redundant in light of the more general protection afforded by the freedoms of religions and expression.

It was shown in chapter 2 that freedom of conscience was the first religious right and the minimum form of religious toleration which had already been accorded to certain religious outsiders during the age of Constantine and was later used as the cardinal principle in the protection of religious liberty. It aptly appears first in the South African Constitution. In so far as freedom of conscience is concerned, one is therefore unable to agree with Smith's statement.³⁹

With regard to the modern-day meaning of freedom of conscience, reference could be made

37 Heyns and Brand 2000 *Emory Int'l L Rev* 700 summarises the importance of the concept of "conscience" in Western political thinking by stating that: "The 'Stoic-Christian' understanding of the demands of political obedience dominated political thinking for many centuries, up to the start of the modern period. The essence of this approach is the notion that one should obey the state, except where conscience is at stake." The authors furthermore show that it was around this exception that the Western concept of inviolable human rights evolved in the modern period.

38 Smith *Freedom of Religion* 19-1.

39 The author, in any event, seems to acknowledge that the presence of the freedom of conscience in the Constitution "indicates that the drafters meant to protect traditional religious systems via freedom of religion and to protect some residual set of ethical belief through the freedom of conscience". See the discussion above where it was argued that each of the rights enumerated in section 15(1) ought to be given a distinct meaning.

to Witte's commentary⁴⁰ on the meaning of "liberty of conscience" in the constitutional context of the United States. He maintains that the concept of freedom of conscience is the cardinal principle for the American "experiment" in religious freedom, and that several other essential rights and liberties of religion in the American context are based directly on this core principle. Witte shows that liberty of conscience had a distinctive content in the early American jurisprudence. In the first place, it served to protect voluntarism. He refers in this respect to Elisha Williams⁴¹ who stated in 1744, in respect of Christianity:

Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the Scriptures for himself ... and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. As every Christian is so bound; so he has the inalienable right to judge of the sense and meaning of it, and to follow his judgment wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical.

In the second place, liberty of conscience prohibited religiously-based discrimination against individuals. This meant that persons could not be penalised for their religious choices, nor could they be influenced to make certain choices because of the civil advantages attached to them.

In the third place, Witte shows that, according to certain eighteenth century writers, liberty of conscience guaranteed "a freedom and exemption from human impositions, and legal restraints, in matters of religion and conscience".⁴² This meant that persons of faith were to be exempt from laws that encumbered and discriminated against certain religious believers; and that they were to be exempt or immune from civil duties and restrictions that they could not, in good conscience, accept or obey. In other words, Witte states that where general laws and policies intruded on the religious scruples of an individual or group, liberty of conscience

40 Witte and Green *American Constitutional Experiment* 516-521.

41 Williams *Essential Rights and Liberties* 61 as quoted by Witte and Green *American Constitutional Experiment* 516-517.

42 John Mellen *The Great and Happy Doctrine of Liberty* (Boston 1795) 17 as quoted by Witte and Green *The American Constitutional Experiment* 517.

demanded protection of these minorities and exemption from general laws.

It could therefore be stated that, in the South African context, freedom of conscience entails freedom of the individual to voluntarily adopt (or not adopt) a religious belief, and freedom of religious groups⁴³ to associate and organise themselves without coercion or undue burdens by the state or other individuals. It moreover, in principle, entails that religious individuals and groups should not be discriminated⁴⁴ against on the grounds of religion and should not be subjected to general laws and policies which they could not, in good conscience, accept or obey.

This thesis is concerned with the protection of "beliefs and actions that concern the ultimate origin, meaning and purpose of life, of existence" which involve "the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values".⁴⁵ Hence the freedoms of "thought and opinion", which are also protected in section 15(1), will be treated here as referring to religious thoughts and opinions. In this sense, Smith's remark quoted above might be true in that protection of freedom of conscience, religion and belief incorporates the protection of religious thought and opinion. But in another context the freedoms of thought and opinion might well protect independent rights. Academic, scientific or political opinion and other thoughts are, however, irrelevant for purposes of this thesis.

4. The right to free exercise of religion

4.1 The right to freely exercise one's religious beliefs in the South African Constitution

The above discussion apparently exhausts the protection which section 15(1) accords. One might nevertheless ask whether the protection extends to the essential religious right to

43 With regard to the issue of whether groups are entitled to religious rights, see the discussion in ch 7.

44 In the South African context, religiously-based discrimination is also explicitly prohibited by section 9 of the Constitution. See in this regard the discussion in ch 6.

45 Witte *Introduction* xxv.

manifest or freely exercise one's religious beliefs. Could it be that the South Africa constitution protects only "internal freedom of religion" and limits religious freedom to its "ineradicable psychological minimum: the freedom to think and believe as one will, so long as absolutely no external manifestation of such belief occurs"?⁴⁶ Or is free exercise of religion protected by sections 15(2), 16 and 31?⁴⁷ It seems improbable and indeed inadequate that the only protection of the right to freely manifest one's religious beliefs is to be found in the reference to religious observance in section 15(2) or in the right to freedom of expression in section 16, which does not mention religion by name, or in section 31 which protects the rights of persons belonging to a religious community to practise their religion.⁴⁸

As was demonstrated in chapter 2, some form of free exercise rights had already been granted by the Edict of Milan (in 313 AD) and in this thesis the argument was advanced earlier that this was one of the essential or core elements of religious freedom. Witte⁴⁹ explains that in the early American Republic, liberty of conscience was inextricably linked to free exercise of religion:

Liberty of conscience was a guarantee to be left alone to choose, to entertain, and to change one's religious beliefs. Free exercise of religion was the right to act publicly on the choices of the conscience once made, without intruding on or obstructing the rights of others or the general peace of the community.

He states that the phrase "free exercise" generally connoted various forms of public religious action, including religious speech, worship, assembly, publications and education. It also embraced the right of the individual to join or associate with other believers in religious associations and meant that these religious associations were free to devise their own modes

46 In the words of Durham *Perspectives* 27.

47 S 15(2) which regulates religious observances at State or state-aided institutions does protect an aspect of the free exercise of religion; it will be discussed in more detail in ch 6. S 16 which protects freedom of expression falls outside the scope of this thesis. S 31 will be discussed in more detail later in this chapter.

48 These protections are, nevertheless, necessary and valuable extensions of the right to freely exercise one's religious beliefs.

49 Witte and Green *American Constitutional Experiment* 521.

of worship, articles of faith, standards of discipline, and patterns of ritual. The drafters of the First Amendment therefore guaranteed protection from laws "prohibiting" the free exercise of religion.

In other words, there is no doubt that the exercise or manifestation of religious beliefs is constitutionally protected in the United States. However, in spite of the wording of the First Amendment, a "belief-action"⁵⁰ debate revived when religious freedom was restricted to freedom of conviction in *Reynolds v United States*.⁵¹ In this case a United States federal law which criminalised bigamy was upheld in spite of the fact that a Mormon's beliefs required him to have more than one wife. However, the United States Supreme Court later granted protection for religiously motivated acts.⁵²

Section 4(2) of the German Constitution expressly protects the right to externally manifest religious beliefs ("äußere Freiheit"). It is also protected by article 18 of the Universal Declaration⁵³ and in most other modern international human rights instruments.⁵⁴

50 For a brief discussion of this dichotomy in the US jurisprudence, see Freedman 1996 *THRHR* 667-674.

51 98 US 145, 25 Led 244 (1878) .

52 See *Cantwell v Connecticut* 310 US 296, 60 Sct 900 (1940) where a conviction for religious soliciting was reversed. However, in 1990 the "belief-action" dichotomy was reaffirmed by the US Supreme Court in *Employment Division v Smith* 494 US 872 (1990). This decision evoked enormous criticism and prompted Congress to pass the Religious Freedom Restoration Act of 1993 which overrules the approach in *Smith*.

53 Art 18 of the 1948 Universal Declaration of Human Rights 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."

54 See, for example, art 18(1) of the International Covenant on Civil and Political Rights (1966), art 9 of the European Convention, art 12(1) of the American Convention and art 1(1) of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. It could be stated that it reflects the emerging consensus on religious liberty.

As Durham⁵⁵ points out, without this extension into the external world, religious liberty is largely meaningless. It is therefore submitted that the right to "freedom of conscience, religion, thought, belief and opinion" in section 15(1) of the South African Constitution also includes the right to act upon or publicly manifest or practise one's religious beliefs. Many religions, as an integral part of their religious doctrine, contain a moral imperative to act, for example to proselytise. To artificially draw lines and exclude acts, but not beliefs, under freedom of religion, would be too restrictive an approach. Acting under a religious belief is, of course, not unlimited.⁵⁶ Religious acts may be limited in accordance with the limitation clause (section 36 of the Constitution) which will be dealt with in chapter 7.

The definition of religious freedom, which includes religious practices as opposed to only internal beliefs, appears to have been accepted in principle by the Constitutional Court. In *S v Lawrence; S v Negal; S v Solberg*⁵⁷ Chaskalson P accepted the definition of religious freedom enunciated by Dickson J in *R v Big M Drug Mart Ltd*⁵⁸ which includes the "right to manifest belief by worship and practice or by teaching and dissemination". In *Christian Education South Africa v Minister of Education*⁵⁹ Sachs J, after also accepting the above mentioned definition of *R v Big M Drug Mart Ltd*, held that "[t]his broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice."⁶⁰

55 Durham *Perspectives* 30.

56 In terms of art 18(3) of the International Covenant on Civil and Political Rights (1966) and similar provisions of other human rights documents, freedom of religion including internal freedom of religion, freedom of the hearth, and the freedom to change one's religion or belief, may not be regulated by the state in any manner. It is only the manifestations of religion that may be regulated in accordance with the restrictive conditions contained in the above mentioned subsections.

57 1997 (2) SACR 540 (CC) 568e-g.

58 (1985) 18 DLR (4th) 321, 353; (1985) 13 CRR 64.

59 2000 (10) BCLR 1051 (CC) par 19.

60 Sachs J deferred to the meaning that Chaskalson P had given 'freedom of religion' in the *Lawrence* case and stated, par 18 note 15 that there was no dissent in this respect. However, as pointed out by Smith 2001 *SALJ* 1-9 there was division on the very nature of freedom of religion in the *Lawrence* case. Five of the nine judges who decided the *Lawrence* case did not hold Chaskalson P's view of the
(continued...)

That brings one to the question of how broadly this right to freely exercise religious rights should be interpreted in the South African constitutional context. In this regard an analysis of the wording of section 18 of the 1948 Universal Declaration of Human Rights⁶¹ proves useful. The first part of section 18 protects the right to freedom of thought, conscience and religion. The second part, whilst not purporting to be a *numerus clausus*, includes the following specific rights:

- (i) the right, alone or in community with others, to privately manifest one's religion;
- (ii) the right to change one's religion;
- (iii) the right to manifest one's religion in worship;
- (iv) the right, alone or in community with others, to publicly manifest one's religion;
- (v) the right to manifest one's religion in teaching, practice and observance.

Durham⁶² points out that these rights reflect how conceptions of religious freedom have been "deposited" in the course of history until the modern expansive protections have been attained. The author's analysis of these rights contributes to a better understanding of the scope and meaning of free exercise rights in a modern constitutional context.

He shows⁶³ that the right to privately manifest one's religion or "freedom of the hearth", alone or in community with others, is the type of "house" freedom that was at times available to dissenters. It is a slightly broader protection of religious freedom than the mere protection of

60 (...continued)
 extent of the right. It was thus only the Chaskalson judgment that treated the Dickson *dictum* as exhaustive of the scope of freedom of religion. In any event, the Dickson definition which has been accepted by Chaskalson P and Sachs J in the above mentioned cases, is only quoted here in support of the argument that the Constitutional Court has accepted, in principle, that religious freedom also entails free exercise of religion. As far as the scope of freedom of religion in general is concerned, it was argued in ch 1 of this thesis that freedom of religion entails a bundle of essential rights and freedoms.

61 This formulation was repeated in a number of subsequent international instruments as shown above.

62 In analysing art 9 of the European Convention of Human Rights which is similar to s 18. See *Perspectives* 26-30.

63 Durham *Perspectives* 28.

"internal freedom of religion", in that internal beliefs can at least be externally exercised within the privacy of one's home, but this is obviously inadequate from a contemporary perspective.

The right to change one's religion is but a short step from the right to have a religion and to practise it in the privacy of one's home. This clause gave rise to much discussion and controversy when the Universal Declaration was drawn up and it still leads to considerable controversy in international human rights law.⁶⁴ This subject, however, does not fall within the scope of this thesis, and for present purposes it will be accepted that the right to change one's religion is part of freedom of religion.

The freedom of worship, narrowly construed, protects the right to worship or pray alone or with others within the privacy of someone's home. At a more expansive level, it would permit communal services in churches or other buildings without allowing any manifestation of belief outside these buildings. Worship includes only the actual formal acts or rituals of worship as opposed to other religiously motivated behaviour. As Durham⁶⁵ points out, the presence of the term "worship" constitutes a significant achievement at an earlier stage in the unfolding of religious liberty but now reflects an excessively narrow conception of what religion entails. It may be just as important to religious believers to engage in other religious practices or observe dietary rules and days of rest as it is to formally attend worship services.

Article 18 extends religious liberty to the public sphere. The protection of religion in any modern country should accordingly protect religion in public or private.

Finally, article 18 protects not only internal religious beliefs or their manifestation in worship, but also the "teaching, practice and observance" thereof. In the first instance and by protecting "teaching", religious individuals should be permitted to teach their religion to the young generation, new converts and students in accordance with the tenets of the specific religion.

64 See for example the discussion in Gildenhuis 2001 *SAPL* 151-175 which deals with the right to change one's religion or belief in international human rights law. Also see the contributions in the special (summer) edition of 2000 *Emory Int'l L Rev* (edited by JD van der Vyver) which deal with the problem of proselytization in Southern Africa.

65 Durham *Perspectives* 29.

This would also mean that religious groups, including theological seminaries or other institutions where clergy are being trained, should enjoy this right. The right to freedom of expression will protect many of these practices but, in addition, the right to religious freedom particularly includes the protection of religious institutions in which religion is taught and transmitted. Secondly, protecting the practice and observance of religious beliefs would entail the right to carry out the beliefs and instructions of a particular belief, such as dietary prescriptions, religious holidays, festivals and Sabbaths, and to participate in communal services and rituals such as ordinations and the holding of church courts.

Witte⁶⁶ summarises the modern content of the right to manifest or practise one's religion as follows:

More fully conceived, religious entitlements embrace an individual's ability and means to engage in religious assembly, speech, worship, to observe religious laws and rituals, to pay religious taxes, to participate in religious pilgrimages, to gain access to religious totems, and the like. They also embrace the religious group's power to promulgate and enforce internal religious laws of order, organisation, 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 worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.

It could therefore be stated that free exercise rights in the South African Constitution should be interpreted to include the following rights and freedoms enumerated in article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981):

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places of worship for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;

- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirement and standard of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (l) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

4.2 The right to establish educational institutions based on a common religion

It was argued in the previous paragraph that the right to teach religious beliefs is included in the right to manifest one's religious beliefs. Parents' right to direct their children's education in conformity with their own religious convictions is moreover an internationally acknowledged right.⁶⁷

67 Art 18(4) of the International Covenant on Civil and Political Rights provides that "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions". Art 13(3) of the International Covenant on Economic, Social and Cultural Rights provides that "The States Parties to the present Covenant undertake to have respect for the liberty of parents and when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions". Art 2(b) of the Convention against Discrimination in Education (1960) provides that: "When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention: (b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or
(continued...)

Section 32(c) of the South African interim Constitution provides:⁶⁸

Every person shall have the right -

- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

This section was interpreted by the Constitutional Court in the case of *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*.⁶⁹ The petitioners *inter alia*⁷⁰ argued that sections

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- 67 (...continued)
institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and of the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;" Also see art 2 of Protocol NO 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952); art 5 of the Convention Against Discrimination in Education (1960); art 4 of the American Convention on Human Rights (1969); and art 5 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981).
- 68 The equivalent section, s 29(3) in the final Constitution, differs from this section as will be shown below.
- 69 1996 (3) SA 165 (CC).
- 70 It was also argued that s 19 of the Gauteng School Education Bill was unconstitutional since, on a proper interpretation of s 32(c) of the Constitution, government was not entitled to prohibit language competency testing as an admission requirement. This issue is, however, not addressed in this thesis.

21(2), 21(3)⁷¹ and 22(3)⁷² of the Gauteng School Education Bill were unconstitutional since, on a proper interpretation of section 32(c) of the Constitution, government was not entitled to direct what religious policy should be developed or who should or should not attend religious classes at schools established in terms of section 32.

Mahomed DP stated that it was crucial to the petitioners' case to determine whether section 32(c) of the Constitution indeed imposed a positive obligation on the state to accord every person the right to have established schools, where practicable, based on a common culture, language or religion subject only to the qualification that it was practicable and that there was no discrimination on the grounds of race. He found⁷³ that what was provided for in section 32(c) was that every person would have the right to establish such educational institutions. The section, however, provides a defensive right to persons who wish to establish such educational institutions and protects that right from invasion by the State, but does not confer an obligation on the state to establish such educational institutions.

It was contended by the petitioners that, if section 32(c) was only intended to protect the right

71 S 21(2) and (3) of the Gauteng School Education Bill read as follows: "(2) The religious policy of a public school shall be developed within the framework of the following principles: (a) The education process should aim at the development of a national, democratic culture of respect for our country's diverse cultural and religious traditions. (b) Freedom of conscience and of religion shall be respected at all public schools; (3) If, at any time, the Member of the Executive Council has reason to believe that the religious policy of a public school does not comply with the principles set out in ss (2) or the requirements of the Constitution, the Member of the Executive Council may, after consultation with the governing body of the school concerned, direct that the religious policy of the school be reformulated in accordance with ss (1) and (2)."

72 S 22(3) reads: "(3)(a)(i) Every learner at a public school, or at a private school which receives a subsidy in terms of s 69, shall have the right not to attend religious education classes and religious practices at that school. (ii) In this regard the department shall respect the rights and duties of parents to provide direction to their children in the exercise of their rights as learners, in a manner consistent with the evolving capacity of the children concerned. (b) The right conferred by par (a) on a learner at a private school which receives a subsidy in terms of s 69, may be limited where such limitation is necessary to preserve the religious character of the private school concerned. (c) Except as is provided for in par (b) no person employed at a public school, or at a private school which receives a subsidy in terms of s 69, shall in any way discourage a learner from choosing not to attend religious education classes or religious practices at that school."

73 Par 7.

of persons to establish their own educational institutions, it would not be necessary to qualify such a right by making it subject to the requirement that it should be practicable. Mahomed DP rejected this argument on the basis that the requirement of practicability was sensible in both interpretations of section 32(c) and of neutral value in the proper interpretation of the subsection.

Sachs J concurred with Mahomed DP, but was specifically concerned in his judgment with internationally recognised principles relating to the protection of minorities to establish what bearing, if any, they would have on the interpretation of section 32, and more particularly of section 32(c) of the interim Constitution. He eventually reached the same conclusion as Mahomed DP. The question that he sought to answer was -

whether there is a current trend towards supplementing individual rights, expressed mainly by the principles of non-discrimination and equality, with additional group rights claimable against the State in the form of obligatory State support for fostering cultural, linguistic and religious diversity.

In considering the broad South African context, Sachs J located the minority rights enquiry (under the interim Constitution) in the context of three important considerations highlighted by that Constitution.⁷⁴ The first relates to constitutional claims by the different language communities and the third to the rights of children. For current purposes, only his second consideration is of importance, namely that immense inequality continues to exist in relation to access to education in our country. After examining a variety of international law instruments, the judge stated in summary that the South African Constitution would be entirely consistent with the principles of international human rights law if it:

- prevented the State from embarking on programmes intended or calculated to destroy the physical existence or to eliminate the cultural existence, of particular groups;
- required the State to uphold the principles of non-discrimination and equal rights in respect of members of minority groups;

- permitted and possibly required the State to take special remedial or preferential action to assist disadvantaged groups to achieve real equality;
- permitted but did not require the State to establish communal schools, or to support such schools already established;
- permitted members of minority groups to establish their own schools.

It is thus clear that section 32(c) of the interim Constitution was interpreted strictly as a "freedom" which requires the state to permit the establishment of communal schools, and not as imposing any obligation on the state to promote or foster religious diversity.⁷⁵

In the final Constitution, the reference to religion in the clause on education was deleted.⁷⁶ Section 29(3) of the Constitution now provides:

- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

The position of religiously based educational institutions seems to be conclusively defined by the finding in the *Gauteng School Education Bill* case and by the newly formulated section 29(3) which leave no doubt that "everyone has the right to establish and maintain, *at their own*

75 This is a clear example of the different results of the "first generation right" and "second generation right" approaches.

76 All references to specific grounds were, in fact, deleted from s 29(3) in the final Constitution. This was probably done in order not to unnecessarily limit the application of the section. It was, for example, problematic under the interim Constitution that "a common sex" was not specifically included as one of the grounds upon which an educational institution could be based, thereby excluding single sex schools.

expense, independent educational institutions". This does not, however, preclude state subsidies for independent educational institutions. One is nevertheless left with the impression that religious group rights are not available to all but merely to those who can pay their own way.⁷⁷ This is demonstrated by the concurring judgment of Kriegler J in the *Gauteng School Education Bill* case where he stated:⁷⁸

Subartikels (a) en (b) van art 32 van die Grondwet boekstaaf en bevestig die reg van iedereen op basiese onderwys, gelyke toegang tot onderwysinstellings en, waar redelikerwys uitvoerbaar, onderrig in die taal van die leerling se keuse...

Daarop brei subart 32(c) dan uit. Soos my Kollega Mahomed AP aandui - en ek wil onderstreep - hou die Grondwet daarmee die deur oop vir diegene vir wie die Staat se onderwysinstellings ontoereikend geag word wat betref gemeenskaplike kultuur, taal of godsdienste. Dit staan hulle vry om eendragtig die erwe van hul vaders vir hul kinders te behou. Daar is egter 'n prys, naamlik dat so 'n bevolkingsgroep daarvoor die hand in eie sak moet steek. In 'n sin gaan die huidige geskil dus nie om volksgoed nie maar om geld.

This result appears to be reinforced when one reads sections 29(3) and 15(2) of the final Constitution⁷⁹ in conjunction with each other. As has just been explained, section 29(3) provides for the establishment of independent educational institutions on the basis of, for example, a communal religious belief. Section 29(4) states that this does not preclude state subsidies for independent educational institutions. However, section 15(2) could be read to imply that as soon as an educational institution receives a state subsidy, it is a "state-aided" institution and that religious observances at such an institution then have to follow the rules made by the appropriate public authorities and be conducted on an equitable basis, and that attendance of these observances has to be free and voluntary. This result seems to contradict the purpose of section 29(3). It will therefore be argued in chapter 6 that the phrase "religious observances" in section 15(2) must be defined narrowly to include only religious practices in the true sense of the word.

77 See *Murdock v Pennsylvania* 319 US 105 at 111.

78 Par 41 and 42.

79 See the discussion below in ch 6.

The above-mentioned interpretation of the provisions of section 32 of the interim Constitution (now section 29(3)) in the *Gauteng School Education Bill* case is not the most benign and accommodative approach to religious rights but it cannot be said to be unduly restrictive of religious freedom. It appears that the Constitutional Court has chosen to interpret religious rights in a strictly "freedom" oriented manner. As shown above, the right to teach religious prescripts is often formulated in "freedom" terms. It would, however, be more accommodating of religious rights if the state were to promote and foster religious diversity by subsidising independent educational institutions based on a common religion as permitted by section 29(4) and one could hope that the constitutional jurisprudence would proceed to such an active approach. Du Plessis⁸⁰ also expresses his concerns in this regard:

The ... concern is whether, in light of South Africa's post- 1994 constitutional case law, it is realistic to expect that judicial constructions of religious freedom might proceed beyond the mere allowance of a *passive toleration* of individual free exercise rights. Is it realistic to hope that constitutional warranties may be forthcoming in order to sustain the identity and integrity of dissimilar religious groups and communities, in a country where incongruities intertwined with religious life are rife? This expectation is premised on the cultivation of active religious tolerance in a state that abstains from favoring any particular religious communities or sentiments.

5. Religious pluralism

South Africa indisputably has a vast religious diversity,⁸¹ and the provisions of the South African Constitution appear to protect the essential principle of religious pluralism or diversity. Section 15(1) protects a plurality of religious beliefs by according freedom of belief to "everyone". Pluralism and the group dimension of religious rights are moreover protected by section 15(3) which provides for the recognition of religious systems under any tradition, by section 17 which protects freedom of association, by section 31 which protects religious

80 Du Plessis 2001 *BYU-LR* 102.

81 For a summary of the religious demography of South Africa, see Du Plessis *Religious Human rights in South Africa* 442. For statistics of religious affiliation in South Africa, see Gouws and Du Plessis 2000 *Emory Int'l L Rev* 657, 659-661. On the reality of cultural and religious diversity within South Africa, see Dlamini *Culture, Education and Religion* 573-598.

communities and by section 29(3) which entrenches the right to establish independent educational institutions.⁸² In this regard Sachs J in *Christian Education South Africa v Minister of Education*⁸³ stated:

There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called "the right to be different". In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.

Sections 15(1), 31 and 15(3), which deal specifically with religious rights, deserve closer analysis.

5.1 "Everyone" in section 15(1)

As shown in chapter 2, the extension of religious rights to everyone was one of the most important achievements of the law pertaining to religious freedom in this century. It means that religious rights protections are not limited to members of a particular religion, to religious believers⁸⁴ only or even to citizens - it is extended to everyone. By protecting the right of "everyone" to religious freedom in section 15 (1), the South African Constitution is thus, in principle, protecting the essential religious right of pluralism.

82 Also see s 30 which recognizes the right to use a language and to participate in the cultural life of one's choice and s 211(3) which recognizes customary law.

83 2000 (1) BCLR 1051 (CC) par 24.

84 As shown above, it has come to be accepted in international human rights law that the right to "freedom of thought, conscience and religion" extends to philosophical "Weltanschauungen" as well as to more traditional religious orientations.

An important aspect of religious pluralism is that it protects not only religious individuals to hold a variety of religious beliefs, but also the existence of various religious groups. In this regard, a distinction can be drawn between confessional and social pluralism:⁸⁵ confessional pluralism can be described as the maintenance and accommodation of a plurality of forms of religious organisations in the community, and social pluralism as the maintenance and accommodation of a plurality of associations, in addition to churches, synagogues, mosques and so forth, to foster religion, for instance schools and charities in the broader community or civil society.

Section 15(1) of the South African Constitution should be construed as not applying only to natural persons, but also to juristic persons or religious associations. Such an approach would be in line with the historical development of religious rights. It was shown in chapter 2 that, after the Edict of Milan, religious rights were primarily protected as group rights and only later extended to all individuals. This aspect will be dealt with in more detail in chapter 7.⁸⁶

5.2 The rights of persons belonging to religious communities in section 31

Religious human rights, as explained in chapter 2, comprise an individualistic as well as a collective or associational dimension.⁸⁷ The first dimension encompasses the right of individuals to decide what they want to believe and whether and how they want to express these beliefs.⁸⁸ In this sense, coercion, the antithesis of voluntarism, is the enemy of the autonomous individual. The collective or group dimension, on the other hand, focuses on the

85 See Witte and Green *American Constitutional Experiment* 522-524 who explains that eighteenth century writers in America regarded "multiplicity", "diversity" or "plurality" as an essential principle of religious rights and liberties. In other words, it was a constitutional condition for the guarantee of true religious rights and liberties. Two kinds of pluralism were distinguished, namely, confessional pluralism and social pluralism.

86 See the discussion of the application clause (more specifically section 8(4)) in ch 7.

87 Heyns and Brand 2000 *Emory Int'l L Rev* 703-704 state that these dimensions are two opposing, but complementary components: one is the need to be left alone; the other the need for engagement by others and also to engage others.

88 The individualist orientation of human rights norms is grounded in Enlightenment reasoning. See the discussion in ch 2.

interests of the group or community. It proceeds from the premise that religion and conscience are not matters which are entirely free and the outcome of individual choice. Communal definitions of religious human rights imply that not only individuals, but also religious associations and communities (such as churches, temples, mosques, families, religious publishers and suppliers and religious schools) have the right to express their religious beliefs and values.

Elements of both individualist and communal perspectives of religious rights are present in any legal system, and a jurisprudence of religious human rights has to balance these concerns and define their respective limits.⁸⁹ This is also the case in South Africa as illustrated by the following comment of Sachs J in *Christian Education South Africa v Minister of Education*:⁹⁰

Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial.

The interim Constitution did not distinguish between personal and communal religious observances and practices. The final Constitution, however, makes specific provision in section 31 for the practice of religion in community with others. Under the heading "cultural, religious and linguistic communities", section 31 of the Constitution provides:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

89 Issues of cultural self-assertion and cultural relativism versus individualism are part of the ongoing international debate. This subject is therefore part of the much broader issue of religious and cultural diversity in a single nation state and the corresponding quests for constitutional solutions. One can agree with Huntington 1993 *Foreign Affairs* no 3 22 that in current world politics "the dominating source of conflict will be cultural". This aspect will also be referred to when dealing with section 15(3) of the Constitution later in this chapter.

90 2000 (1) BCLR 1051 (CC) par 19.

- (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Minority rights⁹¹ will not be analysed in detail in this section. Minority rights issues in South Africa constitute a subject of vast proportions with a strong international law⁹² component and

91 S 31 does not refer to minorities, but to those who belong to a cultural, religious or linguistic "community". It is, however, submitted that the section caters to "minority" rights, as understood in international human rights law. The section closely follows the wording of section 27 of the International Covenant on Civil and Political Rights (1966) which provides: "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 religions, or to use their own language". See the remarks of Sachs J in *Christian Education South Africa v Minister of Education* 2000 (1) BCLR 1051 (CC) par 23 where he pointed out the differences between the two texts. The reason for using the word "communities" is probably, as pointed out by Sachs J in par 25, that "the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity".

92 There are many other provisions in international human rights law which protect religious minorities, groups and indigenous populations. See for example art II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948); Art 6 of the Convention No 106 Concerning Weekly Rest in Commerce and Offices (1957); Art 4 of Convention No 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries (1957); Art 9 of the Convention on the Reduction of Statelessness (1961); Recommendation 3 of the Recommendation Concerning Education for International Understanding, Co-operation and Peace and education Relating to Human Rights and Fundamental Freedoms (1974); Art 12 of the African Charter on Human and People's Rights (1981); Principles 16 and 19 of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989); Art 29 and 30 and Principles 30, 32, 33, 35, 36 and 40 of the Convention on the Rights of the Child (1989); Par 3 and 6 of the Charter of Paris for a New Europe (1990); Art 1-9 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); Art 5, 7 and 32 of Convention No 169 concerning Indigenous and Tribal Populations in Independent Countries (1989); Par 19, 33 (part I) and 25, 26 and 27 (Part II(b)(2)) of the Vienna Declaration and Programme of Action (1993); Art 4 of the Statute of the International tribunal for the Prosecution of Persons Responsible for Serious Violations of
(continued...)

justify an independent study.⁹³ The discussion here will be confined to the protection of religious group rights by the Constitutional Court.

Up to now there has been two Constitutional Court decisions involving section 31 and religious group rights. The *Gauteng School Education Bill* case which was discussed above was decided in the context of section 32 of the interim Constitution (the right to education).⁹⁴ Some of the arguments raised by the Court deserve further attention in the context of religious group rights on account of their underlying assumptions, rather than their bearing on section 32(c). In the first instance, the remarks made by Sachs J on a "hierarchy of rights" in the South African (interim) Constitution call for comment. He stated that:⁹⁵

[t]he very first fundamental right to be specified, preceding even the rights to life and dignity, is the right to equality. We are further enjoined to interpret the whole of chapter 3, including s 32, in a way which promotes the values of an open and democratic society based on freedom and equality. The theme of diversity has markedly less constitutional pungency.... Thus, the dominant theme of the Constitution is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity. In my view, the Constitution should be seen as providing a bridge to accomplish in a principled yet emphatic manner, the difficult passage from State protection of minority privileges, to State acknowledgement and support of minority rights. The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity.

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- 92 (...continued)
 International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1993); and Art 2 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of the Neighbouring States, between 1 January 1994 and 31 December 1994 (1994).
- 93 See for example Strydom 1997 *Loy LA Int'l & Comp LJ* 873-914.
- 94 S 29 in the final Constitution.
- 95 Par 52.

Despite the well-considered remarks of the judge, it is obvious that the gist of this statement is that equality is the touchstone of the Constitution: as long as equality is secured, diversity will be accorded maximum regard. Such an approach would, however, imply that equality concerns will usually dominate minority rights because, in nearly all instances of disputes involving minority rights, equality is the "opposing" interest against which such rights will have to be balanced. If the "dominant theme" of the Constitution is equality and diversity has "markedly less constitutional pungency", the reality is that equality will almost always prevail over minority rights. This is what an unqualified acceptance of individual equality as the dominant theme of the Constitution implies.

In the second instance, and in the context of equality and equal access to educational institutions, there are several references to "affluent schools and their defensive postures" or schools that were "well-endowed because of past state support". Such a narrow understanding of equality as merely a socioeconomic equality would imply that the meaning of equal treatment of groups will always be dominated by economic considerations and, as Strydom⁹⁶ points out, "[w]hat has affluence, after all, to do with the protection of a right?".

In the third place, Sachs J's definition of groups which are entitled to protection is fundamentally suspect. He concluded that:⁹⁷

[T]he central theme that runs through the development of international human rights law in relation to the protection of minorities, is that of preventing discrimination against disadvantaged and marginalised groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination The weight of international law ... should be in favour of the dominated and not the dominating minorities.

Strydom⁹⁸ shows that, in thus arguing, Sachs J relied heavily upon the dated works of Capotorti on minority rights in international law. He makes the following valid remarks in this

96 1997 *Loy LA Int'l & Comp LJ* 891.

97 Par 87.

98 1997 *Loy LA Int'l. & Comp LJ* 891-892.

regard:

In relation to the state, a cultural or ethnic group is neither a minority nor a majority. As equal partners in rights, all cultural groups irrespective of their numerical, linguistic, religious, economic or other differences, have rights to equal treatment by the state in accordance with the demands of justice, of which the state is essentially an agent. This ideal vanishes once the state is perceived to be the embodiment of a specific societal group.

Thus, from a juridical and state theory perspective, Capotorti's categorical statement that dominant minority groups do not need protection lacks foundation. The republican idea of the modern state refers to a juridically qualified, communal bond between citizens and government that transcends all non-juridically qualified social relations. Thus, the numerical, political, economic or cultural dominance of one group or another is irrelevant for the protection of rights. The integration of rights and interests in the state by public law is inclusive, neither excluding nor favouring a particular group. After all, that is why the modern state is referred as a *res publica*, a public matter. Significantly, the Parliamentary Assembly of the Council of Europe stated the following in a recommendation on the rights of minorities:

'In a democratic state there can be no second class citizens: citizenship is the same for all Within this common citizenship, however, citizens who share specific characteristics ... with others may wish to be granted and guaranteed the possibility of expressing them'

Once we link the need for protection to extraneous considerations such as dominance or non-dominance, this equal and common citizenship is refuted. From a legal rights perspective, the sole question is whether a group has a right or interest which inherently qualifies for protection. Nonetheless, the manner in which the state provides protection for certain groups may of course differ, despite the principle of equity receiving due recognition.

It appears from section 31 that the state chose to protect religious group (or minority) rights in a rather liberal style: In other words, "the state's obligation begins and ends with demonstrating a liberal tolerance towards the collective goals and aspirations of certain

cultural communities."⁹⁹ In this regard, the hope expressed above with regard to the right to establish independent educational institutions, namely that constitutional jurisprudence will proceed to a more active protection and promotion or fostering of religious diversity is repeated here. Despite questions as to the appropriateness of such a model for a diverse South African society, the conclusion cannot be drawn that the Constitution does not protect the principle of plurality.¹⁰⁰

However, the same cannot be said of the approach of the Constitutional Court to minority rights in the *Gauteng School Education Bill* case. It is submitted that the Court's distinction between dominant and nondominant groups (apparently based on economic considerations) for the purpose of qualifying for group rights protection does not adequately protect the principle of pluralism or, for that matter, equality.

In *Christian Education South Africa v Minister of Education*,¹⁰¹ an organisation of Christian parents approached the High Court to strike down section 10 of the South African Schools Act which proscribes corporal punishment in any public or private school. The applicants contended that corporal punishment was part of the religious beliefs of its members as protected by sections 15(1) and 31(1) of the Constitution and sought to have it reinstated in at least those Christian private schools under its auspices. The application was refused in the

99 Strydom *Loy LA Int'l & Comp LJ* 890.

100 In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC)* it was argued that the wording of s 31 did not comply with the requirements of Constitutional Principle (CP) XII. The Court noted that: "CP XII does not indicate how the collective rights of self-determination are to be recognized and protected. That was a matter for the [Constitutional Assembly] to decide. Having regard to the CP's as a whole, the '(c)ollective rights of self-determination' mentioned in CP XII are associational individual rights, namely those rights which cannot be fully or properly be exercised by individuals otherwise than in association with others of like disposition. The concept 'self-determination' is circumscribed both by what is stated to be the object of self-determination, namely 'forming, joining and maintaining organs of civil society' as well as by CP I which requires the State for which the Constitution has to provide, to be 'one sovereign State'. In this context 'self-determination' does not embody any notion of political independence or separateness. It clearly relates to what may be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign State."

101 1999 (9) BCLR 951 (SE).

High Court¹⁰² and then taken on appeal to the Constitutional Court.¹⁰³

In a more carefully reasoned judgment the Constitutional Court once again indicated its preference for the liberal, freedom oriented approach to religious group rights as illustrated by the following remarks of Sachs J on section 31:

The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in its fullest sense it needs to be tolerant and accepting of cultural pluralism. At the same time, following the approach used in article 27, the protection of diversity is not effected though giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the State not to deny them the rights collectively to profess and practise their own religion.¹⁰⁴

Sachs J assumed that section 10 limited the parents' religious rights both under section 31 and section 15 but dismissed the appeal on the basis that a statute which precludes parents from authorising a school to administer corporal punishment does not, if all relevant considerations are taken into account, impose a constitutionally untenable limitation on the parents' free exercise of their religious beliefs.¹⁰⁵ This case will be dealt with in more detail in chapters 6

102 See the discussion of Liebenberg J's decision in the High Court in ch 6. Only the Constitutional Court decision will be discussed in this chapter.

103 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

104 S 31 expresses the right of communities to practise their religion or to form, join and maintain religious associations in individual terms by referring to "persons belonging to" religious communities instead of to the communities themselves. S 15(1), s 16(1) and s 18 which protect everyone's right to religious freedom, freedom of expression and freedom of association respectively and which could bolster group rights are likewise expressed in individual terms. The exercise of the rights in s 31 is also subject to the other provisions of the Bill of Rights. S 31(2) of the Constitution provides that "[t]he rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights".

105 Par 29-52.

and 7.

5.3 The recognition of systems of religious personal and family law in section 15(3)

5.3.1 Introduction

Religious pluralism or diversity is also protected by section 15(3) of the Constitution. As shown in chapter 3, the political power in South Africa was mainly in the hands of people of the Christian faith before 1994. This was evident in many laws.¹⁰⁶ Marriages contracted in terms of a system of religious law which permitted polygyny, such as Islam, were not recognised by South Africa law.¹⁰⁷ This had negative legal implications for such matters as intestate succession, the patrimonial consequences of marriage, the legal status of the children born from such unions¹⁰⁸ and maintenance after divorce,¹⁰⁹ as pointed out by Mahomed DP in *Fraser v Children's Court, Pretoria North and Others*:¹¹⁰

Unions which have been solemnised in terms of the tenets of the Islamic faith, for example, are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is “potentially polygamous” and for that reason, said to be against public policy. The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant to s 18 of the Act. The child would

106 See the discussion above in ch 3. Also see Van der Vyver *Religion* par 236.

107 The refusal of the South African law to recognise Muslim marriages has long been a cause of grievance in the Muslim community. See Cachalia 1993 *THRHR* 398; also see the remarks of Sachs J in *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) par 149-152.

108 In *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) Mahomed J found that the fact that fathers of children born from Black customary unions have greater rights than similarly placed fathers of children born from marriages contracted according to the rites of religions such as Islam, constituted a clear violation of the equality clause of the interim Constitution.

109 It even affected the law of evidence. In *S v Johardien* 1990 (1) SA 1026 (C) it was held that the privilege that one spouse cannot be compelled to disclose communications made to him or her by the other spouse during marriage, does not apply to a marriage according to Muslim rites.

110 1997 (2) SA 261 (CC) par 21 .

not have the status of "legitimacy" and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable.

Section 15(3) of the Constitution now states that section 15 does not prevent legislation from recognising marriages concluded under a system of religious personal or family law, or from recognising systems of personal and family law adhered to by persons professing a particular religion.

Section 15(3) permits legislation which recognises systems of personal and family law and marriages concluded under *any* tradition. Since the subject matter in the current context is religious rights, and since section 15(3) appears to have been inserted with a view to specifically address the problems of Muslims,¹¹¹ only the nonrecognition of Muslim marriages and the statutory enactment of Muslim personal and family law will be discussed. The same principles would, however, apply *mutatis mutandis* to systems of personal and family law under any other tradition.¹¹²

5.3.2 The effect of section 15 on the recognition of Muslim marriages

In *Kalla and Another v The Master and Others*,¹¹³ it was argued on behalf of the second respondent that, since the advent of the new Constitution and in terms of section 14(1) of the Constitution, every person had the right to freedom of religion, that the *mores* of society had changed accordingly and that the *Ismail* case, which regarded a potentially polygamous union to be *contra bonos mores*, was no longer valid in the new South Africa.¹¹⁴ The applicants

111 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 157 state that s 14(3) was included at the behest of a Muslim jurist claiming to represent the Muslim community in South Africa and with the support of diversely affiliated politicians.

112 It should be noted that "tradition" is not limited to religious traditions.

113 1994 (4) BCLR 79 (T).

114 85B.

contended that the marriage between the deceased and the second respondent according to Muslim rites was a potentially polygamous union and accordingly not valid and enforceable as a marriage in terms of South African law.

The facts were briefly that the applicants were the sole testate heirs of the deceased. In 1948 the second respondent had become the deceased's wife in India by entering into a marriage celebrated according to the tenets and customs of the Muslim faith. The deceased had bequeathed R20 000 to the second respondent and R20 000 to a mosque. The residue was left to the applicants. The executor rejected the claim by the second respondent for half the assets of the joint estate. The second respondent lodged an objection against the liquidation and distribution account, and the Master decided that the marriage between the deceased and the second respondent had been valid and, according to legislation, in community of property. This was based on the fact that the particulars of the said marriage had been entered in the computerised population register. It was clear, however, that the marriage had never been validated in terms of the Indians Relief Act.¹¹⁵ The applicants sought to review the Master's decision to uphold the second respondent's contention that her marriage to the deceased had been valid under South African law. It was common cause that, on the basis of the *Ismail* case,¹¹⁶ the marriage had been invalid prior to the new Constitution which became operative on 27 April 1994.

The case was decided on the basis that the Constitution did not have retrospective effect and that the Constitution did not apply since the date of death on which the rights of heirs vest, the decision of the Master and the application for review all predated the promulgation of the Constitution on 27 April 1994. Van Dijkhorst J¹¹⁷ nevertheless made the following remarks about the argument that Islamic marriages were no longer invalid:

... the argument that Islamic polygamous marriages are no longer invalid in our law in view of section 14(1) of the Constitution may well flounder on the

115 22 of 1914.

116 *Ismail v Ismail* 1983 (1) SA 1006 (A).

117 89B-C.

provisions of section 14(3) as it could be argued that these would not have been necessary had the draftsmen of the Constitution foreseen that section 14(1) would validate such unions. In fact the draftsmen adopted the approach of *Seedat's Executors v The Master (Natal)* at 309 and provided for specified procedures.

Apart from that, the principle of gender equality embodied in sections 8(2) and 119(3) and constitutional principles I, III and V (read with section 232(4)) may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the *mores* of the New South Africa as they were to the old.

This judgment was criticised by Bonthuys and Du Plessis¹¹⁸ on the grounds that it amounted to a literalist approach and did not reflect an inclusive understanding of section 14(1) by the court. The authors argued that a number of South Africans believed that freedom of religion included the right to recognition of marriages under religious law and that, since international instruments did not reflect the recognition of marriages under religious freedom, section 14(3) had been inserted. This, however, did not imply that recognition of such marriages by virtue of section 14(1) was necessarily excluded. The authors maintained that, if the right to have such marriages recognised was a manifestation of religious freedom, it would, in any event, be subject to the same limitations as religious rights, including the limitation clause and other provisions of the Constitution, such as gender equality.

The issue came to the fore again after the promulgation of the Constitution. In *Ryland v Edros*,¹¹⁹ the plaintiff (the husband) who had married the defendant according to Muslim rites instituted action against her and demanded her eviction from the home where they had lived for some years after their marriage. The marriage had terminated earlier in accordance with Islamic law. The eviction claim was settled. However, the defendant instituted a counterclaim against the plaintiff and, relying on the contractual relationship arising from the Muslim marriage, sought arrears maintenance, a consolatory gift and the transfer of an equitable share of the increase in the plaintiff's estate during their marriage.¹²⁰

118 Bonthuys and Du Plessis 1995 *SAPL* 200-210.

119 1997 (2) SA 690 (C) .

120 The Defendant was successful in claiming arrears maintenance for the three years before her claim
(continued...)

Farlam J had to consider the decision in *Ismail v Ismail*¹²¹ where the Appellate Division held that, because the conjugal union between the parties had been potentially polygamous, "[t]he customs and the contract in question are contrary to public policy and are, consequently unenforceable". Farlam J found that it was not *contra bonos mores* to enter into a marriage contract in terms of Islamic law. The judge based his judgment on the fundamental amendment of the basic values on which our civil polity is based and which resulted from the enactment of the new Constitution.¹²² In considering whether the values underlying chapter 3 (the fundamental rights chapter in the interim Constitution) conflicted with the views on public policy which were expounded and applied in the *Ismail* case¹²³ and the series of cases preceding it, Farlam J stated that,¹²⁴

it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed) views of only one group in our plural society were taken into account.

The judge specifically referred to the importance of the principles of equality, tolerance and accommodation as found in the preamble and sections 8, 10, 14, 21, 32 and 33 of the interim Constitution, as well as in the constitutional principles and the "postamble". He stated:

I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution. In my view those values radiate ... the concepts of public policy and *boni mores* that our courts have to apply.

-
- 120 (...continued)
was served (the rest of the claim had prescribed); she was also held to be entitled to a consolatory gift, but did not succeed in claiming an equitable share of her contribution to the growth of the Plaintiff's estate.
- 121 1983 (1) SA 1006 (A) 1025F-G.
- 122 87E.
- 123 See *Ismail v Ismail supra* 1024D-E; 1024E-1025B.
- 124 1020B-G.

In the event the judge effectively "redefined" public policy and the *boni mores* to bring them in line with the values enshrined in the new Constitution.¹²⁵ He held that, under the new Constitution it could not be said that a Muslim union could be regarded as *contra bonos mores*, not even in the wider sense of the phrase.¹²⁶

This approach was endorsed¹²⁷ by the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accident Fund*.¹²⁸ It was held that a new ethos existed which differed substantially from the ethos which had informed the determination of the *boni mores* of the community when the cases holding that "potentially polygamous" marriages were legally invalid were decided.¹²⁹

The facts of this case are that the appellant instituted an action in the court *a quo* against the respondent (the Motor Vehicle Accident Fund) for the payment of damages suffered by her as a result of the death of her Islamic husband in a motor vehicle accident. The deceased and the appellant had been married according to Islamic law, but the marriage was not registered as a civil marriage under the provisions of the Marriage Act of 1961. The appellant lodged a claim against the respondent for compensation for loss of support as a result of the death of her husband. The respondent did not object to the claim made on behalf of the children but nevertheless repudiated the appellant's own claim for loss of support. The court *a quo* decided that the respondent was not legally liable to compensate the appellant for the loss of support of her deceased husband to whom she had been married by Islamic rites since the duty to support was a contractual consequence and not an *ex lege* consequence of the marriage, seeing that the union between them had not enjoyed the status of a marriage.

125 He did, however, stress (at 92C) that what he had said did not necessarily apply to contractual terms which were agreed to in the context of a marriage that was actually, as opposed to merely potentially, polygamous.

126 93I.

127 In par 22 reference is made with approval to *Ryland v Edros*.

128 1997 (12) BCLR 1716 (D) 1726C-E.

129 Par 21-23.

The Supreme Court of Appeal asked whether or not the appellant's legal right to support from the deceased during the subsistence of the marriage was a right which deserved recognition and protection by the law for the purposes of the dependant's action. It was held that the deceased had in fact had a contractual duty to support the appellant in terms of the Islamic marriage contract and that it was a legally enforceable duty.¹³⁰ It was held that:

In my view, it does, if regard is had to the fact that at the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a *de facto* monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'. The insistence that the duty of support which such a serious *de facto* monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993.¹³¹

It was therefore held¹³² that the *boni mores* which existed at the time when the cause of action arose supported an approach which gave the duty of support following a *de facto* marriage in terms of Islamic law the same protection under common law¹³³ for the purposes of the

130 Par 20.

131 It is interesting to note that the cause of action in this case arose before the promulgation of the interim Constitution. However, in par 23 Mahomed AJ specifically extended the "new ethos of tolerance" on which the *boni mores* are founded, to the period before the interim Constitution.

132 Par 23.

133 The judge also made the significant remark in par 23: "This important shift in the *boni mores* of the community must also manifest itself in a corresponding evolution in the relevant parameters of application in this area. 'The common law is not to be trapped within the limitations of the past.' If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to
(continued...)

dependant's action as would be accorded to a monogamous marriage solemnised in terms of the Christian faith.¹³⁴

The judge expressly left open the question of whether parties to unions, which were in fact polygynous, would fail in a dependant's action. He foreshadowed possible conflict between equality and religious freedom in this respect when he observed:¹³⁵

Arguments arising from the relationship between the values of equality and religious freedom ... might influence the proper resolution of that issue.

One can thus conclude that, although no legislation in terms of section 15(3)(a)(i) has been passed, marriage contracts concluded under a system of religious law which permits polygyny but which are, in fact, monogamous, are no longer branded as *contra bonos mores* by South African law. As stated by Mahomed AJ in the *Amod* case above, this change was brought about by "the new ethos of tolerance, pluralism and religious freedom" in the Constitution.

5.3.3 Legislative reform in the wake of the Constitution

Since the interim Constitution came into operation, there has been some legislative reform in this area of the law. Since the commencement of section 1(2) of the Births and Deaths Registration Act,¹³⁶ African customary marriages and marriages concluded according to religious rites are considered to be "marriages" for purposes of this Act. Children born from these marriages are therefore no longer illegitimate and women in such marriages may now assume their husbands' surnames or add it to theirs. Spouses in African customary and

133 (...continued)
accommodate changing values and new needs."

134 It was not held that the marriage entered into had actually been a valid marriage; but this was not the question. The questions, in the context of the action of the dependant, were whether the deceased had a duty to support the dependant, whether the duty arose from a solemn marriage and whether the duty deserved recognition and protection.

135 Par 24.

136 51 of 1992. The section was inserted by the *Births and Deaths Registration Amendment Act* 40 of 1996 which came into operation on 5 September 1996.

religious marriages are also included in the protection afforded by the Prevention of Family Violence Act.¹³⁷

Section 5A of the Divorce Amendment Act,¹³⁸ however, calls for comment. It provides:

If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the precepts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such precepts or unless a barrier to the remarriage of the spouse concerned is removed the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.

Mahomed¹³⁹ claims that:

The Divorce Amendment Act is ... geared toward creating a harmonious co-existence between our secular laws and various religious and cultural affiliations. With this move, our legislature has taken religious freedom, and individual human rights to new heights...

... the court is effectively empowered *a fortiori* to impose equitable and democratic values upon social relationships

.... [the Act] ushers in a new era in the relationship between our legal system and diverse religions ... and it poses a direct challenge to the exclusivity and internal independence of religious institutions such as the Church, Islamic tribunals and Jewish bodies regulating marital affairs. In short, it places church-state relations on a new plane of justiciability regulated by common standards and democratic values.

137 133 of 1993.

138 95 of 1996.

139 1997 DR 49.

Barker¹⁴⁰ has expressed criticism of these claims. One could agree with him that the effect of this section is indeed not as claimed by Mahomed. If it did have that effect, it would in any event be challengeable under the freedom of religion provisions. Section 5A is concerned with the precepts of religions which preclude a woman from obtaining a divorce from her husband¹⁴¹ and which would have the effect that, should a civil court grant a divorce, she would be divorced in terms of the law of the land, but remain married according to her religious law. However, as Barker¹⁴² points out:

By investing the courts with the power to refuse or grant a decree of divorce in circumstances where, prior to the enactment of the Act, it would in law have been obliged to grant it, the Act gives statutory recognition to those very inequitable and patriarchal precepts. It does so by enacting that such precepts are to be satisfied before it will grant the desired decree.

Barker points out, with reference to Project 76 and Working Paper 45 of the South African Law Commission which dealt with Jewish divorces in 1992, that the Act is a compromise in an attempt to solve a partly insoluble problem. The fact is that, for doctrinal reasons, the traditional religious precepts remain unalterable.

This amendment to the Divorce Act is an indication of the difficulties involved in attempting to draft and implement an Islamic personal and family law statute in South Africa.

6. Conclusion

It was argued in Chapter 2 that freedom of conscience, free exercise of religion, religious pluralism, equality and separationism were the essential rights and freedoms of religion and

140 1998 *DR* 55-56.

141 In Jewish law an *Aqunah* is a wife who has been secularly divorced but remains bound to her husband in terms of Jewish law, until he delivers a "get" to her. A get is a letter of divorce which only the husband can deliver. In Islamic law, the husband has the right to terminate the marriage unilaterally by simply issuing three *talaaqi*. The wife can only obtain a divorce if she can satisfy the *Moulana* that the husband has been guilty of misconduct.

142 Barker 1998 *DR* 56.

that adequate protection of religious freedom would include these basic concepts. In this chapter, the religious rights of freedom of conscience, free exercise of religion and religious pluralism were assessed under the "freedom" dimension.

Before the specific rights and freedoms of religion were discussed, the difficulty of defining "religion" in the constitutional context was demonstrated. It was pointed out that, in the South African constitutional context, different words were used to protect religion, belief and conscience respectively and that "religion" was therefore not to be defined so broadly as to include all beliefs whatsoever. It was proposed that the Swidler definition of religion be accepted which defines "religion" as having a code, a creed, a cult, a community structure and as being based on a belief in a Transcendent. The freedom to have atheistic, agnostic or other beliefs would be protected by the freedom to belief, conscience, thought or opinion.

It was also shown that acceptance of this definition would imply that the reference to religion in sections 15(2) and 31 be given a corresponding meaning. In other words, the freedom to manifest "religious" beliefs in section 15(2) and 31 would be limited to the protection of religious acts in terms of this (limited) definition of religion. Other expressions of beliefs which are not religious would be protected by the freedom of expression.

The religious rights provisions contained in sections 9, 15 and 31 of the Constitution were then considered with a view to ascertaining whether the essential rights and freedoms of religion were indeed constitutionally protected. The relevant religious rights provisions in the South African Constitution were subsequently analysed in order to reach a more comprehensive understanding of the meaning and role of the essential rights of religion in South Africa. In thus ascertaining what adequate protection of religious freedom in the South African implies, we looked briefly at the protection of some of these essential rights in other countries and in current international human rights instruments.¹⁴³

The first religious right, freedom of conscience, is protected by section 15(1) of the Constitution. Its core meaning is that every person has the right to follow the dictates of his

143 S 39(1) of the Constitution provides that "When interpreting the Bill of Rights, a court, tribunal or forum - ... (b), must consider international law; and (c) may consider foreign law."

or her own conscience in matters of religion. It was argued that, in a modern constitutional context, this implied that every person be accorded the right to adopt a religious belief of his or her choice and that religious groups be free to associate and organise themselves. It also means that there should be no discrimination on religious grounds and that people should not be subjected to laws which they could not, in good conscience, obey.

It was argued that free exercise of religion was also protected by the Constitution. Although section 15(1) seemingly protects only the internal freedom to have a religion or belief, religious rights would be largely meaningless unless the protection extends to the manifestation of religious beliefs as well. It was therefore argued, with reference to the international understanding of religious rights, that the freedom of "conscience, religion, thought, belief and opinion" in section 15(1) included protection of the manifestation of religious beliefs. This interpretation is sustained by sections 15(2), 16, 18, 29 and 31, all of which protect different manifestations of religious beliefs. Free exercise of religion entails, more particularly, the right of individuals and groups to manifest their religious beliefs in worship, teaching, practice and observance thereof.

The right to establish educational institutions based on a common religion is a free exercise right which is explicitly protected by section 29(3) of the Constitution (section 32 of the interim Constitution). This right has, however, been interpreted by the Constitutional Court in a liberal, freedom-oriented manner and not as an entitlement imposing any positive obligations on the state. The conclusion is that the section is not unduly restrictive of the right to free exercise of religion in that it does not preclude state subsidies of such educational institutions. The hope was expressed, however, that the state would eventually adopt an approach of more actively promoting and fostering religious diversity.

Religious pluralism is also protected by the Constitution. Section 15(1) protects the right of "everyone" to freedom of religion, conscience and belief. It was argued that "everyone" in section 15(1) should be interpreted to include religious groups. Section 31 protects the rights of persons belonging to religious communities to practise their religion and to form, join and maintain religious associations. Although this right has also been framed in a liberal manner it cannot be stated that it does not protect the principle of religious pluralism. It was, however,

argued that the approach of the Constitutional Court to minority rights (albeit in the context of the right to education) and which distinguished between dominant and nondominant groups, was unduly restrictive of this principle. In accordance with the principle of religious pluralism, section 15(3) also provides that legislation recognising marriages contracted under a system of religious law or systems of religious personal and family law would not be unconstitutional. It was demonstrated that in a number of cases, marriage contracts entered into in accordance with the religious law of Islam, which were *de facto* monogamous, were recognised by the courts for various purposes. This was, however, not done on the basis of section 15(3) but on the basis of religious freedom in general and the values enshrined in the Constitution. It was further argued that legislation envisaged in section 15(3) would be extremely difficult to formulate.

CHAPTER 6

ASSESSMENT OF THE SEPARATION OF STATE AND RELIGION AND OF CHURCH AND STATE IN THE SOUTH AFRICAN CONSTITUTION

1. Introduction

This chapter will investigate whether the final Constitution protects the essential principles of the separation of state and religion, the equality of religions and the institutional separation of church and state and how these principles, as standards, should be interpreted and implemented in the South African constitutional context to ensure adequate protection of religious rights and freedoms.

It was demonstrated in chapter 2 that the state could play a number of different roles in respect of religion. At the one extreme the state could be hostile to the idea of religion by not granting religious individuals or groups a right against interference with the free exercise of religion. The state could also be strictly secular by granting a right against interference with the free practice of religion, but by not allowing any meaningful support to religion. The state could also be semi-secular by allowing some state support to religion, usually subject to certain conditions. The last possibility is that of theocracy, where the state directly and indirectly supports one particular religion, to the exclusion of others. That could, but does not necessarily, entail interference in respect of religious convictions.¹

1 As explained by Heyns and Brand 2000 *Emory Int'l L Rev* 705-706. Van der Vyver *Introduction* xx is guided by four distinct dogmatic presuppositions reflected in the Constitutions of the world: "As extreme positions, (1) the American notion of the impermeable wall between state and church, and (2) the Islamic Shari'a proclaiming the identity of law and religion; and somewhere in between, (3) the scholastic adage of subsidiarity alongside (4) the typical Calvinistic doctrine of sphere sovereignty."

Durham² describes at least eight approaches by the State in respect of religion: (1) absolute theocracies, such as is possible in Muslim theory, where religion is the central feature of political life; (2) established churches, where one particular religion receives preferential treatment; (3) endorsed churches, where, without formally affirming that one particular church is the official church of the nation, the state acknowledges that one particular church has a specific place in the country's traditions; (4) cooperationist regimes, where the state grants no special status to dominant churches but continues to cooperate closely with churches in a variety of ways; (5) accommodationist regimes, where, although the state may insist on separation of church and state, a benevolent neutrality is retained towards religion; (6) separationist regimes, which insist on a more rigid separation of church and state; (7) inadvertent insensitivity, in the case of legislative or bureaucratic insensitivity to religious needs; and (8) hostility and overt persecution where religious freedom (of especially smaller religious groups) is significantly impaired by various forms of persecution.³

There is no single universal formula for reconciling religious rights and state authority⁴ and within any of the above-mentioned categories, a range of possibilities with different implications for religious freedom exist.⁵ Whilst it is evident that there are some configurations of state and religion which are more conducive to ensuring religious freedom than others, it

2 *Perspectives* 19-23.

3 Also see Van Dyk *Human Rights, Ethnicity and Discrimination* (Westport CT, 1985) 53-77 as quoted by Van der Vyver in *Introduction* xix who distinguishes between systems where religious communities are afforded representation in government, those where the government supports religious activities, theocracies and systems that recognise the autonomy of religious groups. Mojzes *Religious Human Rights in Post-Communist Balkan Countries* 263-284 distinguishes (1) ecclesiastical absolutism; (2) religious toleration; (3) secular absolutism; and (4) pluralistic liberty. Shelton and Kiss *Draft Model Law on Freedom of Religion* 559-592 classify the relationship between state and religion in terms of (1) state control over religion; (2) state neutrality toward religion; (3) theocratic political perceptions; (4) state hostility toward religion; and (5) division of authority between state and church by religious institutions.

4 See Noonan *Tensions and the Ideals* 593-605.

5 In this regard Justice Frankfurter in *People of the State of Illinois ex rel McCollum v Board of Education of School District No 71, Champaign County, Illinois, et al* 333 US 203 (1948) at 216 remarked: "A totally different situation elsewhere... only serves to illustrate that free societies are not cast in one mould ... Different institutions evolve from different historic circumstances."

is apparent that religious freedom is not necessarily directly parallel to the degree of separation between state and religion which exists in a country. Total religious freedom does not necessarily occur in the case of complete separation between state and religion, nor is religious freedom necessarily totally absent in the case of some identification of the state with religion or the establishment of religion by law.

After assessing religious freedom in what he calls "differing types of church-state⁶ systems", Durham⁷ provides a helpful perspective in this regard by reconceptualising the "church-state identification continuum" as a loop that correlates with the religious freedom continuum.⁸

At the "positive identification" end of the spectrum of religious freedom one finds absolute theocracies. Established churches, endorsed churches and cooperationist regimes constitute "some identification" of state and religion in varying degrees. Accommodationist regimes and separationist regimes constitute separation of state and religion "in varying degrees". And at the negative side of the spectrum one finds "total separation" of state and religion in cases of inadvertent insensitivity, hostility and overt persecution of religion.

In other words, his model reflects that both strongly positive and strongly negative identification of state and religion correlate with low levels of religious freedom, because in both cases the state adopts a sharply defined attitude towards one or more religions, leaving little room for dissenting views. One can thus not simply assume that a more rigid separation

6 Durham uses the term "church-state" to also include the relationship between "state and religion". It has to be kept in mind that a distinction is drawn in this thesis between the issues of "church and state" and "state and religion". See in this regard the discussion in ch 1.

7 See *Perspectives* 15-25. The author states that "the degree of religious liberty in a particular society can be assessed along two dimensions - one involving the degree to which state action burdens religious belief and conduct and another involving the degree of identification between governmental and religious institutions." In the United States these dimensions are known as the "free exercise" and "establishment" aspects of religious liberty owing to the formulation of the First Amendment of the US Constitution. He states that "for comparative purposes it is useful to think more broadly in terms of varying degrees of religious freedom and church-state identification".

8 See the graphic representation at Durham *Perspectives* 18.

of state and religion will necessarily enhance religious freedom.⁹ As Durham says, "At some point aggressive separationism becomes hostility toward religion." Total religious freedom on Durham's "loop" thus lies somewhere between "some identification of church and state" and "separation of church and state".

It should thus be kept in mind that religious freedom is not necessarily directly parallel to the degree of separation between state and religion which exists in a country. Total religious freedom does not necessarily occur in the case of complete separation between state and religion, and neither is religious freedom necessarily totally absent in the case of the state supporting religion to some extent.

2. Separation of state and religion¹⁰ in the South African Constitution

2.1 Absence of an establishment clause in the South African Constitution

In the United States the central ideas of official enforcement of religious toleration, the equality of persons and religions before the law, and the separation of religious and government institutions¹¹ were put into place with the enactment of their federal religious

9 This is illustrated by, for example, the finding that the institution of an established church (the Lutheran Church in Sweden) does not violate the religion clauses of the European Convention of Human Rights. See Gunn *Adjudicating Rights of Conscience under the European Convention on Human Rights* 305-330.

10 As explained in ch 1, the terms "state and religion" (or "law and religion") and "church and state" are accorded different meanings in this thesis. The term "church and state" is used for the institutions of church and state respectively and the interaction between them. The effect of the South African constitution on the relationship between church and state will be examined later in this chapter. This paragraph is concerned with "state and religion" or "law and religion" which term is used as referring to instances where the state via its conduct or its laws plays a role in religious issues.

11 In *Lemon v Kurtzman* 403 US 602 (1971), the *locus classicus* of "establishment" jurisprudence in the United States, the court held that to satisfy the establishment clause, a law must: (a) have a secular legislative purpose; (b) have a principal or primary effect which neither inhibits nor advances religion; and (c) must not foster an excessive government entanglement with religion. The interpretation of the "establishment clause" of the First Amendment of the American Constitution clearly established a strictly secular state in the United States.

guarantees.¹² The importance of the "establishment clause"¹³ and the separation of "church and state" in the American context can in part be attributed to historical reasons.¹⁴ Witte¹⁵ points out, however, that in the minds of the framers of the First Amendment to the American Constitution, the principle of the separation of church and state mandated neither the separation of religion and politics nor the secularisation of civil society. He states that none of the framers, save for the most radical separationists, intended to preclude religion altogether from the public square or the political process. He emphasises that the principle of separationism was directed to the institutions of church and state, not to religion and culture. The principles of pluralism, equality and separationism served to protect religious bodies, not only from each other but also from the state. Yet it was an open question whether such principles precluded state support of religion altogether. Some evangelical and enlightenment thinkers viewed these principles as an absolute bar to state support of religious beliefs, whilst Puritan and republican writers regarded them merely as a prohibition against *preferential* state support of religion but that general support for religion was licit, and indeed necessary for good governance. However, United States jurisprudence on the establishment clause has developed to a point where the even-handed treatment of religions has often come to mean the "non-treatment" of any religious matters by the state.¹⁶

Although the Canadian Charter of Rights and Freedoms¹⁷ does not contain an establishment

12 See Underkuffler-Freund 1997 *SAPL* 35.

13 The relevant part of the First Amendment of the US Constitution (made applicable to the states by the Fourteenth Amendment) reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof".

14 Witte and Green *American Constitutional Experiment* analyse the American "experiment" of applying constitutional principles for the regulation of religious freedom and depict the theological forces which moulded the experiment and culminated in the adage of separation of "church and state". This separation of "church and state" as currently applied by the United States Supreme Court seemingly inspires far more criticism than praise.

15 Witte and Green *American Constitutional Experiment* 525.

16 Religious observances at state educational institutions are, for example, prohibited. See *Engel v Vitale* 370 US 421 (1962); *Wallace, Governor of Alabama v Jaffree* 472 US 38 (1985).

17 S 2(a) of the Canadian Charter of Rights and Freedoms reads: "Everyone has the following rights and
(continued...)"

clause, the Canadian court has generally followed the separation principle. This has resulted in, for example, the removal of Bibles and prayers from schools and the restriction of religious observances in public institutions.

In Germany,¹⁸ in contrast with the position in the United States, the notion of religious freedom does not preclude the state from financing faculties of theology and religious education, recognising religious institutions as public law corporations, levying church taxes, sanctioning religious holidays, or providing for religious care in state prisons and in the military.¹⁹ Thus, although there is an institutional separation of church and state,²⁰ there is not a complete separation of state and religion.²¹

In the South African constitutional context, the drafters of the Constitution consciously avoided the strict separation ("disestablishment") of state and religion in drafting the religion clauses.²² The "wall of separation" model, which has been accepted in the United States, is not endorsed by the South African Constitution.²³ The text of the final South African Constitution

17 (...continued)
freedoms: (a) Freedom of conscience and religion."

18 See s 4(1) and 4 (2) of the German Constitution .

19 See in general Heckel *The impact of religious rules on public life in Germany* 191-204.

20 S 137 of the Weimar Constitution, which forms part of the German Constitution as a schedule, provides that there is no state church.

21 See, however, the decision in the Crucifix matter (BverfGE 93, 1 (1995)) where the Court expected more neutrality in religious matters.

22 Du Plessis *Religious Human Rights in South Africa* 457.

23 In this regard Van Dijkhorst J pointed out in *Wittmann v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T) 440 that: "In respect of the interpretation of the clause in our interim Constitution dealing with religion, the constitutional law of these countries is singularly unhelpful and may lead the unwary astray. I say this without intending disrespect. The plain fact is that their constitutional development through the courts is, as ours will also be, guided by the particular wording of the clause interpreted by them. As I shall demonstrate the clauses dealing with religion in American, Canadian, German and other constitutions differ materially from ours. Our religious clause is a unique vase carefully fashioned from South African clay. Yet there is this benefit to be gained from reference to the constitutional law of those countries pertaining to religion: it illustrates the problems which were
(continued...)

in fact creates room for the state to take positive measures to ensure an even-handed accommodation of religious concerns.²⁴ For instance, the Constitution,²⁵ expressly provides for the possibility that religious observances be conducted at state or state-aided institutions in certain circumstances. It is, however, clear that a law which required everyone to adopt some religion would be as unconstitutional as a law which forbade any religious adherence.²⁶

In other words, the South African Constitution does not prohibit state support of religion in express or implied terms and it contains no declaration of secularism. Rather, it recognises and endorses the important role played by religion in society.²⁷ In this regard, and after discussing the establishment clause in the United States,²⁸ Van Dijkhorst J commented in the *Wittmann* case:²⁹

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- 23 (...continued)
known to exist in this context with reference to various formulations of religious freedom principles. The conclusion is then inescapable that our different formulation seeks to attain a different end." Also see Dickson CJ in *Big M Drug Mart Ltd* 18 DLR (4th) 321, 356 who stated that he felt that recourse to the categories of American jurisprudence was not particularly helpful in the Canadian context since the Canadian Charter (like the South African Constitution) had no establishment clause.
- 24 The provisions of s 7(2) of the Constitution moreover provide that the state must *inter alia* promote the rights in the Bill of Rights.
- 25 S 15(2).
- 26 In the United States case of *Torcaso v Watkins* 367 US 488, 81 Sct 1680 (1961), a public employment oath requiring a declaration of a belief in God was struck down for violating religious liberty in terms of the free exercise clause. The court held that the provision imposed an invalid test for public office which violated freedom of belief and religion.
- 27 Compare in this regard the following remark of Sachs J in *S v Lawrence, S v Negal; S v Solberg* 1997 (2) SACR 540 (CC) par 162 : "... a reasonable South African is a person of common sense immersed in the cultural realities of our country and aware of the amplitude and nuanced nature of our Constitution. He or she neither attempts relentlessly to purge public life of even the faintest association with religion for fear of otherwise descending the slippery slope to theocracy, nor, at the other extreme, regards the religiously-based practices of the past to be as natural and non-sectarian as the air one breathes simply because of their widespread acceptance."
- 28 The judge mentioned (447) that the provisions of the German constitutional law relating to religion stand much nearer to ours than those of the United States or Canada.
- 29 446.

I have dealt with the United States constitutional law on their religious clause perhaps too extensively in view of my conclusion that it cannot be followed. My reason is that I thereby strive to demonstrate what the options were which confronted the drafters of our Constitution. Instead of taking the American option they unequivocally turned their backs on it.

A comparison of the text of our religious freedom clause with the 'three main evils' (see *Lemon v Kurtzman (supra)*) against which the establishment clause in the United States Constitution was intended to afford protection, immediately evidences that what was there regarded as an evil is not so regarded in our Constitution, in fact it is accommodated or actively promoted. Religious observances in State institutions are permitted and regulated by rules established by the appropriate authority. This entails the use of State facilities (schools) and State personnel (teachers) for religious purposes during time for which the State pays. The practice of these religious observances is regulated by the State. All of this would in the United States flaunt the three evils of *Lemon v Kurtzman (supra)* as it would amount to State sponsorship, financial support and active involvement (entanglement) of the State in religion.

It is clear therefore that the drafters of our Constitution steered our constitutional ship on a religious course diametrically opposed to that of the United States. This is not surprising. Our country has a long history of religious observance in public schools of all sectors of our population. Ours is not a society of atheists or agnostics. Those who profess their belief in the Supreme being are an overwhelming majority. I doubt if any settlement could have been possible at the constitutional negotiations had the abolition of all religious observances in State schools and State-aided schools been on the table.

South Africa could thus be described as a semisecular state or as an "accommodationist regime" in Durham's terminology:³⁰

A regime may insist on separation of church and state, yet retain a posture of benevolent neutrality toward religion. Accommodationism might be thought of as cooperationism without the provision of any direct financial subsidies to religious or religious education. An accommodationist regime would have no qualms about recognising the importance of religion as part of national or local culture, accommodating religious symbols in public settings, allowing tax, dietary, holiday,

Sabbath, and other kinds of exemptions and so forth. Many scholars in the United States argue that the United States religion clause should be construed to allow a more accommodationist approach to religious liberty. Note that the growth of the state intensifies the need for accommodation. As state influence becomes more pervasive and regulatory burdens expand, refusal to exempt or accommodate shades into hostility.

The absence of a United States style "establishment clause" in the South African Constitution does not imply that the state may interfere freely in religious matters or freely support any or all religious practices. It is clear that the Constitution provides for some "separation" of state and religion or "disestablishment" in the sense that the state has certain constitutional obligations in respect of religion.³¹ In terms of the South African Constitution, state support of religion is subject to:

- (i) the principle of the free exercise of religion, as protected by section 15(1) of the Constitution, which means that state support of religion may not constitute undue interference in the free exercise of religion;
- (ii) the principles in section 15(2) of the Constitution if the activity can be defined as a "religious observance" at a state or state-aided institution; and
- (iii) the principle of equality as protected by the equality clause (section 9).

The principle of free exercise of religion has already been dealt with in chapter 5. The provisions of section 15(2) and section 9 will be discussed in this chapter.

31 In this regard one can agree with Malherbe 1998 *TSAR* 687 who states: "Vir die onderhawige doeleindes word daarom aan die hand gedoen dat in die lig van die feit dat die sogenaamde 'establishment clause' vermoedelik bloot betrekking het op die staat se verpligtinge ten opsigte van die reg op godsdiensvryheid, die reg in daardie sin per definisie altyd 'n 'establishment clause' insluit. Die vraag is dus nie of die reg 'n 'establishment clause' bevat, al dan nie, maar (a) wat die staat en ander gebondenes se verpligtinge ten opsigte van die reg presies behels en (b) wanneer die staat regmatig met die uitoefening van die reg mag inmeng."

2.2 Religious observances at state or state-aided institutions

That a degree of endorsement of religion is allowed by the South African Constitution is affirmed by section 15(2) which creates room within which religious activity can be conducted at state or state-aided institutions such as schools, prisons and state hospitals subject, though, to three conditions. Section 15(2)³² provides:

- (2) Religious observances may be conducted at state or state-aided institutions, provided that -
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.

This provision makes it possible³³ for the state to acknowledge and accommodate religious sentiments and practices, without subscribing to them. Du Plessis³⁴ concludes:

[t]he Constitution, in other words, allows the state's 'proactive tolerance' of religious practices in public and semi-public institutions, and safeguards action taken to achieve this objective against constitutional challenges alleging religious bias. At the same time, section 15(2) seeks to counter conduct that could further religious intolerance by laying down the very conditions referred to.

It is clear that section 15(2) applies only if a specific activity can be defined as a "religious observance" and is conducted at a "state or state-aided institution". It was argued in chapter 5 that the phrase "religious observance" in section 15(2) would follow the interpretation of the word "religion" in section 15(1) and that it was probably confined to acts of religious character.

32 S 14(2) in the interim Constitution.

33 As is evidenced by the word "may" in the introductory sentence to s 15(2) (religious observances "may be conducted").

34 2001 *BYU-LR* 119.

Section 15(2) was interpreted in the case of *Wittmann v Deutscher Schulverein, Pretoria and others*³⁵ where the court had to decide, amongst other things, whether the German School was acting in conflict with the Constitution by enforcing attendance at its religious instruction classes. Van Dijkhorst J stated that "religious observance" in section 14(2) of the interim Constitution and in the similarly worded section 15(2) of the final Constitution referred to an act of religious character, a rite, but that religious education was not a "religious observance".³⁶ He pointed out that, whereas the interim Constitution and the final Constitution provided for "religious observances", both were silent about religious instruction in state or state-aided institutions. He therefore held that neither a Bible period nor the study of the Koran would be forbidden. He added:³⁷

Of course, the right of freedom of religion (in the case of religious minorities) and the right to freedom of thought, belief and opinion (in the case of atheists and agnostics) entails that attendance may not be enforced. It must be voluntary. The right of non-attendance is expressly recognised in ss 14(2) of the interim Constitution and 15(2) of the Constitution. Attendance must be 'free and voluntary'. There may be no coercion, neither by rules nor by action on the part of the authorities.

It was held, therefore, that neither the morning assembly and opening prayer session nor the religious instruction (education) classes at the German school would be unconstitutional even if they were of a confessional nature and that this would hold true whether the German school was a State-aided institution or not. This is correct, obviously provided that attendance at such (confessional) religious observances is free and voluntary if the school is a state or state-aided school.

With regard to the question of whether the association by its constitution could enforce attendance at the morning assembly and religious instruction classes,³⁸ the judge rejected the

35 1998 (4) SA 423 (T).

36 438.

37 449.

38 It was assumed that the plaintiff's allegations were correct and that the subject "religious instruction" (continued...)

argument that the German school was not a state-aided institution. However, he decided that the interim Constitution had only vertical application³⁹ and that it therefore only bound "all legislative and executive organs of state" and not private citizens inter se. The argument that the German school was an organ of state and therefore subject to the interim Constitution was also rejected. The judge held that, in terms of the control test enunciated in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*,⁴⁰ the German school was not an organ of State and therefore not bound to the provisions of section 14(2).

If the drafters of the interim Constitution had intended to make rules for religious observances at organs of state, they would have used the term "organ of state" in section 14. Instead it was provided that certain rules would apply to religious observances at "state-aided" institutions. If the control test is accepted as the test for an organ of state,⁴¹ a situation could arise (under the interim Constitution), as it did in this case, where a state-aided institution is not an organ of state and therefore, according to section 7(1), not subject to the Constitution, specifically to section 14(2) which applies to state-aided institutions. This is clearly an illogical result. It is submitted that section 14(2) should have been applied to "state-aided institutions", that is, institutions which receive state aid whether they are organs of state or not. Religious observances at organs of state would in any event have to be conducted on an equitable basis on the strength of other provisions of the Constitution, such as the equality provision.

It is submitted that the German school should have been held to be bound to the provisions of section 14(2). The real question seems to have been whether the religious instruction classes

38 (...continued)
was of a confessional nature. The judge later remarked at 450 that, should the assumption be invalid, the question falls away as any school may enforce attendance at its secular educational activities.

39 As decided by the Constitutional Court in *Du Plessis and others v De Klerk and Another* 1996 (3) SA 850 (CC).

40 1996 (3) SA 800 (T) 808-811.

41 The control test is widely accepted, even under the final Constitution, as the test for whether an institution is an organ of state, as will be shown below in ch 7.

or morning assembly was a "religious observance"⁴² in terms of section 14(2)).

As far as the issue of state organs is concerned, the *Wittmann* case was decided under the interim Constitution, in terms of which constitutionally entrenched rights could only in limited circumstances be enforced against nonorgans of state. Section 8(2) of the final Constitution now clearly provides that "a provision of the Bill of Rights binds a natural or juristic person 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". It is therefore doubtful whether the same result will be reached under the 1996 Constitution.⁴³

The judge further stated *obiter* that, even if he were wrong in his interpretation of section 14(2), the waiver of the freedom of religion, for the limited duration of one's membership and within the limits of the institution's constitution, is not contrary to the provisions of the Constitution in the case of private educational institutions. He emphasised that the debate was not whether there could be a waiver of a fundamental right, but whether one could waive the right of abstention from attendance when others exercised their right to abstain. He stated that the right was merely an ancillary right and amounted to no more than (contractually) saying: "I have the right to walk out but (in deference to you) I will not". It was therefore held that even if the German school was a state-aided institution and an organ of State, the right of nonattendance in section 14(2) could validly be waived and the plaintiff had done just that by subjecting herself to the association's constitution and the school's regulations.

The right to abstain from attendance cannot be understood as an "ancillary right". It has been shown in chapter 2 that, from the outset, voluntarism and the right to "exit" inherently formed part of religious rights. The question is in fact whether one could contractually waive a fundamental right. No attempt will be made to answer this question here but it appears that a person may voluntarily decide and agree not to exert or exercise a certain fundamental right.

42 It was argued earlier herein that "observance" only includes religious observances in the normal sense of the word, that is, purely religious exercises and not all acts of religious people.

43 The application issue will be discussed in more detail in chapter 7.

It is submitted that in this case, a learner attending a state-aided educational institution cannot be forced to attend religious observances or religious instruction of a confessional nature. It is an entirely different matter if the religious education is nonconfessional or the educational institution a private institution which receives no aid from the state.

3. Equality of religions

3.1 Introduction

In the South African constitutional context, the central idea is that of equality,⁴⁴ and the guarantee of religious freedom is expressly subject to notions of human dignity, equality, and freedom⁴⁵ as well as judicial enforcement of the same values.⁴⁶ The essential⁴⁷ guarantee of religious equality is protected by section 9(1) of the South African Constitution which provides that everyone is equal before the law and has the right to equal protection by and benefit from the law, and by section 9(3) which prohibits discrimination on the grounds of *inter alia* religion, conscience and belief.⁴⁸

44 Equality is one of the corner stones of the new South African era, as opposed to and in reaction to the apartheid regime which preceded it.

45 S 36(1) of the Constitution.

46 S 39(1) of the Constitution.

47 It was shown in ch 2 that the principle of the juridical equality of religions was already present in the Edict of Milan which *inter alia* stated that "This has been done by us to avoid any appearance of disfavour to any one religion". Witte and Green *American Constitutional Experiment* 524-525 also explain that, in early American jurisprudence, liberty of conscience, free exercise of religion and confessional pluralism were understood to depend for their efficacy on a guarantee of equality of all peaceable religions before the law: "For the state to single out one pious person or one form of faith for either preferential benefits or discriminatory burdens would skew the choice of conscience, encumber the exercise of religion, and upset the natural plurality of faiths."

48 S 9(3) provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

As pointed out by Du Plessis,⁴⁹ the courts have not really had the opportunity (or have declined) to fully explore the safeguarding potential of the constitutional guarantee of religious equality. The tendency so far has been to approach religious rights issues in a freedom-oriented manner or by refraining from classifying the dispute as a religious rights dispute.⁵⁰ This paragraph is specifically concerned with the principle of equality in the South African Constitution which ensures even-handed treatment of diverse religions and of religious groups, communities and institutions with potentially conflicting interests.⁵¹

In the South African context, as explained above, the mere fact that the state in some way supports a particular religious practice would not automatically render it unconstitutional as would be the case in some interpretations of religious freedom in, for example, the United States. However, the equality clause with its implication of even-handed treatment of religions presents its own difficulties. In such a case it could be quite difficult to determine what should be placed on either side of the scales.⁵²

3.2 *S v Lawrence; S v Negal; S v Solberg*

In the case of *S v Lawrence; S v Negal; S v Solberg*⁵³ the Constitutional Court for the first time had the opportunity to consider the protection of freedom of religion under the interim Constitution.⁵⁴ The relevant facts were that three employees (the appellants) of a Seven Eleven

49 2001 *BYU-LR* 112.

50 See the judgment in *Prince v President of the Law Society* 2000 (3) SA 845 (SCA); *Case v Minister of Safety and Security* 1996 (5) BCLR 609 (CC) and *Christian Lawyers Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (T). Also see the commentary of Du Plessis 2001 *BYU-LR* 117-118.

51 See Du Plessis 2001 *BYU-LR* 111 who states that a broadly conceived establishment clause can play a significant role in guaranteeing such treatment and that the equality clause in the South African Constitution arguably caters for such expansively understood establishment concerns.

52 Such cases will probably be decided on the basis of the limitation clause.

53 1997 (2) SACR 540 (CC).

54 It is unfortunate that the full record of the evidence before the court *a quo* was not before the Constitutional Court because the appellants did not follow the proper procedure in bringing their cases
(continued...)

store were convicted of selling wine in contravention of the provisions of the Liquor Act 27 of 1989. Seven Eleven had obtained a grocer's wine licence in terms of this Act which permitted them to sell wine except on "closed days", that is, Sundays, Good Fridays and Christmas Days.⁵⁵ One of the Appellants, Ms Solberg, was convicted of selling wine on a Sunday.⁵⁶

Solberg contended that the prohibition on the sale of wine on Sundays constituted a violation of section 14 of the interim Constitution, which guaranteed freedom of religion, belief and opinion. She argued that the purpose of prohibiting wine sales on closed days was "to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays" that "coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose" and was inconsistent with the freedom of religion of those persons who did not hold such beliefs and did not wish to adhere to them.⁵⁷ Solberg maintained that the closed days had been introduced into the Liquor Act for a religious purpose since all three days were of particular significance to the Christian religion. The issue that came to the fore was thus whether the provisions of the Liquor Act violated religious freedom as embodied in section 14 of the interim Constitution by giving undue preference to Christian values.

It is rather difficult to determine the *ratio* of the case. It was heard by nine judges, and three separate judgements were given: Chaskalson P, supported by Langa DP, Ackerman J and Kriegler J, held that section 14 was not infringed and that the appeal had to be dismissed; Sachs J, supported by Mokgoro J, held that section 14 was infringed but that such infringement was justified and that the appeal had to be dismissed; and, O'Regan J, supported by Goldstone J and Madala J, held that section 14 was infringed and that it was not justified. The appeal was

54 (...continued)
to the Constitutional Court.

55 Only that part of the case which is concerned with the constitutionality of the provisions of the Liquor Act on the basis of religious rights will be considered.

56 In contravention of s 159(a) read with s 2 which contains the definition of a closed day, s 90(1)(a) which deals with the time when table wine may be sold and s 163(1)(a) of the Liquor Act 27 of 1989.

57 Par 85.

thus dismissed by six against three. However, the three separate judgements represent three completely different approaches, and this leaves some doubt as to what constitutes the majority decision. The six justices who agreed that the appeal should be dismissed were divided 4 to 2 with regard to the reasons for their decision. The three justices who held that the appeal should be allowed used essentially the same arguments as the minority (2) in the first group who found that there was an infringement. It thus seems that the justices were divided 5 to 4 in respect of their approaches: in essence the group of four held that equality concerns were not at issue because the appellants did not rely on the equality provision, whereas the group of five held that equality concerns had to be catered for at any rate. However, the five justices were split 3 to 2 in respect of their value judgments: whereas three found the infringement to be unjustifiable, two found it to be justifiable. It therefore appears that the majority decisions are: (a) that there was an infringement of the right to religious freedom (5-4) and (b) that the appeal had to be dismissed (6-3).

There seemed to be agreement that the issue was whether section 15(1) of the Constitution prohibited state support of religion and if so, whether the facts indeed constituted an infringement of religious freedom. In this regard the 5 to 4 division is significant because it reflected a difference of opinion on questions of religious freedom vis-à-vis religious equality, or between "free exercise" and "establishment" concerns.

Chaskalson P, writing on behalf of the four, emphasised that section 14 did not contain an "establishment clause" as in the United States and that principles pertaining to the advancement or inhibition of religion by the state should not be read into section 14. He added that the interim Constitution dealt with unequal treatment and discrimination under section 8 (the equality clause), but that religious equality was not really at issue because Solberg relied solely on the freedom of religion clause in section 14(1) of the interim Constitution and not on section 8, the equality clause, as well. He concluded:⁵⁸

Whatever s 14(2) might mean ... it cannot in my view be elevated to a constitutional principle incorporating by implication a requirement into s 14(1) that the State abstain from action that might advance or inhibit religion.

This justice further remarked:⁵⁹

There may be circumstances in which endorsement of a religion or a religious belief by the State would contravene the 'freedom of religion' provisions of 14. This would be the case if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own religion. The coercion may be direct or indirect, but it must be established to give rise to an infringement of the freedom of religion. It is for the person who alleges that s 14 has been infringed to show that there has been such coercion or constraint.

He therefore remarked⁶⁰ *obiter* that he would have no difficulty in holding that a law which *compels* sabbatical observance of the Christian Sabbath offends against the religious freedom of those who do not hold such beliefs.⁶¹ But, he distinguished the position from the Canadian Lord's Day Act and stated that:

This does not mean that the selection of a Sunday for purposes which are not purely religious and which do not constrain the practice of other religions would be unlawful simply because Sunday is the Christian Sabbath.

He held⁶² that, in South Africa, Sundays have acquired a secular as well as a religious character.⁶³

The effect of this judgment appears to be that state support of a religion is prohibited only to the extent that it constitutes an infringement of the right to freely exercise one's religion. The justice found the connection between the Christian religion and the restriction too tenuous for

59 Par 104.

60 Par 89.

61 In this regard he quoted Dickson CJC in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 at 93, 99: "If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish Any law *purely* religious in purpose, which denies me that right, must surely infringe my religious freedom."

62 Par 95.

63 It is ironic that religious rights have to be protected with reference to their secular purpose.

the infringement to be characterised as an infringement of religious freedom.

By stating that the appellant failed to rely on the equality clause, the justice declined to decide a real issue in the case, namely the equality of different religions. Whether Chaskalson P should have decided the equality issue without it having been raised by the appellants is a difficult question. On the one hand, it could be stated from a litigation point of view that the justice should only decide what is at issue between the parties and that it would be undesirable to make a finding on an issue which has not been raised and without the benefit of hearing full argument on such an issue. Constitutional issues, *par excellence*, should be thoroughly researched and presented. On the other hand, if the facts support an application of legal principles which have not been raised by the parties, it could be argued that a justice hearing the matter should raise such principles *mero motu*. In my view, however, it is undesirable that a justice who raises certain issues *mero motu* should decide on the issue without hearing full argument. The parties should have been asked to supplement their papers and file supplementary heads of argument to present a complete picture to the justices. In any event, this was not done and this question of judicial policy cannot be dealt with in this thesis.

O'Regan J disagreed with the final conclusions of Chaskalson P and Sachs J about the challenge arising from section 14. Whilst acknowledging⁶⁴ that the position under the South African constitution clearly differed from that of the United States on "establishment" and that the absence of an express establishment clause meant that our Constitution did not require a strict separation between religious institutions and the State, O'Regan J stated:⁶⁵

On the other hand, it also seems plain from the provisions of s 14(2) that State endorsement of religious practices is subject to certain qualifications.

Whilst this is true, the judge seemed to argue that a kind of qualified establishment clause should be read into the provisions of section 14(2). It is, however, clear that section 14(2) only applies to religious observances "at state or state-aided institutions". The justice seems to suggest that wherever religion is observed, the State may never be seen to act in contravention

64 Par 118-119.

65 Par 120.

with section 14(2)(a), (b) and (c). This, with respect, does not reflect the true meaning of section 14(2). One can therefore not agree with O'Regan J in so far as she implied that section 14(2) imposes the duty to act even-handedly even in the case of religious observances not held at state or state-aided institutions.⁶⁶ O'Regan J further stated:⁶⁷

The explicit endorsement of one religion over others would not be permitted in our new constitutional order. It would not be permitted, first, because it would result in the indirect coercion that Black J adverted to in *Engel v Vitale*. And secondly because such public endorsement of one religion over another is in itself a threat to the free exercise of religion, particularly in a society in which there is a wide variety of religions.

Although one could agree with this finding, it is unsatisfactory in so far as it implies that a qualified establishment clause can be read into section 14. If there were indeed such a "qualified establishment clause" in any section of the Constitution, it would be in respect of section 9 (section 8 under the interim Constitution), the equality clause. It is therefore submitted that the enquiry in the current case should have been approached under the equality clause. In this regard one can agree with O'Regan J's statement:⁶⁸

We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others ...

I also cannot agree with Chaskalson P when he concludes that because the provisions do not constrain individuals' right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs', there is no infringement of s 14 (at para [97]). In my view, the requirements of the Constitution require more of the Legislature than that it refrain from coercion. It requires in addition that the Legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse

66 O'Regan stated (par 129) that the appellant did not argue that the provision in the Liquor Act was in breach of s 8(2), the right not to be discriminated against unfairly on the grounds of religion. She therefore found it unnecessary to consider whether the section would constitute a breach of that constitutional provision as well.

67 Par 123.

68 Par 123.

religions is a necessary component of freedom of religion.

O'Regan J further found the infringement of religious freedom unjustifiable because it had to be both reasonable and necessary under section 33 (the limitation clause) of the interim Constitution.⁶⁹

If it is assumed that the equality clause was in fact raised by the appellants and that the justice based her latter remarks not on the premise that section 14 prescribes even-handedness in the treatment of diverse religions in all circumstances, but on the premise that such treatment is mandatory under the equality clause, with the additional requirement that the discrimination be unfair, one can agree with the last statement quoted above. However, the enquiry should have been conducted under section 8 (now section 9) of the interim Constitution with the additional requirements imposed by that section.⁷⁰

According to Sachs J⁷¹ there are only two ways in which the determination of Sundays as closed days for the sale of liquor might involve violations of section 14 of the interim Constitution. The first relates to the impact which the State's choice of the Christian Sabbath as a closed day might have on non-Christians liquor sellers. They are placed at a competitive disadvantage because not only does their religion oblige them to cease trading⁷² on a different (their own) Sabbath but they also have to observe the statutory limit on trading on the closed day.⁷³ The second relates to the "radiating symbolic effect" that State endorsement of the

69 O'Regan J was not convinced that the state has established that the secular reasons for the infringement of s 14 were necessary, as required under the interim Constitution. Under the final Constitution the requirement in the limitation clause is merely that the limitation must be reasonable. It could perhaps be that O'Regan J would consequently be more easily persuaded under the present dispensation.

70 See in this regard, for example, the decision of the the Constitutional Court in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC).

71 Par 137.

72 The justice pointed out (par 139) that the challenge based on s 14 came not from believers whose faith was being threatened but from traders whose profits were being limited.

73 The justice in this regard referred to the case of *Braunfeld v Brown* 366 US 599 (1961) at 616 where
(continued...)

Christian faith might have. In this regard the justice referred to the United States case of *Lynch, Mayor of Pawtucket v Donnelly*⁷⁴ where it was stated that "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favoured members of the political community". The justice accepted this metaphor and stated that the question in the present case was whether the prohibition of the sale of liquor on Sundays amounted to such a message of inclusion for some or exclusion for others. He stated:⁷⁵

What is at issue is the authority of the State to impose a particular religious view on the whole of society.

It is, however, problematic to accept authority of the United States, especially on the question of the state endorsement of religion. As pointed out above, the United States and South African constitutional clauses differ fundamentally on this point. In the United States, state endorsement of religion is explicitly prohibited, whilst that is not the case in the South African Constitution.⁷⁶

Sachs J⁷⁷ further pointed out that, although section 14 was the central provision as far as the enquiry was concerned, it by no means exhausted the text of the Constitution with regard to questions of religion, belief and opinion. He concluded:⁷⁸

73 (...continued)
it was found that it was unconstitutional to, in effect, compel an Orthodox Jew to choose between his religious faith and his economic survival.

74 465 US 668, 687 (1984).

75 Par 138.

76 Sachs J seemed to realise this as evidenced by his remarks on the decision of the Constitutional Court in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) par 18-20 where it was held that it was dangerous to simply transplant into our jurisprudence formulae, modes of classification and legal doctrine developed in other countries where constitutional texts and sociohistorical situations were different from ours; and at the same time, take account of problems shared with all humanity.

77 Par 142-147.

78 Par 148.

To my mind, read in the context of all of the above provisions and the Constitution as a whole, s 14 was intended at least to uphold the following principles and values: South Africa is an open and democratic society with a non-sectarian State that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world view. The Constitution, then, is very much about the acknowledgement by the State of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the State does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

In view of the above, Sachs J was not persuaded that the selection of Sunday as a closed day imposed unacceptable commercial disadvantage on non-Christians in a constitutionally significant sense. He also found that the mere fact that the closed day coincided with a day that had its origins in Christian practice did not automatically mean that it continued to serve the sectarian purpose of compelling observance of that day as a Christian day of rest. He was therefore not persuaded that the closed day resulted in state-imposed observance of the Christian Sabbath in any significant way. However, the fact that all the closed days for purposes of selling liquor are religiously based holidays motivated the judge to hold that such a practice did in fact imply an endorsement by the state of the Christian religion in a manner that was problematic in terms of section 14.

As stated above, such a finding on the basis of the equality clause read in conjunction with the religion clause would have been more sound in view of the fact that neither section 14 of the interim Constitution nor section 15 of the final Constitution involves any curtailment of "state endorsement" of religion other than in state or state-aided institutions. In any event, he found the choice of the closed days to be an infringement of section 14 by reason of the inescapable

message it sent out.⁷⁹

In Sachs J's view, the application of the limitation clause (section 33 of the interim Constitution) resolved the matter. He applied the proportionality test in considering whether the intrusion against the right qualified as reasonable, justifiable and necessary in the particular case. He held that, on the one hand, the scope and intensity of the invasion of section 14 rights were relatively slight and, on the other hand, that the dangers of excessive drinking were grave and that the legislative restrictions were therefore both reasonable and necessary.⁸⁰

In summary, as far as the issue of state support of religion or "establishment" is concerned, the following approaches emerged:⁸¹

- (i) Chaskalson P holds that section 15(1) of the Constitution deals with the free exercise of religion only, but that laws sanctioning establishment could possibly be contested under the equal protection and nondiscrimination provisions of section 9;
- (ii) O'Regan J agrees that section 15(1) does not deal with establishment *per se*, but holds that freedom of religion as such requires fairness and even-handedness and could therefore be invoked to strike down religious favouritism; and
- (iii) Sachs J assumes, without proper motivation, that section 15(1) includes proscription of the establishment of religion.

It is clear from the above analysis that it is no easy task to deal with the principle of equality in the context of religion and, at the same time, reconcile it with the clear intention of the Constitution not to erect a wall of separation between the state and religion but to

79 It was remarked *obiter* (par 164) but not decided that if Christmas Day and Good Friday were severed from the rest of the definition of closed days, the identification of Sunday only would not implicate s 14.

80 It has to be kept in mind that in the "final" constitution the limitation clause no longer contains the reference to "necessary" in relation to certain rights.

81 See Van der Vyver 1999 *BYU-LR* 652-656.

accommodate religion. Du Plessis⁸² states that the approach of the five judges in incorporating an equality analysis in the application of section 14 is more conducive to the promotion of religious tolerance than the approach of the four judges who adjudicated the matter purely on free exercise grounds:

The approach of the five is more conducive to the promotion of religious tolerance than that of the four. Putting up with (often esoteric) manifestations of religious beliefs is not *the* hallmark of tolerating religious eccentricities. In political terms, a state's evenhanded treatment of divergent religious convictions and the realisation of the convictions and their effects in societal life probably does more to evidence (and enhance) positive tolerance. The real freedom of religion issue in the Seven Eleven case was how to accommodate certain Christians' objections to the sale of liquor on their holy day against the acquiescence of Christians and non-Christians who do not really mind.

Du Plessis further states that, in addition, the four attempted to purge the Sunday of its religious significance by labelling it as a general day of rest. Such an approach "secularises" the dispute and thereby sidesteps the issue instead of adjudicating a religious rights issue.⁸³

As Epp Buckingham⁸⁴ states, this case is an example of bad cases making confusing law. The applicants used the wrong procedure, which resulted in the case being appealed to the Constitutional Court with an incomplete record and the court basing its decision on the constitutional issues on little or no evidence. Furthermore, the case dealt with commercial interests rather than religious freedom.⁸⁵ As far as the religious rights issues were concerned, no religious groups appeared before the court to make representations on the nature and ambit of religious freedom, and the appellants' failure to raise section 9 as a ground for declaring the relevant sections of the Liquor Act unconstitutional, led to the somewhat artificial

82 Du Plessis 2001 *BYU-LR* 114.

83 Du Plessis 2001 *BYU-LR* 115 refers to this strategy as "secular sanitization". See his discussion of other examples at 115-118.

84 See the case discussion of Epp Buckingham 1999 *Stell LR* 117-125.

85 Sachs J stated (par 154): "As I have said, although the section 14 issue of principle is real, the way it came to us was artificial. The objective was to abolish a commercial restraint, not to secure religious freedom."

interpretation of section 15(1) to also include a proscription of establishment. It is indeed unfortunate that the court chose such a poor case to articulate its views on religious freedom.

3.3 The Preamble to the South African Constitution

The last paragraph of the Preamble to the 1996 Constitution reads as follows:

May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzima fhatutshedza Afurika. Hosi katekisa Afrika.

The argument could be advanced that the Preamble supports theistic religions, and therefore discriminates against nontheistic religions or atheism.⁸⁶

Van der Vyver⁸⁷ describes the legal position with regard to the reference to "Almighty God" in section 2 of the 1983 Constitution⁸⁸ as follows:

It should also be noted that the present constitutional provision amounts to a confession of faith and as such does not constitute a rule of law. It consequently altogether lacks juridical relevance.

The Constitutional Court appears to have departed from this approach when dealing with the preamble of the Western Cape Constitution. In *Ex Parte Speaker of The Western Cape Provincial Legislature: in Re Certification of The Constitution of The Western Cape*⁸⁹ the

86 Heyns and Brand 2000 *Emory Int'l L Rev* 750 state that these references do not amount to unfair discrimination since there are good secular reasons for such discrimination, namely the unifying symbolic value of the phrase "Nkosi sikelel'iAfrika". It is, however, problematic to distinguish between secular and religious reasons. Du Plessis 2001 *BYU-LR* 106 on the other hand states that the multilingual reference to "God" can be seen to favour monotheistic beliefs and that, although it is doubtful whether this is an intentional gesture of intolerance towards polytheists and atheists, it is nonetheless inconsiderate.

87 *Religion* par 236.

88 The Constitution of the Republic of South Africa 110 of 1983.

89 1997 (4) SA 795 (CC) par 28.

question was raised of whether the Preamble to the Western Cape Constitution, which commences with the phrase "In humble submission to Almighty God", was inconsistent with section 15 of the Constitution. The Constitutional Court held:

The invocation of a deity in these prefatory words to the preamble of the WCC [the Western Cape Constitution] has no particular constitutional significance and echoes the peroration to the preamble to the NC [the National Constitution]. It is a time-honoured means of adding solemnity used in many cultures and in a variety of contexts. Thus, in the United States with its explicit Establishment Clause separating Church and State, the use of the national motto ('In God we trust') and the reference to God in the Pledge of Allegiance to the flag have been characterised as 'ceremonial deism'. Such words have no operative constitutional effect nor are they fundamentally hostile to the spirit and objects of the NC. They could also not be used to interpret the provisions of NC 15 restrictively. These words could therefore have no effect on the rights of believers or non-believers. In the circumstances there is no inconsistency between the preamble of the WCC and the NC.

Du Plessis⁹⁰ sharply criticises the finding of the court that the contested phrase is religiously neutral. He states that a more realistic and credible finding would have been that the phrase expresses religious sentiments but that these are consistent with guarantees of religious freedom in the national Constitution. Van der Vyver⁹¹ likewise criticises the decision and states that the degradation of references to "Almighty God" to the "ceremonial" level where it has no meaning is blasphemy in probably all theistic religions of the world.

In so far as the reference to God in the National Constitution is concerned, Van der Vyver maintains:⁹²

The preambular references to "God" ... is offensive to at least Christians, atheists, and persons adhering to a nontheistic religion (such as Buddhism).

Atheists and persons professing a nontheistic religion might well, and with good

90 2001 *BYU- LR* 115.

91 1999 *BYU-LR* 651.

92 1999 *BYU-LR* 650.

cause, regard the reference to "God" in the preamble of the constitution as a sign of religious favoritism that leaves them out in the cold. Christians would find the preambular testimony to "God" objectionable exactly because it seeks to maintain a certain neutrality in regard to all religions; it thus depersonifies the deity and therefore, from the Christian perspective, pays homage to an idol. A constitutional confession of faith in a nondescript god is as good an example as one might wish to find of taking God's name in vain.

In any event, these references (in the National Constitution) form part of the Constitution itself and are therefore not subject to constitutional scrutiny.

4. Separation of church and state

4.1 Introduction

It was shown in chapter 2 that the essential rights and freedoms of religion include (a) freedom of conscience (b) the freedom to practise (exercise) religion or belief in worship, observance, practice and teaching, (c) pluralism, (d) equality and nondiscrimination on the grounds of religion or belief, (e) separation of state and religion and (e) institutional separation of church and state. This paragraph will investigate whether the institutional separation of church and state is protected by the South African Constitution and what the effect of this protection would be on the courts' view of churches and intrareligious disputes.

4.2 Separation of church and state in the Constitution

The Constitution does not explicitly protect the institutional separation of church (or religious communities) and state. It is, however, clear from the discussion in chapter 2 that the separation of church and state or "[f]reedom of the church from control by the state is one important part of modern religious liberty"⁹³ and that this has been the case since, at least, the Middle Ages. It is therefore inconceivable that the constitutional entrenchment of religious

93 Tierney *Religious Rights* 24. The author pointed out that the *libertas ecclesiae* demanded by medieval popes was not freedom of religion for each individual person but the freedom of the church as an institution to direct its own affairs.

rights in the South African Constitution does not include the institutional separation of church and state.⁹⁴

In the matter of *Ryland v Edros*,⁹⁵ the first case where this issue was raised in the new constitutional dispensation, the judge seemed to accept the implicit separation of church and state. He based the separation of church and state on the religious freedom guarantees of section 14(1) of the interim Constitution (section 15(1) of the final Constitution). Farlam J stated:⁹⁶

... it seemed to me that there was a distinct danger that by making rulings on the issues before the court I might unwittingly become entangled in doctrinal matters which it is inappropriate and indeed undesirable, for the reasons given in the American decisions (see, eg *Jones v Wolf* 433 US 595 (1979)), for a judge in a secular court to do in a country which has a constitution which entrenches every person's 'right to freedom of conscience, religion, thought, belief and opinion ...' (as ours does in section 14(1)).

It is true that our Constitution, unlike the Constitution of the United States, does not have an establishment clause but it seems clear that, although the American rule against doctrinal entanglement is to some extent prompted by establishment concerns, the rule also rests on independent free exercise clause grounds as was explained in *United States v Ballard* 322 US 78 (1944) ...

It is submitted, for the historical reasons set out in chapter 2, that the entrenchment of religious freedom in section 15(1) of the Constitution should be read to include the protection of the institutional separation of church and state and thus as precluding interference in the sovereign sphere of churches, religious institutions or religious communities.

94 Institutional separation of church and state was part of South African law even before 1994, as appears from the discussion in ch 3.

95 1997 (1) SA 690 (C) 702G.

96 86C.

Van der Vyver⁹⁷ writes that interference in the sovereign sphere⁹⁸ of religious institutions might be rendered constitutionally tenable by imposing on persons other than the state the obligation to refrain from unfair discrimination as envisaged in section 9(4) of the Constitution. He points out that the interim Constitution excluded the decisions taken and the acts performed by "private" persons and the conduct and internal rules of conduct of institutions other than the state, from constitutional scrutiny.⁹⁹ Section 9(4) of the final Constitution, however, expressly makes the proscription of discrimination applicable to persons other than the state or state organs.¹⁰⁰ This would imply, for example, that a constitutional obligation is imposed on the Roman Catholic Church not to discriminate against women and to ordain them as priests. As Van der Vyver¹⁰¹ puts it, "the mere fact that the Roman Catholic Church might be constrained to justify its internal ruling before a secular tribunal smells of totalitarianism of the worst kind".¹⁰² Such an interpretation of section 9(4) would moreover be contrary to the international understanding of religious freedom.

97 1999 *BYU-LR* 665.

98 According to the doctrine of sphere sovereignty, according to which church and state are "distinct social entities" as described by Van der Vyver, the institutions of church and state are not subject to one another, each has its own internal structures and each has original inherent powers to *inter alia* lay down internal legal rules to which members are subject. See Van der Vyver *Juridiese Funksie and Introduction* xli-xliv for a brief English explanation of the theory. Whilst this is admittedly a Calvinist theory, it remains an acceptable and valuable scientific theory to explain the interaction of church and state, and of state and religion. The theory was specifically developed to explain the legal relationship between church and state. This dissertation is not concerned with any other application of the theory.

99 S 33(4) of the interim Constitution, however, made provision for civil rights legislation to prohibit unfair discrimination by persons and institutions whose conduct escaped the application of its provisions.

100 S 9(4) provides that "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination".

101 1999 *BYU-LR* 667.

102 It could also be argued that, since s 15(2) specifically provides that religious observances at state or state-aided institutions (which need not be state organs) may only be conducted on an *equitable* basis, religious observances at private institutions need not be conducted on an equitable basis and that s 8(2) will not make the constitutional norms applicable to such a case.

Section 9(4) provides that legislation be promulgated to give effect to the right enunciated in the subsection. It might have been the intention of the drafters of the Constitution to leave it up to the political representatives to decide what type of "private" discrimination is unfair and should be proscribed. And, in the event of such legislation infringing upon religious freedom, it could well have been declared to be unconstitutional. That would mean, however, that the subsection was poorly formulated because the right as formulated in section 9(4) is not dependent upon such legislation. As it now stands it simply provides that "*no person* may unfairly discriminate directly or indirectly against *anyone* on one or more grounds in terms of subsection (3)". As already shown, such an interpretation would, in the case of justifying an interference in the sovereign sphere of religious institutions, be in contravention of the historical development of the concept of religious freedom as well as the current international and foreign understanding of it. Such interference would, moreover, not have been possible in the preconstitutional era in South Africa. It is therefore submitted that section 9(4) should not be interpreted to sanction interference in the internal sphere of religious institutions or churches on the grounds of the historical development of religious freedom and as entrenched in section 15(1) and 31(1).¹⁰³ It is submitted, as will be argued in chapter 7, that the provisions of section 9(4) should be read in conjunction with the provisions of section 8(3) and that, in certain cases, the "right"¹⁰⁴ contained in section 9(4) should be limited accordingly.

4.3 The effect of the constitutional entrenchment of religious freedom on the adjudication of religious disputes

4.3.1 Introduction

The issue of doctrinal entanglement was raised for the first time under the interim Constitution in *Ryland v Edros*.¹⁰⁵ The court was asked to make a finding on the terms of a marriage contract which incorporated Muslim family law. The court had to decide *which* Islamic family

103 S 31(2), however, provides that "that right may not be exercised in a manner inconsistent with any provisions of the Bill of Rights".

104 S 9(4) does not contain a right but a prohibition.

105 1997 (1) SA 690 (C) 702G.

law was incorporated in the parties' marriage contract, but not *what* the meaning of any Muslim family law was. Nevertheless, Farlam J *mero motu* raised the point of doctrinal entanglement by asking whether it would be appropriate for a court to pronounce upon matters of religious law. He raised the point with reference to an article by Cachalia¹⁰⁶ which discussed the nature of Islam and Islamic law. The judge stated:¹⁰⁷

Prior to the coming into force of the Constitution our courts 'would not adjudicate upon a doctrinal dispute between two schisms of a sect *unless some proprietary or other legally recognised right was involved*' (*Allen and Others NNO v Gibbs and Others* 1977 (3) SA 212 (SE) at 218A-B). It seemed to me that section 14 of the Constitution might well have changed the position and that the doctrine of doctrinal entanglement may now be part of our law. (My emphasis.)

This statement expresses the same doubt as Klaaren¹⁰⁸ does in his commentary on administrative justice in the Constitution:

A few bodies previously covered [by administrative law] may no longer be. For instance, religious bodies were covered by the rules of administrative justice but may escape coverage as a result of the entrenchment of religious freedom in the Bill of Rights. (My insertion.)

For example, see *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A). Religious bodies have been susceptible to review as other associations by reason of contract. The value of religious freedom introduced by the Interim Constitution section 14 and Final Constitution section 15 may lead to a change in this common law doctrine.¹⁰⁹

It will be argued in this paragraph that the internal rules of church and religious communities or institutions are, as a general rule, not subject to constitutional scrutiny.

106 Cachalia 1993 *THRHR* 400.

107 86C.

108 *Administrative Justice* 25-6.

109 In the footnote to the above mentioned text.

4.3.2 The position of churches in South African law

In South African law, churches are classified as voluntary associations based on contract. In *Theron v Ring van Wellington NG Sendingkerk*¹¹⁰ the Appellate Division held:¹¹¹

Trouens, op hierdie terrein is kerke nog altyd in ons regspraak op dieselfde grondslag as sodanige genootskappe behandel. Dit is 'n benadering wat reeds in 1843 deur die wetgewer aan die Kaap met Ordonnansie 7 gevestig is. Artikel 8 het onder andere bepaal dat die reëls en regulasies van die kerk 'shall be regarded in law in like manner as the rules and regulations of a merely voluntary association, and shall be capable of affecting the persons or properties of such persons only as shall be found in the course of any action or suit before any Competent Court to have subscribed, agreed to, adopted or recognized the said rules and regulations or some of them in such manner as to be bound thereby in virtue of the ordinary legal principle applicable to cases of express or implied contract.

Pienaar¹¹² points out that this was the result of a confusion of Roman Dutch law and English law concepts. In Roman Dutch law a distinction was drawn between a *universitas* (a juristic person) and a *societas* (a mere association of individuals based on contract). A *universitas* originates if it complies with the requirements for such a juristic person, without any other formal requirements.¹¹³ It is nowhere stated that the basis of a *universitas* is contractual. In

110 1976 2 SA 1 (A) 25.

111 See also *Long v Bishop of Cape Town* (1863) 4 Searle 162 176; *De Waal v Van der Horst* 1918 TPD 277, 289; *Bredell v Pienaar* 1922 CPD 578, 581; *Du Plessis v The Synod of the Dutch Reformed Church* 1930 CPD 403, 414; *De Vos v Ringskommissie NG Kerk* 1952 (2) SA 83 (O) 93; *Odendaal v Loggerenberg* 1961 (1) SA 712 (O) 714; *Van Vuuren v Kerkraad Môreilig Gemeente NG Kerk* 1979 (4) SA 548 (O) 557; Bamford *Voluntary Associations* 117-119, 126-131; Caney and Brooks *Associations* 304.

112 Pienaar *Gemeenregtelike Regspersoon* 167-176, 184.

113 The two main requirements for the existence of a common law juristic person was set out in *Webb v Northern Rifles* 1908 TS 462, 465 as follows: "An *universitas personarum* in Roman- Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity to acquire rights and incurring obligations to a great extent as a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of
(continued...)

English law, on the other hand, three kinds of associations are recognised, namely incorporated associations, unincorporated associations and quasi-corporations. Juristic personality, however, has to be granted by statute or royal charter and cannot originate as a result of a contract. There are consequently two kinds of churches in England: first, the Church of England and the Established Church of Scotland, which are both incorporated associations with juristic personality by way of state grants, and secondly, all other churches, which are classified as voluntary associations based on contract because they cannot obtain legal personality.¹¹⁴

On the basis of these principles of English law, the principles of voluntary associations or clubs were applied to churches in the Cape¹¹⁵ and Natal. According to Ordinance 7 of 1843 (Cape) the regulations of the Hervormde kerk had the legal status of rules and regulations of a voluntary association. Although the Transvaal and Free State courts initially applied Roman Dutch law, the principles of English and Roman Dutch law later merged. This led to the anomaly that a "club" or voluntary association based on contract, which in terms of English law could not obtain legal personality, could be seen as a common law juristic person under South African law. It is completely alien to Roman Dutch law that a common law juristic person could be based on contract.¹¹⁶

113 (...continued)
its members, which are acquired or incurred for the body as a whole, and not for the individual members. Among the most important rights appertaining to an universitas is the right to acquire and hold property. It continues to exist though the individual members comprising it change, so long as one member remains in whom the rights of the universitas can vest. It has what is sometimes called perpetual succession."

114 If a church were to be recognised as a juristic person under English law, the position would be the following: "A clergyman is dismissed from his post. What right does he have? If he belongs to the Church of England or the Church of Scotland then an appeal lies to the relevant ecclesiastical courts. These courts are constituted by statute and are as supreme in their own sphere as the civil and criminal courts are in theirs. Clergymen of the non-established church are in a different position. They belong to what are in effect voluntary associations. Dismissal under the disciplinary procedure of the church in question can be scrutinised by the courts to ensure that there has been no procedural irregularity or breach of the rules of natural justice." See Woolman 1986 *LQR* 356-359.

115 See for example *Long v Bishop of Cape Town* 1863 4 Searle 162, 176.

116 See for example *De Waal v Van der Horst* 1918 TPD 277, 289 where the church was described as a
(continued...)

Pienaar¹¹⁷ convincingly argues that a common law juristic person does not have a contractual nature. The legal relationships between the juristic person and the members are governed by the "internal (private) law" (*ius constitutum* and *ius constituendum*) set out in its constitution.¹¹⁸ It would be more suitable to apply the rules of statutory interpretation, if any. An unlawful breach of the internal law would also give rise to a delictual action rather than to a contractual action.¹¹⁹

The relevance of the above in the current context is that the power of judicial review of the decisions of church or religious tribunals is based on the contractual nature of the "associations".¹²⁰ The courts view the Church Order ("Kerkorde") or the constitution of the church as a contract between the members and the church and accordingly regard themselves as competent to pronounce on or interpret this contract according to the ordinary rules of the interpretation of contracts in review proceedings.¹²¹

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- 116 (...continued)
juristic person and a voluntary association based on contract.
- 117 Pienaar *Gemeenregtelike Regspersoon* 215-216; 254-255. Also see Van der Vyver *Juridiese Funksie* 182 who also refers to "huishoudelike verbandsreg wat in en vir die lede van die betrokke samelewingskring geld."
- 118 Pienaar *Gemeenregtelike Regspersoon* 210, 255 explains this as follows: "By toetrede onderwerp 'n lid hom aan die objektiewe reg soos vervat in die doelstellings, statute of konstitusie van die regspersoon. Dit is dus nie 'n kontraktuele verhouding wat tussen gelyke kontrakspartye bestaan nie maar 'n onderwerping aan die objektiewe reg wat die onderlinge regsverhouding tussen lede en regsverhoudinge tussen die regspersoon en buitestaanders reël. Die nuwe lid se belange word ondergeskik aan die belange van die samelewingsverband soos dit in die doel, statute of konstitusie uiteengesit is. Die lede se belange, hoewel ondergeskik aan die van die regspersoon, word egter steeds deur die goeie trou en billikheid wat tussen die regspersoon en sy lede moet bestaan, beheers en beskerm."
- 119 Pienaar *Gemeenregtelike Regspersoon* 207-216. Also see Fourie *NG Kerk as Regspersoon* 267.
- 120 See Rule 53 of the Uniform Rules of Court which provides that "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be ...".
- 121 Bamford *Voluntary Associations* 110; *Theron v Ring van Wellington NG Sendingkerk* 1976 (2) SA 1 (A) 27; *Long v Bishop of Cape Town* 4 Searle 162, 176; In *De Vos v Ringkommissie NG Kerk* 1952 (2) SA 83 (O) 93 the judge remarked that: "Myns insiens maak dit geen verskil nie, wat die vertolking (continued...)"

The unreserved acceptance and application of the legal principles of voluntary associations based on contract to South African churches by the courts deserve criticism. It does not take into account the nature of churches as religious institutions nor the way in which they function. It is moreover incorrect to say that churches have always been characterised as voluntary associations based on contract.¹²² Not one of the cases in which the requirements for a common law juristic person are set out, makes mention of the fact that a juristic person is based on contract. The Roman Dutch concept of a juristic person provides a far more suitable basis and explanation for the legal position of churches than the English law of voluntary associations. If a church continues to exist notwithstanding the fact that the individual members change, and if it exists as an entity distinct from its members, it would be recognised as a common law juristic person.

In classifying a church on the basis of contract, a number of practical problems arise such as the absence of a contractual explanation for members joining and leaving the church. In addition there are valid theological objections to this view. In any event, and from a practical perspective, the constitution of a church is not used as a contract, but as a church law. It constitutes the objective norms to which members have to conform.

Apart from the above objections, the interpretation of the constitutions of churches or religious bodies and a review of their decisions have now become even more susceptible to criticism in terms of the Constitution. It is submitted that it would constitute an impermissible infringement of religious freedom if a court were to interpret religious doctrine in order to reach a decision or pronounce upon the decision of a religious body or tribunal. The constitutional arguments will be dealt with in more detail below.

121 (...continued)
van die Kerkorde betref, of die NG Kerk 'n regs persoon of 'n onderlinge vereniging is".

122 *Venter v Den Kerkeraad der Gereformeerde Kerk te Bethulie* 1879 OFS 4; *Dutch Reformed Church, Van Wijksvlei v Registrar of Deeds* 1918 CPD 375, 377; *Louis and others v Oiconomos and others* 1917 TPD 465, 476; *Peach and Co v The Jewish Congregation of Johannesburg* 1894 1 Off Rep 345; *Prinsloo and others v Nederduitsch Hervormde of Gereformeerde Church* 1889-1890 3 Barber 220 223. In all these cases the church was characterised as a common law juristic person (*universitas*) and distinguished from a *societas* based on contract.

4.3.3 Extension of the grounds of review

In the preconstitutional era religious freedom was, to some extent, protected by the difference between appeal and review.¹²³ This meant that a court would not lightly have substituted its opinion for that of the administrative tribunal on the merits of a religious matter.¹²⁴

However, in the *Theron* case the Appellate Division introduced the "extended formal" test ("uitgebreide formele maatstaf") for reviewing decisions of administrative tribunals.¹²⁵ The effect is that the merits of the matter are interpreted narrowly and that the greater part of the decision is consequently reviewable. This case was welcomed by the legal community since it opened the door for the recognition of reasonableness as grounds for review. This development eventually culminated in the constitutional entrenchment of administrative justice which extended the grounds for review to include reasonableness and justifiability. However, in the *Theron* case the decision resulted in the finding by the Appellate Division, on the basis of three reasons, that it could interpret the church's constitution. With the extension of the administrative grounds for review under the Constitution,¹²⁶ it is likely that a court, in

123 The line between appeal and review is often very difficult to draw, especially where the exercise of a discretion is involved.

124 The classical formulation of the preconstitutional era can be found in *National Transport Commission v Chetty's Motor Transport* 1977 (3) SA 726 (A) 735: "There is no appeal against the decision of the commission. The legislature appointed it as the final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands - unless it is vitiated by proof on review in the Supreme Court that - (a) the Commission failed to apply its mind to the matter in accordance with the behests of the statute and the tenets of natural justice; in other words, that *de jure*, it failed to decide the matter at all. Such failure could be established by reference to *mala fides*, improper motive, arbitrariness or caprice. The list is not exhaustive; or (b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid - a formidable *onus*".

125 The part of Jansen JA's decision on the extended formal test (and unreasonableness as independent grounds for review) did not form part of the majority decision. On this point the appellate judges were divided 2-2-1.

126 *Afrisun Mpumalanga (Pty) Ltd v Kunene No and Others* 1999 (2) SA 599 (T); *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) 918F-G; *Roman v Williams NO* 1998 (1) SA 270 (C) 281E; *Kotzé v Minister of Health and Another* 1996 (3) BCLR 417 (T); *Premier, Eastern Cape, and* (continued...)

interpreting a church's constitution and reviewing the decision of a religious body, would in fact be encroaching upon the principles of (corporate) religious freedom.

In view of these arguments, it is submitted that the decision in *Theron v Ring van Wellington*¹²⁷ should be reconsidered. The dispute in this case was mainly about the correct interpretation of the relevant provisions of the "Kerkorde". The respondents argued that the court could not interpret these provisions of the church's constitution since, in terms of the formal test, the court could not on review decide on the merits of the matter. The respondents, however, did not maintain that the church had greater immunity from judicial review than any other voluntary association by virtue of the fact that it was a church. The Appellate Division held that:

Dit kan egter wees dat 'n kerk algehele outonomie oor leerkwessies besit, maar hieroor hoef geen mening uitgespreek te word nie; ook is dit, gesien die standpunt van die Respondent, onnodig om verder by die kwessie van kerklike immunititeit (indien enige) of die verhouding tussen die Staat en kerk stil te staan.

Nevertheless, the failure by the Respondents to raise the point of doctrinal entanglement should nevertheless, not have provided sufficient grounds for the court to interpret religious doctrine.

4.3.4 The position in the United States with regard to judicial intervention in intrachurch disputes

The position in the United States, where a clear institutional separation of church and state is maintained by virtue of the wording of the First Amendment to the Constitution, offers a

126 (...continued)
Others v Cekeshe and Others 1999 (3) SA 56 (Tk) 72; *Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (3) SA 162 (T) (1995 (2) BCLR 138); *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) SA 74 (B) (1995 (3) BCLR 305); *Pennington v Minister of Justice and Others* 1995 (3) BCLR 270 (C); *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N) (1997 (2) BCLR 248); and in the Land Claims Court, *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC) (1998 (5) BCLR 579)).

127 1976 (2) SA 1 (A) 14.

number of principles which could be useful to South African courts in dealing with the issue of judicial intervention in religious disputes.

In the United States, judicial intervention in disputes within ecclesiastical structures (intrachurch disputes) takes the form of three basic tests:¹²⁸

(a) The "departure from doctrine" test

The "departure from doctrine" test is based on the "Catholic model" of church-state relations in which the church is typically treated as an institution within the jurisdiction of the court or as a sort of state entity. This test was devised when there was an establishment regime in the United States. The court, assuming that it is competent to do so, interprets religious doctrine in order to identify the faction which departed from orthodox doctrine and then reaches its decision on that basis and, for example, divides the church property accordingly. For present purposes it would suffice to say that this test was declared unconstitutional in the case of *Presbyterian Church in the United State v May Elizabeth Blue Hull Memorial Presbyterian Church*.¹²⁹ It has, however re-appeared in 12 lower court cases.

(b) The "deference" test

The "deference" test, on the other hand, treats the church as an alien institution which is beyond the purview of civil courts. Its basic premise is that of the "Puritan model" which maintains that the church is separate from this world. Religious matters are thus not to be interfered with, but are constitutionally protected. The method of this test, as demonstrated in *Watson v Jones*,¹³⁰ is that the highest *locus* of authority within the ecclesiastical structure has

128 These tests can be seen as representative of judicial responses to disputes between church and state or political and religious interests. It has been stated that one way of looking at the American constitutional law of church and state, is to view it from the perspective of principles present in the body of law governing intrachurch disputes over property. In this "microcosm" one finds a miniature representation of the recurrent themes of "deference" and "neutral principles".

129 393 US 440 (1969).

130 13 Wallace 679 (1872).

to be found, and the court has to enforce what it says.

The main criticism is that the court defines the character of the church polity and that the minority group is often denied standing. This test was developed after the 1941 incorporation doctrine in the United States and the creation of national free exercise rights (in their individual and corporate dimensions), as seen in *Kedroff v Saint Nicholas Cathedral*.¹³¹ It was held that the free exercise clause *demand*s that religious people themselves should be allowed to choose the highest authority. Corporate free exercise rights were held to be superior to individual free exercise, by giving the church itself the right to define its own law and polity, and by arguing that since the highest authority spoke on it, the State could not countermand the free exercise clause, even if it appeared in a state constitution. The deference test as applied in the *Watson* and *Kedroff* cases above, was affirmed in the *Presbyterian Church* case. In *Serbian Eastern Orthodox Diocese for the United States v Milivojevich*¹³² the court, still using the basic deference test, argued that it was natural for human beings to join communities, thereby giving up certain state rights and subscribing to others. The law respects these voluntary assembly patterns and the rules of internal communities, but will get involved when matters go beyond certain *limits*. The court held that in the case of a church, the law would not undermine the institutional structures, because of the corporate free exercise "halo" of the First Amendment, but would intervene if voluntary exit were restricted or if life and limb of a member were compromised, thereby developing deference to include the basic notion of voluntarism.

(c) The "neutral principles" test

The "neutral principles" test had its origins in the *Gonzalez v Archbishop*¹³³ case where it was *obiter* stated that, even if the deference test was used, courts could maintain marginal review in the case of arbitrary or fraudulent conduct. In the *Milivojevich* case in 1976, this principle

131 344 US 94 (1952).

132 426 US 696 (1976).

133 (1929). As quoted in the *Milivojevich* case *supra* at 711.

was used to supplement the deference test. In *Jones v Wolf*,¹³⁴ however, a fully-fledged neutral principles test, premised on the "Evangelical model", was used. The church is seen as a dualistic institution, having both a worldly and a sacred dimension. The method followed is thus one of classifying the dispute. If the dispute deals with doctrine or spiritual matters at the heart or core (as opposed to the periphery) of the religion, the courts will defer. However, in instances where the dispute is simply secular or if the dispute really comes down to secular documents and can be resolved on these documents alone, the court is permitted to adjudicate according to neutral principles.

The problem with this test is twofold. With regard to the characterisation of the dispute, the disputants will characterise it as secular or sacred according to the result they wish to achieve. The main, and grave, criticism is the artificial line-drawing in which the courts indulge. If a religious body is involved, disputes are essentially theological, and the issues cannot be separated by a civil court. In a holistic theology, the drawing of lines between "secular" and "sacred" or between religious core concepts and peripheral issues is a highly artificial exercise by a civil court and would be unacceptable in view of the fundamental freedom of religion guarantees.

Deference as firstly used in the above-mentioned American cases is the test which commands judicial deference to the religious governmental structures in intrachurch disputes and, as such, is sufficiently protective of corporate religious freedom. It represents a broader judicial hermeneutical approach founded on a specific theory of the autonomy of social institutions and a correlative view of the role of the judiciary. In application it would result in a more purposive and generous approach in interpreting the constitution, as opposed to a more mechanical, literalist approach as in the neutral principles approach. This approach has led the courts in some instances to take proactive steps to protect religious freedom in accordance with the principle that the state cannot countermand the constitutional free exercise guarantee. It could perhaps be labelled as a political model of "constitutional supremacy" following the role of the judiciary as custodians of the Constitution.

In my view then, deference as used here is representative of a broader theory of social institutions, requiring the state not to interfere in nonstate institutions (like churches). This does not mean that the state has no role to play in religion, but its duty at a religious level is coloured by the inherent and typical nature of the state, that is, of maintaining order between citizens on an equal basis. Such an approach could therefore be accepted by the South African courts in the new constitutional dispensation.

The second sense in which "deference" is used is in conjunction with the neutral principles approach. As seen above, a court applying the deference test in the first sense is not interested in neutral principles, but a court using neutral principles will defer if the issue is of a "sacred" (as opposed to a secular) nature. Deference in this second sense is characterised by the basic hermeneutical approach of viewing the role of the judiciary as limited to "applying" statutes; and the task of the legislature as limited to making law. This results in a much more literalist interpretational method (in statutory as well as constitutional analysis). In my view this approach lacks a proper social theoretical basis and defies the basic notions of constitutionalism. The traditional approach in South Africa, as set out above, of reviewing decisions of religious bodies save for the area defined as "merits" corresponds with a neutral principles approach, coupled with deference for the merits.

4.4 Separation of church and state in cases decided after the commencement of the new South African Constitution

In *Ryland v Edros*,¹³⁵ *Christian Education SA v Minister of Education*¹³⁶ and *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & Others*,¹³⁷ the courts had to deal with the issue of the separation of church¹³⁸ and state in the new constitutional dispensation.

135 1997 (1) SA 690 (C).

136 1999 (4) SA 1092 (SE).

137 (1999) 20 ILJ 1936 (LC).

138 As mentioned in ch 1, "church" should also be understood to include religious institutions, communities and groups.

4.4.1 *Ryland v Edros*

In this matter Farlam J approached the matter cautiously:

It follows that if that is so and a decision on the points in issue between the parties in the present case will, regard being had to the fact that Islam is a 'revelational culture', involve the court in deciding points of doctrine, then it would be inappropriate for the court to endeavour to find the answer to the questions posed for decisions in this case.

In this case, however, both parties agreed that the particular issues arising for adjudication did not require any religious doctrines to be interpreted; for example, they agreed that the rules of the *Shafi'i* school would be the applicable rules which the parties must be taken to have incorporated in their contract. The judge accordingly held that he was satisfied that there was nothing in section 14 of the Constitution which would preclude him from deciding the issues arising in the matter. He made it clear, though, that the position might be different in cases where issues arose which involved matters of doctrine, even should proprietary or other legally recognised rights be involved.

4.4.2 *Christian Education SA v Minister of Education*

The approaches adopted in the cases of *Christian Education SA v Minister of Education*¹³⁹ and *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & Others*,¹⁴⁰ on the other hand, can be criticised as being insensitive to the above-mentioned issues and incompatible with the notions of freedom of religion and separation of church and state as set out above.

In *Christian Education SA v Minister of Education* the Applicant, a voluntary association representing 196 constituent independent schools which maintain an active Christian ethos, brought an application to have the provisions of section 10 of the South African Schools Act 84 of 1996 declared unconstitutional. In terms of section 10, the Legislature, on pain of

139 1999 (4) SA 1092 (SE).

140 (1999) 20 ILJ 1936 (LC).

criminal sanction, prohibits the administration of corporal punishment at all schools, including independent schools within the Republic.

The first ground relied upon by the applicant was that section 10 offended its religious and cultural rights as protected in the Constitution.¹⁴¹ The applicant stated in its founding affidavit:

Whilst applicant and its member schools are completely opposed to child abuse in any form, they are unanimously in favour of correction, using biblical guidelines. Whilst such correction does contain a punitive element, the corrective element is paramount. As such it is seen as a vital element of the Christian religion.

The applicant relied on various biblical passages found in the Book of Proverbs,¹⁴² Deuteronomy¹⁴³ and Matthew¹⁴⁴ for this contention.

Although the end result of the judgment is not necessarily being criticised here, the method of the court in reaching its decision is, in my view, a clear example of the "neutral principles" approach or even "departure from doctrine" as described above and unacceptable from a constitutional religious rights perspective.

At the outset, the court referred to certain American authorities on the approach which should be adopted by a court of law in order to decide the question of whether a person's right to freedom of religion had been infringed.¹⁴⁵ The judge specifically referred to the case of *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church*¹⁴⁶ where it was held by the United States Supreme Court that:

141 Applicant relied on s 15 of the Constitution, and also on s 29, 30 and 31 for this contention.

142 Proverbs 22:6, 22:15, 19:18, 23:13-14.

143 Deuteronomy 6:4-7.

144 Matthew 28:19-20.

145 1100.

146 393 US 440 (1969) 451.

Secular authorities may not resolve civil disputes that engage them in the forbidden process of interpreting and weighing church doctrine.

However, the judge proceeded to engage in precisely this process. He found that:

A consideration of the foregoing has led me to the conclusion that in cases of this nature a Court will in the first place consider whether the belief relied upon in fact forms part of the religious doctrine of the religion practised by the person concerned. Once it is found that the belief does form part of that doctrine, the Court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of the belief. But the Court will then inquire into the sincerity of the persons claiming that a conflict exists between the legislation and the belief which is indeed burdensome in the person.

It is submitted that in order to ascertain "whether a belief relied upon in fact forms part of the religious doctrine of the religion practised" involves an impermissible interpretation of religious doctrine. It is clear that, in order to ascertain what forms part of a religion and what not, a judge would have to enter into a theological debate and attempt to define the religion.

Liebenberg J found:

Although I do not question the sincerity with which the applicant attempts to maintain the right to administer corporal punishment at its constituent schools, I have not been persuaded that it has been shown to be a sincere belief on religious grounds that teachers and schools should be empowered to administer corporal punishment.

He found this on the basis that no biblical guidelines were relied upon by the applicant which suggested that persons other than the parents had the right or obligation to use the rod in order to correct a child. To expect from an applicant in such a case to justify his religious beliefs would conflict with the principle enunciated in the United States case of *Thomas v The Review Board* 450 US 707 (1981), quoted by the judge himself in this case, where it was stated:

Religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection.

The judge further held that, even if he accepted that the applicant had shown the existence of

a sincere religious belief in the administration of corporal punishment by teachers and at schools, section 10 did not infringe on such a belief since it did not "substantially burden" religious freedom. Whilst that might be the case, the judge, to reach this conclusion, found:¹⁴⁷

It can be stated without fear of contradiction that after a few thousand years of development of civilization this guideline [Deuteronomy 21:18-21] to parents is no longer appropriate, nor does it form part of religious doctrine; and

I have therefore come to the conclusion that, on the applicant's own showing, corporal punishment as a means of correction for boys is a peripheral issue in the whole context of the exercise of its religion.¹⁴⁸

It is submitted that for a civil court to make a finding on what forms part of Christian doctrine for a specific group of people and, furthermore, to state what lies at the core or periphery of a religion, are constitutionally unacceptable. It is suggested that a better approach would have been to find, on the basis of the deference test described above, that the court has to accept what the religious group describes as their religious beliefs. An Act which precluded them from freely exercising these religious beliefs would constitute a *prima facie* infringement of religious freedom. However, on the basis of the limitation clause, it could have been found to be a justifiable limitation.

The case was taken on appeal to the Constitutional Court¹⁴⁹ but the appeal was dismissed. Sachs J indeed found that section 10 of the Schools Act imposed a limitation on parents' right to freely exercise their religious beliefs, but that the limitation was justifiable in terms of the general limitation clause. However, he did not criticise the court *a quo*'s interpretation of the Bible verses, namely that the scriptures did not sanction the delegation of the parents' authority to administer corporal punishment to teachers. In any event, the approach of the Constitutional Court is commendable in so far as it did not transgress the principle of the separation of church and state (as was done by the court *a quo* by interpreting the scriptures) but adjudicated the matter on the basis that the state had a role to play in respect of religion subject to the religious

147 1102.

148 1103.

149 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

being sovereign in its domain, as evidenced by the following remarks of Sachs J:¹⁵⁰

To the extent that the two orders can be separated, with the religious being sovereign in its domain and the State sovereign in its domain, the need to balance one interest against the other is avoided. However religion is not always a matter of private individual conscience or communal sectarian practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. 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 a way of life, of a people's temper and culture.

The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day-to-day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.

The answer cannot be found by seeking to categorise all practices as religious, and hence governed by the factors relied upon by the appellant, or secular, and therefore controlled by the factors advanced by the respondent. They are often simultaneously both. Nor can it always be secured by defining it either as private or else as public, where here, too, it is frequently both. 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, whenever 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.

4.4.3 *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit*

The *Schreuder* case involved a labour dispute between a minister in the Dutch Reformed Church (the applicant) and his "employer", the Nederduitse Gereformeerde Kerk, Wilgespruit. The second respondent was the "Ring van Roodepoort van die Nederduitse Gereformeerde Kerk" and the third respondent, the Synod of the Dutch Reformed Church in Western Transvaal. The applicant had been dismissed from office by the respondents in terms of section 12 of their Church Order¹⁵¹ because of his inability to adapt in the congregation which led to an irretrievable breakdown of the relationship between the ministers of the parish.

It was held that the applicant was an employee of the congregation (and that the Presbytery and the Synod were his secondary employers) for the purposes of the Labour Relations Act of 1995. The mere fact that he was called to the ministry did not, in view of the church rules and his letter of employment, affect his employment relationship. Basson J found that his dismissal was both procedurally and substantively unfair and he reinstated the applicant retrospectively in the employ of the second and third respondents.

It is submitted that this decision is based on a misconception of, or a failure to take into account, the principles of the separation of church and state as they existed in this country even before the Constitution came into operation, as well as the principles of religious freedom as enshrined in the Constitution.

Traditionally this kind of dispute would have been instituted as an application to review the

151 S 12(1) provides: "Indien 'n leraar nie sy gemeente verder tot stigting kan dien nie, mag die ring na ondersoek, waarin beide die kerkraad en die betrokke leraar aangehoor word, die band tussen die leraar en gemeente losmaak indien daar, volgens die oordeel van die ring, billike voorsiening vir die leraar gemaak is."

decision of the specific congregation, Presbytery or Synod. It is improbable that, even on the extended principles of review of a decision of a religious body, a court would have substituted its opinion for the opinion of the religious body on the merits of the matter to find that the religious body had made a wrong decision, as the court did in this case.

Furthermore as set out above, since the advent of the constitutional era, questions have been posed as to the effect of the constitutional principles of religious freedom on the acceptability of even light judicial review. It is submitted that, in the present case, the court could, at the most, have found that the religious bodies had acted procedurally unfairly or in contravention of their own church order and referred the matter back to the relevant religious authority. A court would not be in a position to assess the abilities or shortcomings of the pastoral duties of a minister. To assume such jurisdiction and to define the ambit of a minister's responsibilities and moreover, to measure and to pronounce on his conduct or competence would be unacceptable in view of the principles of religious freedom. It could even be that, in terms of the specific religious doctrine, the minister is not in the "employ" of any of the respondents. As set out above, it is an essential feature of religious freedom that the power to define religious institutions, including the office of the minister, lies with the religious body only. Nor would the application of the principle of fault or the absence thereof be competent in such a case. Where the relationship between a minister and the congregation or other ministers had irretrievably broken down, it is of no use to find that it had not been occasioned by the fault of the minister (*non constat* that he could not be awarded damages). The fact remains that, in terms of the tenets of that religion, the minister can no longer work successfully in such a congregation. Furthermore, to reinstate such a minister (even if only in the employ of the presbytery or synod) would be to assume a jurisdiction the court does not have.¹⁵²

152 Even in England where no Bill of Rights was in force at the time, the a judgment of the Queen's Bench in *Regina v Chief Rabbi of the United Hebrew Congregation of Great Britain and the Ricardo Commonwealth, Ex part Wachmann* (1992) 1 WLR 1036 (QB) 1042 held that a court would not interfere with internal church matters, especially not where the functions of a rabbi were in dispute, since that was clearly a religious matter. It was held: "The court must inevitably be wary of entering a self-evidently sensitive area, straying across the well-recognized divide between church and state."

5. Conclusion

It was shown that the South African Constitution does not contain an "establishment clause", in the United States sense of the word, which proscribes any and all state support of religion. The strict separation of state and religion which is applied in the United States therefore does not form part of the South African Constitution and, in view of the international understanding of religious freedom and the theory of Durham, it is not necessary to interpret the South African Constitution in such a manner. The Constitution does, however, provide for the separation of state and religion to some extent in that state support of religion is subject to certain constitutional principles, such as those enunciated in sections 15(1), 15(2) and 9.

Section 15(2) clearly provides that attendance at religious observances at state or state-aided institutions must be free and voluntary. This provision, which does not strictly separate state and religion, is not in contravention of religious freedom norms since total religious freedom is possible in the case of "some identification of state and religion. This provision also accords with the essential requirements of voluntarism and noncoercion in religious matters.

In applying section 15(2) it is important to establish whether a particular activity could be defined as a "religious observance" and whether it is conducted at a "State or state-aided institution". It was shown earlier that the phrase "religious observance" would have to correspond with the meaning attributed to the word "religion" in section 15(1) and that "religion" in section 15(1) refers to the Swidler definition of religion. It is therefore maintained that "religious observance" is confined to typically religious activities which flow from adherence to a certain religion.¹⁵³ If a specific activity cannot be defined as a "religious observance", then such an activity would, in any event, not be proscribed at state or state-aided institutions. Whether an institution can be labelled a state or a state-aided institution is a factual question depending on whether the state is in control of or financially aids an institution.

It was shown that section 9 prescribes even-handed treatment of religions and not, in view of

153 This is supported by the Afrikaans text which refers to "godsdienstbeoefening".

the fact that there is no establishment clause in the Constitution, "no treatment" of religion. In this regard reference was also made to the provisions of section 7(2) which provides *inter alia* that the state must promote the rights described in the Bill of Rights. Despite the absence of an "establishment clause" in the South African Constitution, the equality clause thus prohibits unfair discrimination on the grounds of religion. An important difference between the constitutional principle of the equality of religions (as protected in section 9) and reading an establishment clause into section 15(1) is that, in terms of section 9, discrimination between different religions would have to be unfair before it can be said to be unconstitutional, whereas under a deemed establishment clause mere state support of religion would be unconstitutional. It is clear that the requirements of section 9 as interpreted by the Constitutional Court will have to be complied with before it can be said that state support of a particular religious practice is discriminatory.

The adjudication of equality in the context of religious rights is, however, no easy task as illustrated by the divergent approaches to the matter in the *Lawrence* case. It is submitted that, in reconciling the equality (section 9(3)) and religious freedom clauses (section 15(1)) (in cases not involving state or state-aided institutions), these sections have to be read together to determine whether a provision unfairly discriminates on the grounds of religion and whether declaring it invalid would infringe on free exercise rights. If the provision unfairly discriminates and a declaration of invalidity will not impose on the right to free exercise of religion, the provision would probably constitute an unjustifiable infringement of religious freedom. If, on the other hand, the provision constitutes unfair discrimination on the grounds of religion but declaring it invalid would result in a restriction on free exercise rights, these concerns need to be balanced in terms of the limitation clause. It is probable that most matters of this kind will be decided with reference to the limitation clause. The limitation clause will be analysed in detail in chapter 7.

It was shown that the institutional separation of church and state is an inherent part of religious freedom and as such protected by the South African Constitution. A church, religious institution or community is an entity with its own internal structure and laws and should be free from state control.

Section 9(4) of the Constitution is problematic in this respect since it makes proscription of discrimination applicable to persons other than the state or state organs. It was argued that it appears from the wording of this section that it could have been the intention of the drafters of the Constitution to have specific instances of unfair private discrimination set out in legislation but that the section is not clear in this respect. Discrimination within any religious institution or community will almost always depend on a specific interpretation of its doctrine and it would constitute an infringement of religious freedom if religious laws or doctrine were to be interpreted by a court and subjected to constitutional norms. It was therefore argued that section 9(4) should not be interpreted to sanction interference in doctrinal matters. It is moreover submitted that section 9(3) should be read in conjunction with section 8 (the application clause), which will be discussed in more detail in chapter 7.

The effect of religious freedom and of the constitutional protection of the separation of church and state on the administrative review of church decisions was also analysed. It was argued that in the preconstitutional era, the South African courts used a kind of "neutral principles" test. However, a proper application of the constitutional principles of freedom of religion, would require the courts to defer, limited only by the considerations set out in the limitations clause. This will call for a re-evaluation of the manner in which religious bodies and their decisions are dealt with in South African law. As demonstrated above, continuing to view churches as voluntary associations based on contract irrespective of their true nature and reviewing decisions of religious bodies on the basis of the extended principles of administrative justice, will be in disregard of the freedom of religion provisions in the South African Constitution.

CHAPTER 7

EFFECT OF THE OPERATIONAL PROVISIONS OF THE CONSTITUTION ON THE PROTECTION OF RELIGIOUS RIGHTS

1. Introduction

In the process of constitutional interpretation, the Constitution's operational provisions play an important role. These provisions are usually understood to include the application clause (section 8), the limitation clause (section 36) and the interpretation clause (section 39). The interpretation clause has already been discussed in chapter 4, and only the application and limitation clauses will be dealt with in this chapter. These two clauses determine such matters as who is entitled to religious rights protection, who is bound to the provisions of the Constitution, and what the limits of constitutional protection in specific cases are. It can thus be said that they codetermine the scope of the constitutional protection of a specific right under the Bill of Rights. An analysis of the application and limitation clauses in the Constitution is therefore an intrinsic part of the inquiry into the adequacy of the constitutional guarantees for the protection of religious rights. Therefore the operational provisions, in so far as they impact on religious rights, should also be interpreted in the context of the understanding of religious freedom as described in the previous chapters. This chapter does not purport to be an exhaustive discussion of the application and limitation clauses since the focus of the thesis remains religious rights. The clauses are therefore only discussed in general and in so far as they impact upon the protection of religious rights.

2. The application clause

2.1 Introduction

Section 8 of the Constitution provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

- (2) A provision of the Bill of Rights binds a natural or a juristic person 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.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

In specific circumstances, chapter 2 of the Constitution (the Bill of Rights) imposes constitutional obligations on the state, state organs, natural or juristic persons not to infringe upon the fundamental rights of other natural or juristic persons. It furthermore protects the fundamental rights of not only natural but also juristic persons to the extent that the nature of the right and the nature of the juristic persons make it applicable to juristic persons. The application clause (section 8), in so far as it concerns religious rights issues, will be analysed to ascertain the nature and extent of the constitutional rights and obligations relating to religious individuals, institutions, groups or communities.

The present paragraph is concerned, on the one hand, with the *binding* effect of the Constitution and, on the other hand, with the question of which persons or institutions are *entitled* to the rights contained in the Bill of Rights. The focus is specifically on the impact of the application clause on religious individuals, groups, institutions and communities.

2.2 The binding effect of the Constitution

2.2.1 All law

The interim Constitution provided in s 7(2) that the Bill of Rights "shall apply to all law in

force and all administrative decisions taken and acts performed". With reference to this section in the interim Constitution, Van der Vyver¹ maintained that, in so far as the application of the Chapter on Fundamental Rights was concerned, the South African (interim) Constitution was based on the classification of law into the law of the state (which includes statutory law, the common law and customary law and which comprises both public and private law) and the legally enforceable internal rules of conduct of institutions other than the state. Van der Vyver thus explained this provision in terms of the distinction between state imposed law ("staatlike reg") and the internal rules of conduct of nonstate institutions ("nie-staatlike reg"). The interim Constitution, he stated, was applicable to all law of the state, that is, common law, statutory law and customary law but only administrative decisions and acts of the state and state organs would be subject to the Bill of Rights. In this regard he pointed out² that the South African interim Constitution was unique and distinguishable from the position in the constitutions of America, Canada and Germany. He explained that the position in respect of the application of the constitution to private entities was dealt with in Canada on the basis of the distinction between statutory and common law; in America on the basis of the concept of state action and in Germany on the basis of the distinction between private and public law.

The wording of the 1996 Constitution, however, differs from that of the interim Constitution in this regard. Section 8(1) provides that the "[t]he Bill of Rights applies to all law". Section 9(4) of the Constitution also appears to deviate from the position as previously set out by Van der Vyver.³

There can be no doubt that the 1996 Constitution applies to statutory law, common law and customary law, irrespective of the nature of the parties involved in the dispute (that is, whether they are private persons or state organs) and irrespective of whether it is private or public law. The question is, however, whether "nonstate law" is subject to the 1996 Constitution. It appears from the wording of the new Constitution that whenever the constitutionality of

1 See Van der Vyver 1994 *SALJ* 569-576; Van der Vyver 1994 *THRHR* 378; Van der Vyver 1995 *SALJ* 587.

2 1995 *SALJ* 577-579.

3 See the commentary of Van der Vyver 1999 *BYU-LR* 666.

"nonstate law" is in issue, the provisions of sections 8(2) and 8(3) will determine whether the Constitution applies. In other words, it appears that, insofar as the application of Constitutional norms is concerned, the Constitution now treats "conduct" and "law" of nonstate institutions in a similar manner. Sections 8(2) and 8(3) will be discussed in detail below.

2.2.2 State organs

Section 8(1) provides that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. That means that the conduct of these entities are subject to constitutional scrutiny. When dealing with bodies, institutions or entities which do not form part of one of the three branches of government, the binding effect of the Constitution on them would depend, in the first instance, on whether they are organs of state.⁴

In the current context, the question of whether an institution is a state organ would become relevant in the case of, for example, a religious educational institution established in terms of legislation.⁵ Such institutions are usually based on specific religious tenets and often, in principle, discriminate on religious grounds for various purposes. If such a religious institution is held to be a state organ, its acts would be subject to constitutional scrutiny. In other words, it would be bound by the Constitution in all respects.

The phrase, "organ of State", is defined as follows in section 239 of the Constitution:

In the Constitution, unless the context indicates otherwise, 'organ of state' means-

- (a) any department of state or administration in the national provincial or local sphere of government; or

4 It was stated in *Goodman Bros (Pty) Ltd v Transnet Ltd* 1999 (4) SA 989 (W) 997B-D, a case decided under the interim Constitution, that "The Constitution has had a profound effect on the relationship which every organ of State ... has in its dealing with other persons or bodies and in the manner in which it conducts its business activities. S 217, read together with s 32(1) and 33, makes it plain that in addition to his common-law rights, any person dealing with a State organ ... is entitled to expect fairness, openness and equitable conduct from it in all its actions".

5 Such as, for example, the Potchefstroom University for Christian Higher Education.

- (b) any other functionary or institution -
 - (i) exercising a power or performing a public function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

Under the interim Constitution,⁶ the position regarding state organs was regulated by sections 7 and 233 of that Constitution. Section 7(1) limited application of the Constitution to "legislative and executive organs of State at all levels of government" and was held not to apply to private bodies or citizens *inter se*.⁷ According to section 233(1), an organ of State included "any statutory body or functionary".⁸

In order to interpret these phrases of the interim Constitution, the courts mostly subscribed to the "control test".⁹ In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and others*,¹⁰ a case decided under the interim Constitution, Van Dijkhorst J dealt specifically with the question of whether Telkom was an organ of State, and he described the "control test" under the interim Constitution as follows:¹¹

6 Constitution of the Republic of South Africa 200 of 1993 .

7 *Du Plessis and others v De Klerk and another* 1996 (3) SA 850 (CC). See the critical discussion of this case by Van der Vyver 1995 *SALJ* 572-602.

8 See *Baloro and others v University of Bophuthatswana and others* 1995 (4) SA 197 (B) where the court adopted three tests and held that 'organs of State' in the context of section 7(1) of the interim Constitution must be interpreted widely to include, *inter alia*, universities and law societies. However, in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and others* 1996 (3) SA 800 (T) Van Dijkhorst J found this approach to be too wide and declined to follow it.

9 For other views see also *Du Plessis and Corder Understanding South Africa's Transitional Bill of Rights* 110; *Du Plessis* 1994 *TSAR* 709; *Rautenbach General Provisions* 54.

10 1996 (3) SA 800 (T) 807H-811D. Also see *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* 1999 (4) SA 375 (T) 381F-H.

11 810F-H.

The concept as used in s 7(1) of the Constitution must be limited to institutions which are an intrinsic part of government - ie part of the public service or consisting of government appointees at all levels of government - national, provincial, regional, and local - and those institutions outside the public service which are controlled by the State - ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short the test is whether the State is in control.

It appears from the wording of section 239 of the Constitution that the test laid down by the final Constitution is less restrictive than the one under the interim Constitution¹² and that it is not necessary for an organ of state to be an intrinsic part of government.¹³ Section 239(b)(ii) clearly indicates that the test is now whether an institution exercises a public power or performs a public function in terms of any legislation.¹⁴

12 See *SA Agricultural Plantation & Allied Workers Union and other v Premier of the Eastern Cape and others* (1997) 18 ILJ 1317, 1323D-F; *Claase v Transnet Bpk en 'n ander* 1999 (3) SA 1012 (T) 1019C-I; *Inkatha Freedom Party and another v Truth and Reconciliation Commission and others* CPD 15 December 1999 Case no 6879/99 (per Davis J).

13 The Canadian Courts rejected a functional link with government as being the test to determine whether the Charter of Rights and Freedoms applied to a body or institution, and applied the control test to determine whether a public body was bound by the Charter. In terms of this, it was irrelevant whether a body performed a "public service", as long as it was done independently of government. See Hogg *Constitutional Law of Canada* 34-13; *McKinney v University of Guelph* (1990) 3 SCR 229; *Harrison v University of British Columbia* (1990) 3 SCR 451; *Stoffman v Vancouver General Hospital* (1990) 3 SCR 483.

14 Olivier 1997 *TSAR* 340, 343-344 also expresses this view when he states: "Wat ookal die posisie onder die vorige grondwet was, die posisie onder die nuwe grondwet word myns insiens uitdruklik gereël ... Artikel 8(1) bepaal dat die handves van regte van toepassing is op alle reg en die wetgewende, die uitvoerende en die regsprekende gesag en alle staatsorgane bind. 'n Staatsorgaan word in artikel 239(1)(b)(ii) omskryf om ook 'any other functionary or institution exercising a public power or performing a function in terms of legislation' in te sluit. Hierdie bepaling is veel wyer as die van die oorgangsgrondwet wat 'n staatsorgaan bloot omskryf het as 'ook 'n statutêre liggaam of funksionaris' (a 233(1)). Ingevole die nuwe omskrywing word die uitoefening van openbare bevoegdhedes of die uitoefening van 'n funksie ingevolge wetgewing as die deurslaggewende kriteria gestel ... Kontrole deur die uitvoerende gesag of deur tipiese staatsorgane word nie as sodanig vereis nie". Also see *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) where the same reasoning was applied to conclude that the Commission for Conciliation, Mediation and Arbitration was an organ of state. Also see Chaskalson *Constitutional Law of South Africa* 10-62A - 10-63.

However, the courts have accepted the control test to be the authoritative test for a state organ under the final Constitution.¹⁵ In *Korf v Health Professions Council of South Africa*¹⁶ Van Dijkhorst J found that the law on state organs had not changed fundamentally under the final constitution:¹⁷

The 1993 definition 'statutory body or institution' has not [should read 'now'] become 'any other functionary or institution'. I do not think that therein lies a material difference. The latter phrase is further limited in the definition, whereas the 1993 definition was limited by the nature of an organ of State as explained in *Direct Advertising Cost Cutters*.

Has the description set out in subpara (b) now extended the meaning of organ of State? Subparagraph (i) limits it to a power or function in terms of the national and provincial constitutions. This does not bring about a difference. Subsection (ii) limits it to a public power or public function in terms of any legislation. It does not bring about a difference insofar as the reference to public power is concerned. The remaining question then is whether the reference to a public function in terms of legislation takes the concept 'organ of State' out of the control test.

The answer depends on the meaning given to the words 'public function'.

The three pillars of the State, legislative, executive and judicial, are referred to in s 239. The latter is expressly excluded. The executive arm is expressly mentioned in subpara (a) and the legislative one falls under subpara (b)(i) which can also encompass, for example, the auditor-general, public protector, etc. They are all

15 In *Claase v Transnet Bpk en 'n Ander* 1999 (3) SA 1012 (T) the court applied the control test as set out by Van Dijkhorst J in conjunction with the "public service" test under the final Constitution. It was held that "Na my oordeel, is dit duidelik dat eerste respondent deur die Staat beheer word en 'n openbare funksie verrig". Van Dijkhorst's control test was also applied in *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) another case involving Transnet and decided under the final Constitution. It was held that the real basis for the finding by Van Dijkhorst J that Telkom was an organ of State, was that that body was ultimately controlled by the State through the relevant Minister and that it exercised a public function in that sense. It was therefore held that Transnet was an organ of State in the sense that it was subject to the provisions of the Constitution relating to such bodies.

16 2000 (1) SA 1171 (T) 1177D-1178A.

17 This decision was recently confirmed by Van der Merwe J in the unreported judgment in *NCON Civils CC v Telkom SA Ltd* TPD 23 May 2000 Case No 25076/99. In this case the control test was applied and Telkom was held to be an organ of State under the final Constitution.

part of the machinery of the State. So is a functionary (or institution) exercising a public power. There is no reason to give the word 'public' when used in conjunction with 'function' in para (b)(ii) a meaning that would take it outside the context of 'engaged in the affairs or service of the public' and give it the meaning of 'open to or shared by all the people'. (Both these meanings are given in *The Concise Oxford Dictionary* for the word 'public'.)

It follows that the more precise definition of 'organ of State' in s 239 of the Constitution was not intended to differ materially from the 1993 definition.

That definition was interpreted in *Direct Advertising Cost Cutters* to include the element of control. I adhere to that decision. The Supreme Court of Appeal also appears to favour the control test (in a different context) in the unreported judgment in *Umfoloji Transport (Edms) Bpk v Die Minister van Vervoer en Andere ...*¹⁸

The proper test for establishing whether an entity is an organ of state under the final Constitution thus remains the control test. Whenever the constitutionality of the conduct or internal rules of a religious institution, association or group is challenged, the first question is therefore whether such an institution, association or group is controlled by the state. If it is, the Constitutional norms will apply. If it is not, the provisions of section 8(2) and 8(3) will determine whether such a nonstate institution would in particular circumstances be bound to the Constitution.

2.2.3 Application of the Constitution to entities which are not organs of state

In terms of the provisions of section 8(2) of the Constitution, a natural person or juristic person which is not an organ of State would be bound by the Constitution "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed

18 In *Umfoloji Transport (Edms) Bpk v Minister van Vervoer en andere* 1997 (2) All SA 548 (A) the relevant question was whether the State tender board was an organ of State. This question was not decided but the Supreme Court of Appeal (seemingly *obiter*) applied the control test. Also see the judgment in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) par 14 *per* Schutz JA where s 217 of the Constitution was relied upon by Goodman as an alternative basis for relief, but where it was held that it was not necessary to decide whether Transnet was an "organ of State".

by the right".¹⁹ At the outset reference should be made to Van der Vyver's comment:²⁰

Autonomy is a juristic person's right to privacy and is to such entities what the right to life is to natural persons. Avoiding state 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 defence of the kind of freedom that opposes totalitarianism.

It is submitted that in applying the provisions of sections 8(2) and 8(3), this important principle of restraint should be kept in mind.

When dealing with the binding effect of the Constitution in respect of nonstate entities, a distinction should be drawn between provisions of the Bill of Rights which accord *rights* to certain recipients²¹ and provisions which impose *obligations* or *prohibitions* on nonstate entities, such as section 9(4).²² The provisions of section 8(2) imply that a provision which accords a right to "everyone" will only be enforceable against nonstate entities "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". It seems that the enquiry in terms of section 8(2) would be an enquiry into the right itself rather than an application enquiry. The nature of the right would therefore be the focal point in such an enquiry. However, if a provision of the Bill of Rights, such as section 9(4), already binds private entities, only the provisions of section 8(3) will be applicable. In other words, when a section of the Bill of Rights imposes an obligation on a nonstate entity, a court, in applying such a provision, must do so in terms of section 8(3) and may give effect to or limit such a right. It is therefore submitted that the sections in the

19 For a summary of the application of ch 3 of the interim Constitution to private entities see Cockrell *Private Law and the Bill of Rights* par 3A6. The position under the interim Constitution was unclear until the matter was resolved in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC). For a critical discussion of this matter and the problem of application, see Van der Vyver 1995 *SALJ* 572-602.

20 See Van der Vyver 1994 *THRHR* 392.

21 Most of the provisions of the Bill of Rights accord rights to "everyone".

22 An argument could perhaps be made out that a section such as s 9(4) does not form part of the Bill of Rights since it does not contain a separate right, but is merely a prohibition flowing from the right which is entrenched in s 9(1).

Constitution which impose obligations on entities other than the state (or state organs), such as section 9(4), should be read in conjunction with the provisions of section 8(3) and, of course, the limitation clause.

In the case of, for example, the Potchefstroom University for Christian Higher Education (the PU for CHE), and assuming that it is not a state organ,²³ the question could arise of whether it is bound by the proscription of discrimination in section 9(4).²⁴ It could be argued that the provision in the relevant Act²⁵ that the Council of the University "shall ensure that the Christian historical character of the University is maintained" in the appointment of academic and nonacademic staff, the PU for CHE is exercising its religious rights and freedom of association²⁶ in terms of section 8(4), 15(1) and 18 of the Constitution. It could therefore be argued that section 9(4) should be limited in terms of section 8(3) and that this university would therefore not be bound to the equality provisions as far as discrimination on religious grounds²⁷ is concerned. The same arguments could be advanced in respect of the binding effect of the Constitution on churches, religious communities or groups.

There is not much guidance to be found in the decisions of the courts on this issue. So far there

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- 23 It appears that universities would not qualify as state organs in terms of the final Constitution since they are not controlled by the State. See *contra Motala & Another v University of Natal* 1995 (3) BCLR 374 (D) where Hurst J simply assumed that internal university regulations were subject to the interim Constitution.
- 24 See Pienaar 1993 *THRHR* 210-228 for a comparative discussion of the position with regard to religiously based education in the Netherlands and America and freedom of association.
- 25 S 25 of the Potchefstroomse Universiteit Vir Christelike Hoër Onderwys (Private) Act (House of Assembly) 80 of 1993 provides that: "(1) In appointing academic and non-academic staff, the Council shall ensure that the Christian historical character of the University is maintained: Provided that no test with regard to membership of a specific church shall be applied to any person as a condition of his becoming or continuing to be a member of the academic or non-academic staff at the University, or of his holding any office or receiving any emolument or exercising any privilege therein. (2) No person shall be prevented on the ground of his religious belief from becoming or continuing to be a student of the University or from obtaining or holding a degree or diploma.(3)..."
- 26 See Pienaar 1993 *Cilsa* 147-171.
- 27 It is however clear from a contextual reading of the Constitution that no juristic person would be permitted to discriminate on the basis of race.

have been very few occasions when the courts have pronounced upon the interpretation of section 8(2) of the Constitution.²⁸ In *Jooste v Botha*²⁹ Van Dijkhorst J held:

In determining whether a horizontal right is intended one has to have regard to the nature of the proposed right, its enforceability, the practicalities of the human relationships involved and whether public policy or public mores require such moral obligation to be converted into a legal obligation. It is important to bear in mind that the proposed horizontal right will not operate in a void. It will invariably infringe upon and curtail the rights of others...

The comments on section 8(2) in other cases amount to mere *obiter* remarks, a fact which highlights the difficulty of interpreting section 8(2).³⁰ It therefore remains to be seen how the courts will interpret this section. In the context of religious rights, however, the principle of institutional separation of church and state lends support to the above-mentioned interpretation of the relevant sections.

28 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 53-56 where the objections raised to the text of s 8(2) were dismissed.

29 2000 (2) SA 199 (T) 205.

30 In *Fedics Group (Pty) Ltd And Another v Matus And Others; Fedics Group (Pty) Ltd And Another v Murphy And Others* 1998 (2) SA 617 (C) par 84 it was remarked that "Even more difficult to answer will be the questions that arise from the provisions of s 8(2) of the 1996 Constitution, namely, to which Ch 2 rights does the doctrine of direct horizontality apply, to which does it not apply and how are we to distinguish the one category from the other...". In *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) it was stated that "Counsel for both parties have addressed me at length on this issue and the related question whether, in this regard, the provisions of item 23(2)(b) of Schedule 6 to the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution'), read with s 8(2) of the Constitution or the provisions of s 39(2) of the Constitution, have brought about, or require, any changes to our common law. All that I need to say in this regard is that, had it been necessary for me to decide this principal issue, I would probably have regarded it as a 'difficult question of law'". In *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) it was stated that the provisions of s 8(2) and (3) of the 1996 Constitution will also be relevant to the way in which the common law is developed under s 39(2) of the 1996 Constitution.

2.3 The bearers of constitutionally protected rights

Section 15 provides that "everyone" shall be the bearer of the constitutionally entrenched right of religious freedom. The question which is considered in this paragraph is whether the term "everyone" includes, in addition to natural persons,³¹ also religious institutions, churches, groups and communities.

It was demonstrated in chapter 2 that religious rights have both an individual and associational (or corporate) character. After the window of individual freedom in the Edict of Milan³² had been closed, religious rights as such were conceived as corporate rights, the rights of a body of people. The canon law system provided groups of people with all kinds of protection and the history of religious rights can be seen as a process of extending the *corpus* of people entitled to religious rights until eventually, all individuals were included in the class entitled to protection.³³ It was furthermore shown that the international human rights instruments accord the right to religious freedom to "everyone". The term "everyone" seemingly applies only to natural persons but the current international understanding also construe the term to protect the rights of religious associations as entities or groups, for religious freedom can often best be protected by recognising the rights of religious communities to autonomy.

2.3.1 Juristic persons

Whilst the formation, existence and functioning of juristic persons are protected by the right to free association contained in section 18 of the Constitution,³⁴ section 8(4) formally recognises juristic persons as bearers of rights by providing that a juristic person is entitled to the rights described in the Bill of Rights to the extent required by the nature of the rights and

31 Malherbe 1998 *TSAR* 678-679 shows that the right of religious freedom of children under parental or alternative care may be limited to the extent that parents have a right to bring their children up in accordance with their own religious beliefs. See in this regard Malherbe 1993 *TSAR* 691.

32 For a discussion of the Edict of Milan's provisions, see the discussion in ch 2.

33 Witte *Introduction* xxii note 18.

34 See Pienaar 1993 *Cilsa* 147-171.

the nature of that juristic person.³⁵

The Constitution seems to confirm the accepted position in South African law that juristic persons are real entities,

wat meer is as die somtotaal van die lede/bestuurders op 'n gegewe oomblik, aangesien dit voortbestaan ongeag die wisseling van die lede/bestuurders en draer is van regte en verpligtinge afsonderlik van die regte en verpligtinge van die individuele lede/bestuurders waaruit dit saamgestel is.³⁶

It therefore appears that all entities acknowledged as juristic persons by South African law would, in principle, be entitled to the rights contained in the Bill of Rights, subject to section 8(1) and 8(4). In other words, all common law juristic persons and statutory juristic persons, in addition to organs of state, would be entitled to fundamental rights where the nature of the right and the nature of the juristic person would not make the protection of the fundamental right inapplicable.³⁷

This was confirmed by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.³⁸ Objections to the text of section 8(4) were lodged on the basis of the language of Constitutional Principle II, which provides that "everyone shall enjoy all universally accepted fundamental rights and freedoms". It was argued that "everyone" referred only to natural persons, and that, by extending the rights to juristic persons, the rights of natural persons were diminished. The Court stated:

35 See Rautenbach *General provisions* 37 et seq for a comparative discussion of this clause.

36 See Pienaar 1994 *THRHR* 92-98.

37 See Rautenbach *General Provisions* 37 et seq who mentions the following examples of rights which would probably not be susceptible to being held by a juristic person: right to human dignity (s 10), the right to life (s 11), freedom and security of the person (s 12), protection from slavery, servitude and forced labour (s 13), citizenship (s 20), the right to housing (s 26), the right to have access to health care, food, water and social security (s 27), and childrens' rights (s 28). Also see Pienaar *Regspersoon en Regsubjektiwiteit* 101-102.

38 1996 (4) SA 744 (CC) par 57.

[57] ... We cannot accept the premise: many 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.

[58] The objectors were also concerned that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. But the same could be said of powerful and wealthy individuals. Moreover, the objection wrongly equates juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than do natural persons. The CA was entitled to retain the provision in IC chap 3 that provides that juristic persons are entitled to the benefits of the entrenched fundamental rights. The objection therefore has no basis in the CPs.

The question therefore is what the nature of a juristic person has to be to qualify for constitutional protection and whether juristic persons of a religious nature can be bearers of constitutionally entrenched rights. There seems to be no proper basis for distinguishing between the way in which juristic persons are established, that is, whether they are common law or statutory juristic persons. The kind of activity that a juristic person engages in, will play a role in an enquiry into the nature of the right, rather than into the nature of the juristic person. It therefore seems that the reference to the "nature of the juristic person" in section 8(4) of the Constitution³⁹ probably bears only on the question of whether a juristic person is a state organ or not, since state organs are bound to the constitution in terms of section 8(1).

In this respect it is interesting to take note of the position in Germany. In German law a distinction is drawn between private and public juristic persons, with churches and religious institutions being regarded as public juristic persons. The general view is that public juristic

39 The interim Constitution contained no reference to the nature of the juristic person. The equivalent of s 8(4) in the interim Constitution, s 7(3), provided that "Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the right permits".

persons are not in principle bearers of rights in terms of the bill of rights; yet, an exception is made in respect of churches and religious associations. The South African Constitution does not draw a distinction between private and public juristic persons, but differentiates between private juristic persons and state organs and provides that state organs will be bound by the Constitution (in section 8(1)). However, the position will in effect be the same as in German law when section 8(4) is taken to mean that private juristic persons are entitled to the rights contained in the Bill of Rights if the nature of the right permits and if it is accepted that juristic persons can be bearers of religious rights.

It is clear from section 8(4) that juristic persons cannot be the bearers of *all* rights but that the nature of the right, besides the nature of the juristic person, would determine to which rights in the Bill of Rights a juristic persons would be entitled.⁴⁰

With regard to religious rights, Woolman⁴¹ in his commentary indicates that "Corporations have neither conscience nor religion within the meaning of s 14".⁴² He adds that the fact that corporations cannot invoke these rights in order to obtain a remedy does not mean that a corporation can never invoke one of these rights as a defence. In this regard he cites as authority the Canadian case of *R v Big M Drug Mart Ltd*⁴³ in which the Canadian Supreme Court held that a corporation might invoke the right to freedom of religion described in section 2(a) of the Canadian Constitution as a defence against a criminal charge of selling goods on a Sunday.

40 Rautenbach *General Provisions* 41-42 refers to the position in German law and lists the rights on which agreement more or less exists which private juristic persons may not be bearers of and the rights which juristic persons may be bearers of, subject to certain qualifications.

41 Woolman *Application* 10.8.

42 S 14 is a reference to the interim constitution; this section is s 15 of the final Constitution. See Pienaar 1997 *THRHR* 581 who is also of the opinion that a church cannot have a belief or a conscience ("geloof of gewete") and that, in the light of s 31, s 15 applies only to individuals. See *contra* Malherbe 1998 *TSAR* 679 who states: "Aangesien regspersone geregtig is op die regte in die Suid-Afrikaanse handves in die mate waarin die aard van die betrokke reg en die aard van die regspersoon dit vereis, kan onomwonder verklaar word dat kerkgenootskappe die draers is van sulke aspekte van die reg op godsdiensvryheid".

43 (1985) 18 DLR (4th) 321, (1985) 1 SCR 295 .

In view of the historical development of religious rights, the view that a juristic person cannot have the rights enumerated in section 15 is incorrect. It was shown in chapter 2 that religious rights had been protected as the rights of a group of people even before they developed into individual rights.

With reference to the German Federal Constitutional Court, Rautenbach⁴⁴ refers to two considerations which should be taken into account in determining whether a juristic person is the bearer of a constitutionally protected right: first, whether the conduct or interests protected by a certain right could also be performed or managed by a juristic person and secondly, whether juristic persons could find themselves in a situation in which these interests or acts could be restricted by state organs. With regard to the question of whether the conduct or interests protected by section 15 could also be performed or managed by a juristic person, a distinction has to be drawn between the various rights mentioned in section 15. It can be accepted that a religious corporation or association as such could not have freedom of conscience and thought since these are uniquely human attributes. Yet it cannot be said that a church or religious association does not have a certain religion or even, a belief. Churches or religious groups often express their religious beliefs in one or more Confessions of Faith ("geloofsbelydenis") which are regarded as the religious beliefs of that church.

As shown above, religious freedom comprises more than freedom of belief. The right to freedom of religion includes the right to act in accordance with a religious belief. It was argued above that religious beliefs and the concomitant religious acts cannot be separated. Churches can certainly exercise their religious beliefs in a variety of ways, for example by having services and by teaching the tenets of their religion.⁴⁵ It is therefore clear that religious groups

44 *General Provisions* 40 .

45 Compare in this regard principle 16(d) of the Vienna Concluding Document (1989) which provides: "[Participating States will] respect the right of religious communities to establish and maintain freely accessible places of worship or assembly, organise themselves according to their own hierarchical and institutional structure, select, appoint and replace their personnel in accordance with their respective requirements and standards as well as with any freely accepted arrangement between them and their State, and solicit and receive voluntary financial and other contributions".

or churches which are juristic persons cannot be denied the right to religious freedom.⁴⁶ A situation could indeed be imagined where a church could find itself in a situation in which these acts could be restricted by the state.

In this respect, reference could once more be made to the position in Germany. The German constitutional provision⁴⁷ which is equivalent to section 8(4) of the South African Constitution, provides that juristic persons have basic rights to the extent that the nature of the right makes it applicable.⁴⁸ With regard to religious rights, it has been decided in Germany that religious and ideological organisations are bearers of freedom of confession, but not of freedom of conscience⁴⁹ and that religious organisations without juristic personality are bearers of the right to the free exercise of religion.⁵⁰

It is thus clear that, under German law, churches and religious associations (acknowledged as public juristic persons in German law) are bearers of the right to freedom of religion. In my view religious juristic persons should also be accorded the right to freedom of religion and belief under the South African Constitution.

2.3.2 Associations which are not juristic persons

In the case of associations which are not juristic persons, one has to draw a distinction between the protection claimed, *locus standi*, and the procedure. The first question is whether a group or association which is not a juristic person could be the bearer of rights in terms of the

46 S 31 of the Constitution strengthens the view that this was not the intention of the drafters of the Constitution.

47 "Die Grundrechten gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diesen anwendbar sind."

48 The German provision does not refer to the nature of the juristic person.

49 BverfGE 19, 132.

50 See BverfGE 42, 322. Stern III/I 1128 states: "Das mag angesichts des Umstands überraschen, dass juristischer Personen weder einen Glauben haben noch Gewissensentscheidungen treffen können. Aber sie können den Glauben ihrer Mitgliedern verkünden und fördern sowie religiöse Aktivitäten entfalten und Zwecke verfolgen."

Constitution. This is a question of substantive law. The second question is whether such a group or association has *locus standi*, that is, a sufficient interest in the matter to allege an infringement or claim relief. This is a question of fact and of substantive law. The third question is how such a group or association can sue or be sued, and this is a question of procedure.

With regard to the first question posed above, Rautenbach⁵¹ argues that the protection under section 8(4) should be extended to associations without legal personality. He argues that there is an increasing tendency in German law to recognise associations as bearers of rights even though they are not formally recognised as juristic persons. Since the constitution does not define fixed categories of bearers of rights (the formulation normally used is "everyone has the right...") and since section 8(4) deals only with the position of juristic persons, one could agree with Rautenbach that this would be a logical development. He adds that the right to freedom of association not only protects the right of natural persons to freely form and join associations, but also guarantees the associations *as such* particular rights, whether they are juristic persons or not.

With regard to the second question pertaining to *locus standi*, or "a direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the litigation",⁵² the matter is explicitly regulated by the Constitution itself in section 38 which provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own

51 *General Provisions* 40.

52 See Harms *Civil Procedure* C1-C2. This definition is simplistic; this is, however, not an exhaustive discussion of locus standi. For cases on "direct and substantial interest" see Harms *Civil Procedure* E22 n 4.

- name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members.

With regard to the third question, and in terms of common law, one has to be a person, that is, a natural or a juristic person, to be able to sue or be sued. An association of natural persons may thus sue or be sued in its own name in cases where it is a juristic person (*universitas personarum*), that is, an entity distinct from the members constituting it and one which has perpetual succession and the capacity to own property apart from its members. But, unless each individual forming part of an unincorporated body of persons is joined and cited by name, the summons will, as a matter of procedure, be bad for misjoinder.⁵³

In an attempt to simplify this method of citation, rule 14(2) of the Uniform Rules of Court provides: "A partnership, a firm or an association may sue or be sued in its name." "Association" is defined in subrule (1) as "any unincorporated body of persons, not being a partnership". Rule 14(9) further provides: "A plaintiff suing an association may at any time before or after judgment deliver a notice to the defendant calling for a true copy of its current constitution and a list of the names and addresses of the office bearers and their respective offices as at the relevant date."

It therefore seems that an association without juristic personality can be the bearer of constitutional rights, has *locus standi* and is able sue or be sued.

53 See Erasmus *Superior Court Practice* B1-110 - B1-117 for the rules regulating the conduct of the proceedings of the several Provincial and Local Divisions of the High Court of South Africa published under Government Notice No. R 48 of 12 January 1965, as amended. These rules apply to matters heard in any high court, also if they are of a constitutional nature. In this regard it has to be kept in mind that, apart from matters falling within the exclusive jurisdiction of the Constitutional Court in terms of s 167(3) of the Constitution, the Constitutional Court is not usually a court of first instance, and that direct access is only allowed in terms of s 167(6) of the Constitution and rule 17. Cases are usually referred to the Constitutional Court for confirmation or it sits as a court of appeal, in terms of the Constitution and according to the Constitutional Court Rules.

2.3.3 Groups or communities

Groups or communities are given a constitutionally protected right by section 31. This section makes it clear that persons belonging to a religious community have the right to practise their religion and to form, join and maintain religious associations and other organs of civil society. In other words, they have "the right to be left alone" and the right to engage in religious activities, both being aspects of "free exercise" of religion. In this sense then, at least, groups or communities are awarded substantive rights by the Constitution and can be bearers of rights.

A group or community can also have *locus standi* in terms of the broadly formulated section 38 as set out above.

The problem is, however, that a group or community which does not have legal personality and which is not an association cannot as a group, and in its own name, sue or be sued for an alleged infringement of a right or for relief. There simply exists no procedural means for this. An entity which can sue or be sued in its own name will have to litigate on behalf of such a community or group. The individual claimants will therefore all have to be cited or they could cede their claims to another entity.

In the last instance it has to be pointed out that, once an applicant has a sufficient interest in the outcome of constitutional litigation, the inquiry is objective.⁵⁴ It is, in other words, sufficient to show that a right in the Bill of Rights has been violated by a law or by conduct; it is not necessary to show that the rights of the *specific applicant* have been violated. This ought to enable a juristic person or an association to invoke the rights of a natural person to attack laws or conduct which violate the rights contained in the Bill of Rights.

3. The suspension of religious rights

Section 37 of the South African Constitution provides for the suspension of fundamental rights

54 The doctrine of objective constitutionality is accepted in South Africa. In other words, if a law is unconstitutional because it violates a section of the Constitution, it is objectively invalid and any applicant with an interest in setting aside the law has standing to challenge its constitutional validity.

during a state of emergency. Some rights are not suspendable or "nonderogable",⁵⁵ but section 15 rights have not been included in this category. In the transitional Bill of Rights, all the section 14 (now section 15) rights were nonderogable, and religious rights could therefore not have been suspended during a state of emergency. In this regard the transitional Constitution conformed more strictly to international standards than the final Constitution.⁵⁶ Article 4(2) of the International Covenant on Civil and Political Rights provides that religious rights as entrenched in article 18 may not be derogated in time of a public emergency which threatens the life of the nation.⁵⁷ Du Plessis⁵⁸ states that the suspension of section 15 during an emergency will, for instance, exclude constitutional protection for nonconformist conscientious objectors to conscription.

4. Limitation of religious rights

4.1 Introduction

The adjudication of religious freedom issues hinges largely on the courts' understanding of the effect of the general limitation clause. The South African jurisprudence of the constitutional protection of religious rights and freedoms can therefore not be understood in isolation from the effect which the general limitation clause can have on the adjudication of religious rights issues.

Fundamental rights entrenched in the Bill of Rights, including religious rights, may be limited in terms of the general limitation clause (section 36), which provides:

55 See s 37(5)(c).

56 Du Plessis 2001 *BYU-LR* 110 points out that the rule of nonderogability has probably become part of customary international law binding on every state irrespective of whether it is a party to any international convention or covenant.

57 Also see art 27(3) of the American Convention on Human Rights (1969) which states that the suspension provision does not authorise suspension of art 12 which entrenches freedom of conscience and religion.

58 2001 *BYU-LR* 110.

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution,⁵⁹ no law may limit any right entrenched in the Bill of Rights.

4.2 A proportionality test

The South African Constitution followed the example of Canadian,⁶⁰ German⁶¹ and European

59 S 36(1) is not the sole constitutional source of conditions pursuant to which fundamental rights can be limited. Du Plessis 2001 *BYU-LR* 108 points out that rights can, for instance, also be demarcated by internal modifiers (see eg s 17), specific limiting provisions (see eg s 16(2)), the effect of other rights entrenched in the Bill of Rights and constitutional provisions outside the Bill of Rights. The specific limiting provisions which occur in s 15(2) and 15(3) have already been discussed where these sections were dealt with in ch 5 and 6. This chapter is only concerned with the general limitation clause.

60 The American constitutional order does not work with a general limitation clause, but makes use of definitional exclusions. The difference between the approach in America and in Canada is explained in *Prince v President of the Law Society, Cape of Good Hope, and Others* 1998 (8) BCLR 976 (C) 981B-982B.

61 Rautenbach *General Provisions* 98-99 states: "The German proportionality principle is applied in Canada and by the European Court of Human Rights and its basic elements are present in the criteria developed by the American Courts for the application of the equality principle. It seems unavoidable that the proportionality principle will also be applied in South Africa." The author then sets out the three elements of the German proportionality principle, namely that the limitation of a particular right must be capable of achieving the object of limitation; the object of the limitation may not be realised as effectively by means of a less drastic measure and an appropriate relationship has to exist between the nature and extent of the limitation and the nature and importance of the rights and community interests concerned. The appropriate relationship is determined by taking into account the nature and gravity of the factual limitation, the nature and importance of the right that is limited and the nature
(continued...)

Council jurisprudence which relies on general limitation principles⁶² combined with a proportionality test to decide the justifiability of specific limitations of fundamental rights.⁶³ The drafters of section 33 of the interim Constitution⁶⁴ were strongly influenced particularly by the Canadian example of a general limitation clause,⁶⁵ and the Canadian decision in *R v Oakes*.⁶⁶ As a result, the Constitutional Court indicated that it was going to follow the

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- 61 (...continued)
and importance of the public interest that is protected or promoted.
- 62 See Rautenbach *General Provisions* 82-85 for a discussion of general approaches in bills of rights to the limitation of rights and elements of limitation clauses.
- 63 Many international human rights instruments also contain general limitation clauses. Art 29 of the Universal Declaration of Human Rights provides: "(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations." Art 18 of the International Covenant on Civil and Political Rights (1966) provides: "(3) Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Also see: Art 9 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Art 12 and 30 of the American Convention on Human Rights (1969); Art 8 of the African Charter on Human and People's Rights (1981); Art of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981); Principles 17 and 21 of the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989); Art 14 of the Convention on the Rights of the Child (1989); Principles 9 and 24 of the Document of the Copenhagen Meeting of Representatives of the Participating States of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1990); and para 28 of the Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1991).
- 64 S 33(1) of the interim Constitution stipulated more strict conditions for the limitation of some specified rights, including religious rights. The limitation of these rights, in addition to being reasonable, also had to be necessary. The notion of a more strict limitation test is absent from the 1996 Constitution.
- 65 S 1 of the Canadian Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
- 66 (1986) 26 DLR 4th 200.

Canadian "two stages" approach.⁶⁷ The first stage of the enquiry is to ascertain whether law or conduct,⁶⁸ by its intent or impact, infringes a right protected by the Constitution. If it does, the second stage⁶⁹ of the enquiry ensues which entails an investigation of whether the infringement is justified under the limitation clause of the Constitution.⁷⁰

67 *S v Zuma and others* 1995 (2) SA 642 (CC) par 21; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 100-102; *S v Williams* 1995 (3) SA 632 (CC) par 54; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) par 9; *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) 26 H; *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) 815E-820D. Also see *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C) 982E-G.

68 When the conduct of an entity or a person (as opposed to a law) is the subject of constitutional scrutiny, the limitation clause plays a cardinal role in the interpretation process from the outset. The reason is that a section in legislation which authorises the conduct might be too wide. In order to ascertain what the scope of the conduct is that would pass constitutional muster, it is necessary to apply the limitation clause to the particular section. An interpretation of the particular section which passes the limitation test will then determine the conduct which is constitutionally permissible. If the particular section of the legislation does not pass the limitation test, and if it cannot be read down, the legislation itself is unconstitutional. See in this regard also Rautenbach *General Provisions* 87-88 who states: "It has to be accepted that 'limitation by law of general application' in section 33(1) also includes the authorisation by law of executive organs to limit rights and that this authorisation may include the exercise of a discretion. The capacity of the legislature to authorise an executive organ to limit rights is restricted by the bill of rights".

69 It has been held that during the second stage, the *onus* of proving that the limit on a fundamental right is permissible in terms of the limitation clause, rests upon the party seeking to uphold the limitation. See *S v Zuma* 1995 (2) SA 642 (CC) par 35-39; *S v Makwanyane* 1995 (3) SA 391 (CC) par 102. Furthermore, it has been held that justification "must be established clearly and convincingly". See *S v Mbatha*; *S v Prinsloo* 1996 (3) BCLR 293 (CC) par 19 *per* Langa J. Also see *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); *R v Oakes* 26 DLR (4th) 200 SCC 226-227; *S v Lawrence* 1997 (4) SA 1176 (CC) par 132 *per* O'Regan J; *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 (2) SA 817 (C).

70 There has been some debate about the effect of "special" limitation provisions in certain sections of the Constitution. See in this regard Van der Walt 1997 *SAPL* 275-330 who regards the general limitation provision as the basis of a proportionality test which is used to test the justifiability of all limitations and specific limitation provisions in a specific clause as extensions, qualifications or further explications of the general limitation clause. It was accordingly held in *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) 981B-982B that s 36 was an integral provision that always had to be considered when determining whether a law was contrary to any of the provisions in the Bill of Rights.

In its first decision under the interim Constitution, *S v Makwanyane and Another*,⁷¹ the Constitutional Court's approach to the limitation clause was largely based on the *Oakes* decision, and this still forms the basis of its approach to section 36 in general.⁷² In *Makwanyane*⁷³ Chaskalson P stated that the limitation clause involved a process involving -

the weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests.⁷⁴

Chaskalson P further stated that the balancing of interests had to be done on a case-by-case basis and then set out the relevant considerations that could be taken into account in determining whether a limitation was reasonable and necessary.⁷⁵ It is these considerations that were ultimately written into section 36 of the final Constitution of 1996.

In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*,⁷⁶ decided under the final Constitution, it was accordingly stated that

71 1995 (3) SA 391 (CC) 436B-439E.

72 Par (a) to (e) of s 36(1) in fact derive from *dicta* of the President of the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC).

73 1995 (3) SA 391 (CC) par 104.

74 Also see *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) par 49 where it was held: "To determine whether a law is overbroad, a court must consider the means used (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad. The Canadian case of *Royal College of Dental Surgeons of Ontario v Rocket* offers an example of this analysis in the free expression setting. The Canadian Supreme Court struck down as overbroad a ban on dentists' advertising, using an analysis conducted under the Canadian Charter's limitation clause. The Court held that while there was no doubt a legitimate government interest in preventing irresponsible and misleading advertising by dentists, the blanket ban challenged also struck at legitimate advertising, with the result that the test of proportionality between the effect of the legislative measure and its purpose was not met." Also see *Reitner Pharmaceuticals (Pty) Ltd v Registrar of Medicines and Another* 1998 (4) SA 660 (T).

75 Par 104.

76 1998 (12) BCLR 1517 (CC) par 34.

the relevant considerations in the balancing process are now expressly stated in section 36(1) of the 1996 Constitution to include those itemised in paragraphs (a) to (e) thereof. In my view this does not in any material respect affect the approach expounded in *Makwanyane*, save that paragraph (e) requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose [of the limitation].' Although section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.

The Court further stated:⁷⁷

The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.

In *De Lange v Smuts NO and Others*⁷⁸ Ackermann J confirmed that the Constitutional Court viewed the limitation issue as one that had to be decided in the second of the two stages of constitutional analysis and that it still regarded the limitation issue as a balancing of interests as described earlier in *Makwanyane*.

One could agree with Van der Walt⁷⁹ who concludes in the context of constitutional property rights:

The result of the development from section 33 of the interim Constitution to section 36 of the final Constitution is that it has become reasonably clear that the justifiability of limitations will be tested in terms of a proportionality test which must reflect the interests of society and the interests of those affected by a limitation... This development not only suits the general tenor of the South African

77 Par 35.

78 1998 (7) BCLR 779 (CC) par 86-101.

79 *Constitutional Property Clauses* 358.

Constitution, but also brings the possible interpretation and application of the property clause into line with a very strong tendency in other jurisdictions, where the focus is placed on questions about the constitutional reasonableness and justifiability of limitations on the protected property right rather than the exact definitions and scope of the right itself.⁸⁰

The final Constitution now specifies that in the application of the proportionality test all relevant factors have to be taken into account including "(a) the nature of the right (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose". Since the application of these factors will depend on the facts of each particular case, each of them will not be discussed separately in this thesis.⁸¹

The application of the proportionality test in the context of religious rights was thoughtfully⁸² conducted by Sachs J in *Christian Education South Africa v Minister of Education*.⁸³ The justice assumed but did not come to a decision in this regard, that section 10 of the Schools Act limited parents' religious rights under both sections 15 and 31.⁸⁴ He proceeded to determine "whether, under section 36, the negative impact which the Schools Act has on the practice of corporal correction in the schools of the appellant's religious community, is to be

80 See also De Waal *Bill of Rights Handbook* 411 who states that the requirement of s 36 that limitations of rights should be reasonable and justifiable involves a three-part inquiry, namely firstly, the evaluation of the reasons for the law that limits rights; secondly, the determination of whether there is a rational relationship between these reasons and the limitation; and thirdly, the determination of whether there is an acceptable degree of proportionality between the benefits to be obtained by the limitation and the harm that limitation of the rights entails.

81 In *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C) 984-990 the Cape High Court applied the limitation test in the context of religious rights by taking the respective factors mentioned in s 36(1) (a) - (e) as subheadings and discussing each in turn. Also see Malherbe 1998 *TSAR* 692-695 for a discussion of each of these factors in the context of the limitation of religious rights.

82 As illustrated, for example, by his comments in par 33-35 on the difficulties of proportionality analysis in the area of religious rights owing to the fact that the competing interests to be balanced belong to completely different conceptual and existential orders.

83 2000 (10) BCLR 1051 (CC).

84 Par 27.

regarded as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality".⁸⁵ The justice rejected the strict scrutiny test taken from American jurisprudence and affirmed that section 36 of the South African Constitution required a "nuanced and context-sensitive form of balancing".⁸⁶

He conducted the proportionality analysis by dealing with the relevant factors under two headings: "The nature of the rights and the scope of their limitation"⁸⁷ and "The purpose, importance and effect of the limitation, and the availability of less restrictive means".⁸⁸ In the first instance he held that there could be no doubt that freedom of religion, belief and opinion was important and that the appellant's members sincerely believed that they were obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children. However, parents were not being deprived by the Schools Act of their general right to bring up their children according to their Christian beliefs. They were merely prevented from empowering the schools to administer corporal punishment. In the second instance, he held that the state was under a constitutional duty to protect children from degradation and indignity in the institutional environment of a school, which was quite different from corporal punishment in the home environment. Sachs J found:⁸⁹

The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.

When all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim

85 Par 28.

86 Par 29-31.

87 Par 36-38.

88 Par 39-49.

89 Par 51.

for a constitutionally compelled exemption.

Du Plessis⁹⁰ states that, in adopting this line of reasoning, justice Sachs neglected to deal sufficiently with what schools and teachers should be permitted to do in a country where a modern-day constitution guarantees adherence to values that underlie an open and democratic society based on human dignity, equality and freedom. He points out that it would have been commendable to do so because it would have proceeded beyond the adjudication of a religious rights issue in a strictly libertarian and individualistic free exercise vein.

In any event, as pointed out by Smith,⁹¹ Sachs J's application of the limitation provision in this matter is consistent with recent ideas about the limitation of rights in general and of freedom of religion in particular.

In a much less considered judgment, the Supreme Court of Appeal in *Prince v President of the Law Society*⁹² gave little regard to what the free exercise right of a Rastafarian entailed by definition and proceeded to limit the right before defining and determining its scope. The question was whether there should be an exemption for the use of cannabis by Rastafarians for *bona fide* religious observance. As far as the right is concerned the Court contented itself with holding that the Appellant attempted to introduce an additional ground of exemption and that it could not legislate.⁹³ Such an approach does not acknowledge that religious freedom may demand exemptions from generally applicable laws in particular cases;⁹⁴ although it might be

90 2000 *BYU-LR* 116.

91 See discussion of the case in Smith 2001 *SALJ* 6-9.

92 2000 (3) SA 845 (SCA).

93 Par 11.

94 See, for example, the statement of Sachs J in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) par 42 where he acknowledges (albeit in a different context) that religious freedom may demand exemptions from generally applicable laws in particular cases: "To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views."

limited in accordance with section 36. As Du Plessis⁹⁵ points out, a judgment which took Prince's religious rights more seriously but nonetheless concluded that it could not sanction a prospective attorney's consumption of dagga for religious purposes, would have been a more valuable contribution to the evolution of a constitutional jurisprudence on religious rights.⁹⁶

4.3 Meyerson's theory on the limitation of constitutional rights

Following a different approach, Meyerson⁹⁷ points out that the concepts invoked in the limitation clause in the phrase "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" are inherently contested and therefore open to a variety of interpretations.⁹⁸ The Bill of Rights, for example, recognises the rights to equality, dignity and particular freedoms and it seems contradictory that infringements of these rights could be justified in the name of the very same values which the rights function to protect. Furthermore, these concepts, now married in one comprehensive phrase, sometimes conflict with one another, thereby making a choice between them inevitable. This, in turn, would indicate some kind of a hierarchy of rights, a matter which raises serious interpretational questions.

Meyerson states that it is possible to supply an interpretation of the phrase mentioned in section 36(1) which avoids the problems mentioned above by arguing that⁹⁹

... the problem of conflict would evaporate if these concepts were capable of playing a role at a much higher level of generality than when they function to

95 2000 *BYU-LR* 117.

96 Prince has thereafter appealed to the Constitutional Court, South Africa's final court of appeal in constitutional matters, but at the time of finalising this thesis the Constitutional Court's judgment in this matter was still pending.

97 Meyerson *Rights Limited* xxiv.

98 The phrase in s 36(1) (this phrase is also found in s 1, s 7(1) and s 39(1)) was referred to in ch 4 in the context of constitutional interpretation, as an example of "general and undefined words and phrases" which could present enormous interpretive difficulties.

99 *Rights Limited* xxvi.

assert specific rights, and if there were a single moral general requirement for which they could plausibly be said to be standing in.

Drawing considerably on theories of political philosophy,¹⁰⁰ the author argues that the phrase "an open and democratic society based on human dignity, equality and freedom" should be understood at a sufficiently general level so that it provides a distinctive and principled test for determining which limitations of constitutionally entrenched rights are competent. She believes that this phrase should be used to test the state's purpose *before* the inquiry into the relevant factors mentioned in section 36(1) can take place.

In the first instance she argues¹⁰¹ that the phrase "an open and democratic society" is the opposite of an authoritarian society and that government action should therefore, in such a society, be justified by reference to something other than pure political power. It has to be justified by reasons. In other words, openness requires that public policies should be justified in public by furnishing the actual reasons which guide them. In evaluating whether a particular limitation to a right is reasonable and justifiable in an open and democratic society, a judge is therefore obliged to scrutinise whatever reason the state offers in order to make sure that it is not just a disguise for the exercise of raw power.

The further reference to "dignity, equality and freedom" in section 36 builds on the previous phrase of "open and democratic" but requires even more. The author demonstrates this by stating that the need for restrictions to be based on something more than the exercise of raw power does not preclude a restriction on religious freedom which is justified, for example, on the basis that a particular religion is false. This leads her to state that the inclusion of the phrase "dignity, equality and freedom" suggests that the conduct or law should be justified not only in terms of reasons, but also in terms of reasons of a certain kind.

The kind of reasons that would be permissible that is, the considerations which, in justifying restrictions on religious freedom, would respect the values of dignity, equality and freedom,

100 Especially on the work of the philosophers such as John Locke and particularly, John Rawls.

101 *Rights Limited* 3.

are captured by her interpretation of the phrase "freedom and equality".¹⁰² She interprets it in terms of Locke's notion that "equal" and "free" mean that there are no natural or preordained hierarchies of power, and that people are not naturally subordinate to anyone. In this scheme, theorists in political philosophy say that if the exercise of political power is to be consistent with the recognition that there are no natural hierarchies of power, then it must be such that the political institution "would be accepted by all reasonable people". She therefore finds that the Constitution -

[i]n disabling the majority from taking up any position about the scope of constitutional rights which is inconsistent with respect for equality and freedom, it is demanding that the justification for whatever position is taken up should be one which would win the consent of all reasonable citizens.

The requirement of "free and equal" therefore means that when the state limits an entrenched right, it has to offer a justification for such limitation to which all reasonable people would (hypothetically), if asked, accord some degree of force.

In discussing the requirement of dignity, the author builds on Kant's account of the intrinsic dignity¹⁰³ of human beings by virtue of their capacity of rational choice and quotes¹⁰⁴ his categorical imperative to

act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end.

This leads her to the conclusion that, besides confirming the ideal of unanimous consent expressed by the words "equal and free" as explained above, inclusion of the word "dignity" makes it clear that any limitation of a constitutionally protected right must respect our inherent

102 *Rights Limited* 10.

103 Also see the judgment of O'Regan in *S v Makwanyane* 1995 (3) SA 391 (CC) par 328: "Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings."

104 *Rights Limited* 12, quoting from Kant I *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (trans HJ Paton) (London 1963) 96.

moral status or the fact that we are ends in ourselves.¹⁰⁵ This means that the limitation clause does not test the legitimacy of restrictions on protected rights with reference to what all reasonable people would agree to from the perspective of their own self-interests but by asking what all reasonable people would agree to from the perspective of everyone's inherent and equal moral status.

Meyerson¹⁰⁶ then applies her theory to religious rights to ascertain which restrictions on the right to religious freedom would weigh with all reasonable people who relate to each other as possessors of equal moral status. She distinguishes between two kinds of debates which she refers to as "public reason" and "personally reasonable beliefs". The first comprises only "presently held beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial".¹⁰⁷ In other words, the participants have a common code or a common reason in terms of which they can argue, even though they might not convince the other side. By contrast, there are debates where no "evidence" could shake the beliefs of the participants and where the divergent beliefs could not be explained with reference to a universally accepted code. The beliefs in the latter case are clearly incompatible personal points of view. Meyerson¹⁰⁸ states that these beliefs may be objectively reasonable but could not be publicly demonstrated to be objectively reasonable. She calls these matters "intractable".

This distinction forms the basis of her theory that in limiting a constitutionally entrenched right the state may not appeal to a justification whose normative force depends on an intractably disputed point of view or way of reasoning. Such a view would be disqualified from serving as a justification for limiting a constitutional right, irrespective of its objective soundness. In other words, it would not be consistent with respect for everyone's equal moral status if, in limiting constitutional rights, the majority were permitted to appeal to reasons which they believed to be sound without being able to publicly demonstrate that their claims were true.

105 *Rights Limited* 14.

106 *Rights Limited* 15-20.

107 Rawls *Political Liberalism* 224 as quoted by Meyerson *Rights Limited* 15.

108 *Rights Limited* 16.

She states that views about such matters as the correct path to salvation or whether God exists are examples of views that are not backed up by publicly accessible evidence and ordinary modes of inquiry and that there are no public way to debate disagreements about religious matters.

On this basis she distinguishes between two kinds of "harm" that may be caused by religious conduct:

On the one hand, there are harms which would not be suffered were it not for the holding of an intractably disputed belief that the conduct in question is wrong from the religious point of view.¹⁰⁹ And on the other hand, there are harms whose harmfulness is independent of intractably disputed religious beliefs.¹¹⁰

The author illustrates this distinction by means of two examples: (a) a law that prohibits attendance at the services of all religions except for one which is seen as the true religion and (b) a law that prohibits the followers of a particular religion from making human sacrifices at their ceremonies. In the first example the harm which the law seeks to prevent is that of practising an unworthy religion. In accordance with her theory such a law is not justifiable since the harm depends on the intractably held religious view and would not have been suffered in the absence of the belief that there is only one true religion. In the second example, by contrast, the harm of involuntary loss of life would be accorded at least some weight by all reasonable people regardless of their religious beliefs. The reason for limiting the religious right is therefore independent of intractably disputed religious beliefs. In other words, that which reasonable people cannot be expected to agree on in rational dialogue is taken off the list of possible justifications for limiting a constitutionally protected right, but an appeal to objectives that all reasonable citizens would unite in affirming would pass the threshold test set by the limitation clause.

109 Also referred to as "non-neutral harms".

110 Also referred to as "neutral harms".

Conduct "within the sphere of each individual's rightful control",¹¹¹ in other words, conduct outside the purview of state interference in these terms, is conduct which, though it may cause real harm, causes only "non-neutral harm", that is, harm that would not exist were it not for certain religious beliefs on the part of those who suffer harm.

The theory expounded above espouses a benevolent approach to the free exercise of religion.¹¹² It implies that if a person or group could prove that certain conduct is based on an intractable religious belief (a sincerely held belief) and that the harm it causes to other people would not exist but for their different religious beliefs, the state would not be entitled by legislation or conduct to interfere with the nonneutral harm by limiting their right to freely exercise such religious rights.

Other ways of restricting religious freedom include giving a preferred status to a specific religion or religions, unduly favouring certain religious institutions or exempting some from common duties and standards on the grounds of religion ("establishment concerns"). By conferring a benefit upon one or supporting religion, other religious or irreligious groups might complain of discrimination against them. This is a decidedly more complex and controversial subject which raises not only equality concerns but also concerns about religious freedom in the sense that preferential treatment could indirectly coerce citizens to conform to the officially approved religion. The added difficulty is that the claim to be exempted from ordinary laws for religious reasons may, whilst serving the right to free exercise of religion on the one hand, raise questions about discriminatory conduct on the other hand.

Meyerson does not seem to be able to deal satisfactorily with the latter issue. She acknowledges:¹¹³

Another fear which a devout majority is likely to have is that if the state refrains from supporting religion the result will be a victory for atheism ... [W]hen the state

111 *Rights Limited* 8.

112 See Epp Buckingham 2000 *Stell LR* 133 who criticises Meyerson's proposals as being too freedom-centered.

113 *Rights Limited* 50.

refuses to promote either religion or atheism ... it might have the effect, in particular, that atheism is *de facto* strengthened.

Meyerson apparently suggests that this has to be accepted, and that the fact that a neutral approach to religion could produce nonneutral results is not a valid argument against such a policy. In this regard Malherbe¹¹⁴ comments:

Die probleem kan nie so met 'n skouerophaling afgemaak word nie. Die godsdiensbewuste Suid-Afrikaanse gemeenskap sal dit waarskynlik nie aanvaar nie en dit is ook nie die korrekte benadering tot die toepassing van die grondwet nie.

One could agree with Meyerson¹¹⁵ that it would be a mistake to suppose that the phrase "[an] open and democratic society based on human dignity, equality and freedom" does no real work in the limitation clause.¹¹⁶ But, in view of the decisions of the Constitutional Court on the limitation clause mentioned above, there is no authority for Meyerson's approach to the above-mentioned phrase as a kind of "threshold test" which has to be passed before the inquiry into the relevant factors mentioned in section 36(1) can take place. The limitation issue remains, in essence, a proportionality¹¹⁷ enquiry as set out in the *Makwanyane* case, and a court is enjoined in the balancing process to take into account all relevant considerations, including

114 1998 *TSAR* 690.

115 *Rights Limited* xxv.

116 Rautenbach *General Provisions* 93 points out that these concepts have to be considered as a whole in South Africa and that other systems do not usually employ them individually.

117 Dickson CJC in *R v Oakes* (1986) 26 DLR 4th 200 described the components of proportionality as follows: "There are, in my view, three important components of a proportionality test. 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. Secondly, 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: *R v Big M Drug Mart Ltd* at 352. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

those described in section 36(1).¹¹⁸ From the development of section 33 to section 36, and if regard is had to the *Makwanyane* case, it appears that the specific factors enumerated in section 36 were specifically included to assist a court in adjudicating whether a specific limitation were indeed "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" and that the whole of section 36(1) has to be read together in order to make such a judgment.¹¹⁹ Meyerson's interpretation of the phrase could, however, play a valuable role in balancing the interests of the community and of the persons affected by the limitation in the greater proportionality analysis.¹²⁰

5. Conclusion

In the analysis of the application clause (section 8) of the Constitution, a distinction was drawn between the binding effect of the clause and the entitlements according to it in terms of the Constitution. As far as the binding effect is concerned, section 2 of the Constitution provides that any law or conduct inconsistent with the Constitution is invalid. In any legal proceedings the constitutionality of either a law or conduct can thus be challenged.¹²¹ The question whether all law and all conduct are subject to constitutional scrutiny was therefore addressed in this chapter.

As far as "law" is concerned, section 8(1) provides that the Bill of Rights applies to the law

118 See Malherbe 1998 *TSAR* 691-695 who also maintains that all relevant factors, including the five factors mentioned in s 36(1) must be taken into account to determine whether the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". See the author's discussion of the five factors of s 36(1) in the context of the limitation of religious rights.

119 See Rautenbach *General Provisions* 93 who points out that although the precise wording differs to some extent these concepts are also used in other systems and that "...all systems have one pervasive theme: *a particular relationship has to exist between the factual limitation imposed and a public or community interests which may be protected and promoted by the state*".

120 Meyerson's approach was referred to with approval by Sachs J in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) par 33 n 35.

121 S 2 of the 1996 Constitution provides: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled" (my emphasis).

in its entirety. Under the interim Constitution, the application of the Chapter on Fundamental Rights was based on the classification of law into the law of the state (which includes statutory law, the common law and customary law and which comprises both public and private law) and the legally enforceable internal rules of conduct of institutions other than the state. The wording of the 1996 Constitution (in section 8(1)), however, differs from that of the interim Constitution (section 7(2)) in this regard. Section 9(4) of the Constitution also appears to deviate from the previous position. There can be no doubt that the 1996 Constitution applies to legislation, common law and customary law, irrespective of the nature of the parties involved in the dispute (that is, whether they are private persons or state organs) and irrespective of whether it is private or public law. On the question of whether "nonstate law" is subject to the 1996 Constitution, the provisions of sections 8(2) and 8(3) appear to determine whether the Constitution applies. The provisions of section 9(4) should therefore be read in conjunction with the provisions of section 8(3) in order to limit the section 9(4) "right" in cases where a strict application thereof would conflict with the principle of separation of church and state.

The same principles apply in determining which conduct would be subject to constitutional scrutiny. Section 8(1) provides that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. With regard to the conduct of organs of state, it was shown that the control test has been accepted by the court to determine whether an entity is an organ of state. Thus, if an entity is found to be controlled by the state as defined by the courts, it would be bound by the Bill of Rights. But when the constitutionality of the conduct of nonstate entities is at issue, the provisions of sections 8(2) and 8(3) will become relevant to determine whether it is subject to Constitutional norms.

In other words, the general principle in the application of the final Constitution is reflected in sections 2 and 8(1) of the Constitution. Section 8(2) and 8(3) specifically make provision for the (exceptional) cases where the Bill of Rights would bind the laws or the conduct of natural and (private) juristic persons "if and to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by the right". It was argued, with reference to Van Dijkhorst J's decision in *Jooste v Botha*, that "the nature of the proposed right, its enforceability, the practicalities of the human relationships involved and whether

public policy or public mores require such moral obligation to be converted into a legal obligation" would stand central in applying sections 8(2) and 8(3). In the context of religious rights the principle of institutional separation of church and state would require that, say, church laws should not be subject to constitutional norms. This principle of separation would furthermore serve as a guiding principle in determining whether the conduct of religious individuals or groups should be subject to Constitutional scrutiny.

With regard to the entitlement to certain protections in terms of the Bill of Rights, it was shown that section 8(4) provided that juristic persons would be bearers of constitutionally protected rights if required by the "nature of the right" and the "nature of the juristic person". The "nature of the juristic person" could refer to the question of whether the juristic person was a state organ, in which case it would not be entitled to the rights in the Bill of Rights, but bound to the Constitution in terms of section 8(1). It could also mean that the fact that a juristic person is, for example, a church or religious institution, should be taken into account. With regard to the nature of the right it was argued, with reference to the position in German law and the historical development of religious rights, that juristic persons such as churches and religious associations could be the bearers of the right to freedom of religion and belief. The protection under section 8(4) could even be extended to associations without legal personality. It was, however, shown that, although groups or communities which do not have legal personality or are not associations could have a substantive right to practise their religion as well as *locus standi*, they would, procedurally speaking, not be able to litigate in their own names.

Without attempting a complete discussion of the limitation clause, it was shown that the South African Constitution had adopted the two stage approach of Canada, Germany and the European Council. After determining the scope of the entrenched right and establishing whether a *prima facie* infringement has taken place, the limitation clause is applied in the second stage to determine whether the limitation is reasonable and justifiable.

The Constitutional Court's approach to the limitation clause, which commenced in the *Makwanyane* matter, entails the application of a proportionality test. In view of the fact that the issue of the limitation of rights is an "ineluctably discretionary judgment by a court, which

cannot easily be captured in any verbal formula",¹²² as well as ineluctably tied to the facts of a specific matter, no attempt was made to set general principles for the limitation of religious rights.¹²³ It is clear that in each individual matter the judge will have to evaluate the justifiability of the limitation of rights and balance the various interests with reference to section 36(1). The fact that "the nature of the right" has to be taken into account in terms of section 36(1)(a) means that the essential rights and freedoms of religion, as explained earlier in this thesis, must also be taken into account at this level of Constitutional analysis. The approach of the Constitutional Court in the *Christian Education* matter and the Supreme Court of Appeal in the *Prince* matter was evaluated in these terms. It was shown that the approach of the Constitutional Court to the limitation of freedom of religion in the former matter was, in contrast to the approach of the Supreme Court in the latter matter, a promising start. Meyerson's alternative approach, although not totally in line with the approach of the Constitutional Court, was also discussed. It was argued that her theory and its application to religious rights issues could be incorporated in the balancing process.

122 Hogg *Constitutional Law of Canada* 15-16.

123 Regarding the limitation of manifestations of religious beliefs, it was held in *R v Big M Drug Mart* (1985) 18 DLR (4th) 321, (1985) 1 SCR 295 that: "Every individual [is] free to hold whatever religious beliefs his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own".

CHAPTER 8

CONCLUSION

It is clear that religious rights are, by their very nature, complex and multifaceted. The protection of the ideas underlying religious human rights often involves a balancing of different and sometimes conflicting interests. This is partly the result of the fact that

religious human rights ... must find their source and sanction simultaneously in morality, history, and politics.¹

It is therefore not surprising that the members of the South African Constitutional Court do not yet have even broad agreement on the meaning of the religious freedom provisions found in the Constitution.²

This thesis endeavours to determine what freedom of religion means in South African law. It is argued that the complex and multifaceted nature of religious freedom is, in part, to be explained by recognising that religious freedom is, in fact, a bundle of rights and freedoms. The essential rights and freedoms of religion which constitute this "bundle" are identified and it is shown that no single principle could by itself guarantee religious freedom and that the essential rights and freedoms of religion are mutually supportive and mutually subservient to the highest goal of guaranteeing religious freedom. It is argued that these essential rights and freedoms constitute minimum standards for the protection of religious freedom and that

1 Witte "Introduction" xxix explains this to mean that religious rights are rooted, morally speaking, in the natural qualities of the person and community, in the creation order, natural law, divine covenant or in sacred statements of morality; historically speaking, in the customs and traditions and historical experiences of peoples; and politically speaking, in the laws and constitutions of states and the international community. The sanction is likewise rooted in moral condemnation; communal condemnation and social stigmatising; and legal punishment of violators.

2 Smith 2001 *SALJ* shows, with reference to the decisions in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) par 18 and *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), that the Constitutional Court was markedly divided on the very nature of freedom of religion. See the discussion of the *Christian Education* and *Lawrence* cases in ch 5 and 6.

religious freedom as protected in the South African Constitution should be interpreted to incorporate these multiple principles. The religious rights provisions in the South African Constitution are assessed to determine whether and how these essential rights are protected and how, as standards, they should be interpreted and implemented in the South African constitutional context to ensure adequate protection of religious freedom.

The thesis commences with a historical analysis to identify the constituting elements of religious freedom. It is shown in chapter 2 that, in the course of Western history, certain religious tensions gave rise to the development of a bundle of "essential rights and freedoms of religion". The Edict of Milan already introduced the concepts of freedom of conscience, freedom to practise religion, religious pluralism and equality of religions. Although these rights were subsequently (during the Middle Ages) only *de facto* protected as the rights of a group of people, theories of religious rights continued to build on these concepts. The medieval church insisted on freedom from state control of the church as an institution, thus introducing the concept of institutional separation of church and state. The value of the individual conscience and the idea that everyone had natural rights also originated during the Middle Ages. During the Protestant Reformations of the sixteenth century and the introduction of nominalistic egalitarian theologies, the duty to obey the individual conscience was accepted in principle. Moreover, since everyone was believed to be priest, prophet and king, religious rights could no longer belong only to the clergy, but also to every individual. The ideas of institutional separation of church and state found expression in the writings of Calvin, and the idea of a separation of state and religion was expounded by the Anabaptist theology. Certain minimum religious rights which protected groups with religious beliefs different from those of the majority were consequently incorporated in peace treaties after the sixteenth and seventeenth century religious wars in Europe and subsequently in certain domestic statutes and constitutions. In the eighteenth and nineteenth centuries, when the individual was the focal point, freedom of conscience came to be regarded as one of the natural rights of each individual. Thus individual religious rights came to be protected in the constitutions of most countries of the world and in international human rights instruments.

It is concluded that the essential rights and freedoms of religion which emerged during this historical development of religious rights are freedom of conscience, freedom to practise

religion, accommodation of religious pluralism, equality of different religions, institutional separation of church and state and some separation of state and religion.

Chapter 3 is concerned with the protection of these essential rights and freedoms of religion in South Africa before the 1993 Constitution came into effect. The position with regard to religious freedom prior to 1994 is analysed with reference to the relationship between the state and the (Christian) church and the establishment of the Christian religion by law in the eras of the Dutch East India Company (1652-1795), Batavian Republic (1803-1806), British rule (1806-1910), the Boer Republics and post-Union South Africa, the latter including the Union of South Africa (1910-1961) and the Republic of South Africa from 1961 until 1994. The position with regard to religious freedom prior to 1994 is also analysed with reference to the legal position of religious minorities, namely black Christian Groups, Muslims and Jewish groups in South Africa.

With regard to the requirement of institutional separation of church and state it is shown that the relationship between church and state developed from a stage where, from 1652 to 1779, the Reformed Church was the only recognised church at the Cape to a stage where complete separation of church and state was attained in 1875 with the introduction of the Voluntary Bill. During the second half of the nineteenth century, the Constitutions of the Boer Republics once again reverted to the idea of a state church, but with the Union of South Africa in 1910 the last constitutional establishment of a state church disappeared. In so far as institutional separation of church and state is a requirement for the protection of religious rights, this requirement was met in South Africa after 1910.

With regard to the requirement of separation of law and religion, it is shown that, after the concept of a state church in South Africa had been abandoned, Christianity as such was, to a certain extent, the religious basis for political society. Although a legally endorsed choice for Christianity was made in South Africa, a definite denominational choice was not made. It is shown that a variety of statutory enactments protected particular tenets of Christianity. This is illustrated in different periods with reference to Sunday observance legislation, provisions of publication control and education policy. It is thus clear that there was no separation of state and religion in pre-1994 South Africa.

With regard to the requirement of religious pluralism, it is shown that a practical religious (Christian) pluralism was recognised from 1780. Religious pluralism became more pronounced after the arrival of Muslim slaves and indentured labourers from the Islamic parts of the East Indies and India from the middle of the seventeenth century, adherents to the Hindu religion from India in the second half of the nineteenth century, eastern and western European Jews who made their way to South Africa at the turn of the nineteenth century, and immigrants from China and elsewhere. The *de facto* existence of religious pluralism was, however, not protected *de jure*. In South Africa, a rigid group differentiation, enforced by law, obscured the accommodation of pluralism and equal protection of the religious beliefs of all people.

Similarly, religions were not equal before the law. Before 27 April 1994, South African law had a distinct Christian bias. The choice of Christianity by the legislature reflected the definitive attitude of the state with regard to people of "other" religious traditions. The constitutional entrenchment of religious rights since that date has made religiously biased provisions in both statutes and common law vulnerable to constitutional challenges.³ Moreover, political (racial) and religious discrimination overlapped to a great extent. In terms of the apartheid policy, people of "nonwhite" races were classified as such and excluded from certain political rights and privileges. And, as people from "other" religions were almost always "nonwhite", such groups were in effect politically and religiously sidelined. The Group Areas Act and other apartheid measures had the effect of eliminating any real awareness of religious pluralism, and precluded equality of religions before the law and nondiscrimination on the basis of faith.

Freedom of conscience has always existed in this country. However, the right to exercise religious beliefs freely did not exist for all people. This right was limited in the case of "nonwhite" religious groups before 1994.

3 Although not many of these laws have been challenged thus far, Parliament has in some instances submitted new legislation for religiously biased legislation. See for example the Films and Publications Act 65 of 1996 which replaced the Publications Act 42 of 1974 and the Choice of the Termination of Pregnancy Act 92 of 1996 which replaced the Abortion and Sterilization Act 2 of 1975.

It is therefore concluded that the essential rights and freedoms of religion were not adequately protected in South Africa prior to 1994.

Chapter 3 further shows that, although no aggressive religious persecution or extreme religious intolerance occurred in South Africa during that time, the essential threshold conditions for the emergence of true religious freedom were not adequately represented. The threshold conditions, as identified by Durham,⁴ which have to exist before religious freedom can truly emerge in a society, were described in chapters 1, 3 and 4: "Some measure of (1) pluralism, (2) economic stability, and (3) political legitimacy within the society in question ...[and] some willingness on the part of differing religious groups and their adherents to live with each other." Although *de facto* religious pluralism existed, it was not legally protected. In fact, there were several legislative enactments intended to protect the tenets of Christianity. There was not sufficient economic stability in all spheres of society to say that this condition was fully complied with. The likelihood of achieving religious liberty was furthermore reduced to the extent that the apartheid government lacked political legitimacy. The apartheid laws also obscured a real awareness of religious pluralism and the need for religious tolerance. It is therefore clear that the necessary conditions for the emergence of true religious freedom did not exist in South Africa prior to 1994. Chapter 3 shows that various factors in South Africa's political history necessitated the constitutional entrenchment of fundamental human rights which would *inter alia* promote the fulfilment of the threshold conditions for the emergence of religious freedom and afford protection of the essential rights and freedoms of religion.

Chapter 4 commences with a brief overview of the emergence of South Africa's first Constitution with an entrenched Bill of Rights and the inclusion therein of religious rights which, despite deep-seated ideological tensions, were never disputed. However, no agreement on the meaning of the religious rights clauses has so far been reached in the South African constitutional context.

The constitutional protection of religious rights is part of the broader new constitutional context in which the constitutional text constitutes the supreme law of South Africa and the

standard for the assessment of the validity of all law and administrative conduct. It is shown that constitutional interpretation in this context is fundamentally different from the traditional concept of statutory interpretation rooted in a system of parliamentary sovereignty. The most important indications, in the Constitution and in general, of how the Constitution should be interpreted are briefly dealt with in order to provide a framework within which the religious rights provisions in the South African Constitution could be interpreted and assessed in the next two chapters.

Chapters 5 and 6 assess the religious rights provisions in the South African Constitution to determine whether and how the essential rights and freedoms of religion are protected and how, as standards, they should be interpreted and implemented in view of the particular history and circumstances of the country.

In chapter 5 the religious rights of freedom of conscience, free exercise of religion and religious pluralism are assessed under the "freedom" dimension since these rights are mostly formulated and protected in a freedom-oriented manner. First, the necessity for and, at the same time, the difficulty of defining "religion" in the constitutional context are demonstrated. It is pointed out that, in the South African constitutional context, and since different words are used to protect "religion", "belief" and "conscience" respectively, it is not necessary to define "religion" in such a broad manner as to include all beliefs. Since the freedom to have atheistic, agnostic or other beliefs would be protected by the freedom to belief, conscience, thought or opinion, it is proposed that the Swidler definition of religion be accepted which defines "religion" as having a code, a creed, a cult and a community structure and as being based on a belief in a Transcendent. The acceptance of this definition would imply that the reference to "religion" or "religious" in sections 15(2) and 31 be given a corresponding meaning. According to this construction, the holding of beliefs which are not of a religious nature would be protected under freedom of belief, opinion or conscience, but the freedom to manifest these nonreligious beliefs would not be protected by section 15(2) and 31. However, expressions of beliefs which are not religious would probably be protected by the right to freedom of expression (section 16).

The religious rights provisions contained in sections 9, 15 and 31 of the Constitution are then

considered with a view to ascertaining, in the first instance, whether the essential rights and freedoms of religion are indeed constitutionally protected and, in the second instance, to investigate their interpretation and implementation in the South African constitutional context.

The first religious right, freedom of conscience, is explicitly protected by section 15(1) of the Constitution. It is argued that this right has not been made redundant by the more general protection afforded by the freedom of religion but that the right of every person to follow the dictates of his or her own conscience in matters of religion, still lies at the basis of the essential rights and freedoms of religion. In a modern constitutional context, this freedom implies that every person be accorded the right to voluntarily adopt a religious belief of his or her choice, that religious groups be free to associate and organise themselves, that there should be no discrimination on religious grounds and that people should not be subjected to laws which they could not, in good conscience, obey.

It is argued, with reference to the historical development and international understanding of religious rights, that the freedom of "conscience, religion, thought, belief and opinion" in section 15(1) includes the right of individuals and groups to manifest their religious beliefs in worship, teaching, practice and observance thereof (the free exercise of religious beliefs). Religious rights would be largely meaningless unless the general⁵ protection extends to the manifestation of religious beliefs as well. This construction has been accepted in principle by the Constitutional Court.⁶ It is argued that free exercise rights in the South African constitutional context should be interpreted to include the rights enumerated in article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981).

It is shown, with reference to the right to establish educational institutions based on a common religion which is protected by section 29(3) of the Constitution (section 32 of the interim Constitution), that the Constitutional Court has chosen to protect religious free exercise rights in a liberal, freedom-oriented manner and not as an entitlement imposing any positive

5 S 15(2), 16, 18, 29 and 31 all protect particular manifestations of religious beliefs.

6 In *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (2) SACR 540 (CC) 568.

obligations on the state. Although it could not be stated that such an approach is unduly restrictive of the right to free exercise of religion, it is proposed that the Constitutional text could be interpreted in a manner which is more accommodating of free exercise rights. The hope is expressed that the state would eventually adopt an approach of more actively promoting and fostering religious diversity.

It is shown that the provisions of the Constitution protect the essential principle of religious pluralism or diversity. It is (at least) protected by sections 15(1), 15(3), 29(3) and 31. Section 15(1) protects the right of "everyone" to freedom of religion, conscience and belief. It is argued that "everyone" should include religious groups. Section 31 makes provision for the practising of religion in community with others. The right has, however, been formulated in a liberal manner by not protecting religious groups as such but by protecting the rights of persons belonging to religious communities to practise their religion and to form, join and maintain religious associations. The Constitutional Court has also opted to protect section 31 rights in a liberal freedom-oriented manner. However, the hope is once again expressed that constitutional jurisprudence would proceed to a more active protection and promotion of religious diversity. Minority rights are not analysed in detail in this thesis, but as far as religious group rights in the context of section 31 are concerned, it is argued that the approach of the Constitutional Court (albeit in the context of the right to education) which distinguishes between dominant and nondominant groups, is unduly restrictive of the principle of pluralism.

Religious pluralism is also protected by section 15(3) of the Constitution which provides that legislation recognising marriages contracted under a system of religious law or systems of religious personal and family law would not be unconstitutional. It is shown that the legislation envisaged in section 15(3) would be extremely difficult to formulate. However, in a number of cases, the principles of religious freedom, religious pluralism and the values enshrined in the Constitution have led to the recognition of marriage contracts which were entered into in accordance with the religious law of Islam and which were *de facto* monogamous.

Chapter 6 is concerned with the essential principles of the separation of state and religion, the equality of religions and the institutional separation of church and state in the South African

constitutional context. It is firstly shown, with reference to the theory of Durham,⁷ that both strongly positive and strongly negative identification of state and religion correlate with low levels of religious freedom and that one cannot simply assume that a more rigid separation of state and religion would necessarily enhance religious freedom. The strict separation of state and religion which exists in the United States jurisprudence is not endorsed by the South African Constitution. The Constitution thus does not contain a United States-style reason to interpret the South African Constitution in such a manner. In fact, the South African Constitution creates room for the state to take positive measures to ensure even-handed accommodation of religious concerns. The Constitution does, however, provide for the separation of state and religion to some extent in that state support of religion is subject to certain constitutional principles, such as the free exercise of religion (section 15(1)), the provisions of section 15(2) and the principle of equality as protected by the equality clause (section 9).

Section 15(1) and free exercise concerns are discussed in chapter 5. Section 15(2) provides that attendance at religious observances at state or state-aided institutions must be free and voluntary. This provision, which does not strictly separate state and religion, is not in contravention of religious freedom norms since, as pointed out above, total religious freedom is possible in the case of "some identification" of state and religion. This section moreover provides for the essential requirements of voluntarism and noncoercion in religious matters. In applying section 15(2) it is important to establish whether a particular activity could be defined as a "religious observance" and whether it is conducted at a "State or state-aided institution". It was argued earlier that the phrase "religious observance" in section 15(2) would follow the interpretation of the word "religion" in section 15(1) and that "religion" in section 15(1) refers to the Swidler definition of religion. "Religious observance" ("godsdiensoefening") will therefore probably be confined to typically religious activities which flow from adherence to a certain religion and will not include all acts of religious people. If a specific activity cannot be defined as a "religious observance", then such an activity would not be proscribed at state or state-aided institutions. Whether an institution can be labelled a state or a state-aided institution would depend on whether the state is in control

7 *Perspectives 15-25.*

of an institution or provides financial aid to it.

The principle of equality of religions is protected by section 9(1) of the Constitution which provides that everyone is equal before the law and has the right to equal protection by and benefit of the law, and by section 9(3) which prohibits discrimination on the grounds of *inter alia* religion, conscience and belief. It is shown that section 9 prescribes even-handed treatment of religions and not "no treatment" of religion. A consequence of the protection of the principle of the equality of religions by section 9 is that, in terms of section 9, discrimination between different religions would have to be unfair before it can be said to be unconstitutional, whereas under a deemed establishment clause mere state support of religion would be unconstitutional. Therefore, before it can be said that state support of a particular religious practice is discriminatory, the requirements of section 9 will have to be complied with. So far, the courts have not fully explored the safeguarding potential of the constitutional guarantee of religious equality. The tendency has been to approach religious rights issues in a freedom-oriented manner or to refrain from classifying the dispute as a religious rights dispute. However, the adjudication of equality in the context of religious rights is no easy task. In the case of conflict, free exercise rights and equality concerns will need to be balanced in terms of the limitation clause.

Although the Constitution does not explicitly protect the institutional separation of church and state, it is shown, with reference to the historical development of religious rights, that the institutional separation of church and state is an inherent part of religious freedom and as such protected by section 15(1). The state would therefore be precluded from interfering in the sovereign sphere of churches, religious institutions and religious communities.

Section 9(4), which makes proscription of discrimination applicable to persons other than the state or state organs, presents interpretative problems in this regard. The section which refers to legislation which must be enacted is not clear. Differentiation or discrimination within any church, religious institution or community often depends on a specific interpretation of its doctrine and it would constitute an infringement of religious freedom if religious laws or doctrine were to be interpreted by a court and subjected to constitutional norms. It is therefore argued that section 9(4) should not be interpreted to sanction interference in doctrinal matters

but that it should be read in conjunction with the provisions of section 8(3) and that, in such cases, the "right" contained in section 9(4) should be limited accordingly.

The effect of religious freedom and of the constitutional protection of the separation of church and state on the administrative review of church decisions is also analysed in this chapter. It is argued that in the preconstitutional era, the South African courts used a kind of "neutral principles" test. However, a proper application of the constitutional principles of freedom of religion would require the courts to defer, limited only by the considerations set out in the limitations clause. This will call for a re-evaluation of the manner in which religious bodies and their decisions are dealt with in South African law. As demonstrated above, continuing to view churches as voluntary associations based on contract, irrespective of their true nature, and to review decisions of religious bodies on the basis of the extended principles of administrative justice, will be in disregard of the freedom of religion provisions in the South African Constitution.

Chapter 7 considers the effects of the operational provisions on the understanding of the constitutional sections in which religious rights and freedom are entrenched. In the analysis of the application clause (section 8) of the Constitution, a distinction is drawn between the binding effect of the clause and the entitlements according to it in terms of the Constitution. As far as the binding effect is concerned, it is considered whether all law and all conduct are subject to constitutional scrutiny. Section 8(1) provides that the Bill of Rights applies to the law in its entirety. The 1996 Constitution therefore applies to legislation, common law and customary law, irrespective of the nature of the parties involved in the dispute (that is, whether they are private persons or state organs) and irrespective of whether it is private or public law. Section 9(4) of the Constitution, however, appears to subject "nonstate law" to constitutional norms. It is argued that whenever the constitutionality of "nonstate law" is in issue, the provisions of sections 8(2) and 8(3) should be used to determine whether the Constitution applies. The provisions of section 9(4) should be read in conjunction with the provisions of section 8(3) in order to limit the "right" in section 9(4) in cases where it would result in an unacceptable contravention of religious freedom and the autonomy of religious institutions, groups or communities.

According to section 8(1), the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. With regard to the conduct of organs of state, it is shown that the control test has been accepted by the courts to determine whether an entity is an organ of state. Thus, if an entity is found to be controlled by the state as defined by the courts, it would be bound by the Bill of Rights. It is argued that when the constitutionality of the conduct of nonstate entities is at issue, the provisions of sections 8(2) and 8(3) will become relevant to determine whether the conduct is subject to Constitutional norms. Sections 8(2) and 8(3) specifically make provision for the (exceptional) cases where the Bill of Rights would bind the laws or the conduct of natural and (private) juristic persons "if and to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by the right". It is argued that "the nature of the proposed right, its enforceability, the practicalities of the human relationships involved and whether public policy or public mores require such moral obligation to be converted into a legal obligation"⁸ would stand central in applying sections 8(2) and 8(3). In the context of religious rights the principle of institutional separation of church and state would require that church laws should not be subject to constitutional norms.

With regard to the entitlement to certain protections under the Bill of Rights, it is shown that section 8(4) provides that juristic persons would be bearers of constitutionally protected rights if required by the "nature of the right" and the "nature of the juristic person". If the "nature of the juristic person" were that of a state organ, it would not be entitled to the rights in the Bill of Rights, but bound to the Constitution in terms of section 8(1). With regard to the "nature of the right" it is argued, with reference to the position in German law and the historical development of religious rights, that juristic persons such as churches and religious associations could be bearers of the right to freedom of religion and belief. The protection under section 8(4) could even be extended to associations without legal personality. It is, however, shown that, although groups or communities which do not have legal personality or are not associations could have a substantive right to practise their religion as well as *locus standi*, they would, procedurally speaking, not have the right to litigate in their own names.

The adjudication of religious freedom issues hinges largely on the courts' understanding of the effect of the general limitation clause (section 36). The South African Constitution has adopted the two-stage approach of Canada, Germany and the European Council: After determining the scope of the entrenched right and establishing whether a *prima facie* infringement has taken place, the limitation clause is applied in the second stage to determine whether the limitation is reasonable and justifiable. The Constitutional Court's approach to the limitation clause, which commenced in the *Makwanyane* matter, also followed the example of these jurisdictions which rely on general limitation principles combined with a proportionality test to decide the justifiability of specific limitations of fundamental rights.

Section 36(1) specifies the factors which have to be taken into account in the application of the proportionality test. The fact that "the nature of the right" has to be taken into account in terms of section 36(1)(a) means that the essential rights and freedoms of religion must also be taken into account at this level of Constitutional analysis. The approach of the Constitutional Court in the *Christian Education* matter and of the Supreme Court of Appeal in the *Prince* matter is evaluated in these terms. It is shown that the Constitutional Court's approach to the limitation of freedom of religion in the former matter, in contrast to the Supreme Court's approach in the latter matter, is consistent with recent ideas about the limitation of rights in general and of freedom of religion in particular.

Meyerson's alternative approach to the limitation clause implies that the phrase "an open and democratic society based on human dignity, equality and freedom" functions as a kind of threshold test which has to be passed before the inquiry into the relevant factors mentioned in section 36(1) can take place. Although this approach is not in line with the Constitution or the approach of the Constitutional Court, her theory and its application to religious rights issues could be incorporated in balancing the interests of the community and of the persons affected by the limitation in the greater proportionality analysis.

It can be concluded that the emergence of the new constitutional dispensation and the constitutional protection of fundamental human rights have contributed to the fulfilment of Durham's threshold conditions for religious freedom. The Constitution contains specific provisions for a great diversity of individuals and communities in South Africa and recognises

the particular concerns created by this diversity. The constitutionally entrenched, democratic process representing all citizens of South Africa has introduced political legitimacy into South African society. In addition, the promotion of constitutionalism and democratic values by the Constitution aims to enhance political legitimacy and stability. The constitutional entrenchment of socioeconomic rights and the statutory reform measures which have been implemented since the promulgation of the Constitution have raised awareness of the plight of the poor in South Africa and could be instrumental in promoting economic stability so as to meet the (low) threshold of this condition. The fourth condition set by Durham is that there must be some willingness on the part of the various religious groups and their adherents to live in harmony with each other. As illustrated in chapter 3, South Africa has never been subjected to the kind of religious oppression and strife found in certain contemporary and past fundamentalist societies. However, the political climate of apartheid fostered an unwillingness on the part of religious groups to live with one another. That system has been abolished, and although a legal system of equality cannot per se change attitudes of intolerance, it could undoubtedly contribute to a culture of respect for and tolerance of differences. The final Constitution has, in many respects, been designed to inculcate tolerance among South Africans. Some of the general value statements make it clear that reconciliation of individuals, groups and communities with potentially conflicting interests is one of the Constitution's priorities. The preamble, for example, recognises the injustices of the past and states that the Constitution is adopted *inter alia* to "heal the divisions of the past", thereby recognising the political necessity of tolerance. The constitutional protection of rights is furthermore premised on the foundational values of "human dignity, equality and freedom".⁹ The central place accorded to human dignity emphasises the importance of promoting respect and tolerance among different peoples.¹⁰

It therefore appears that, as far as the threshold conditions for religious freedom are concerned, the new South African Constitution has paved the way for reaching the goal of religious

9 S 1, 7, 36(1) and 39(1)(a).

10 This is also borne out by, for example, s 16 which guarantees the right to freedom of expression, but provides that the right does not extend to "propaganda for war", "incitement of imminent violence" or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". These limitations are, arguably, aimed at promoting tolerance.

freedom.

The constitutional entrenchment of religious rights can in turn have a positive impact on patterns of pluralism, political legitimacy, economic stability and tolerance in a diverse society such as ours. In this regard Durham¹¹ reminds us that for much of human history it was assumed that "religious truth required state implementation of religious beliefs and that political stability presupposed religious and cultural homogeneity".¹² However, in this regard he refers to Locke who contends that, far from destabilising a regime, toleration and respect could have exactly the opposite effect. The idea is that in the context of a pluralistic society, a regime which respects divergent beliefs will win support from those it respects, resulting in much greater stability than can be achieved by favouring the dominant group. Locke maintains that respect for freedom of choice in matters of religion is a source of both legitimacy and stability for political regimes. As a result there is general growing consensus that the protection of freedom of religion is conducive to stability and peace.¹³

An assessment of the constitutional guarantees of religious freedom shows that religious freedom as protected in the Constitution can be interpreted as a bundle of rights and freedoms and that the new constitutional text opens up the possibility for the protection of the bundle of essential rights and freedoms of religion in South Africa. It is important that the clauses in the Constitution which pertain to religion be interpreted and implemented in such a manner as to ensure the protection of freedom of conscience, freedom to practise religion, accommodation of religious pluralism, equality of different religions, institutional separation of church and state and some separation of state and religion. As a consequence we should not only be able to attain the greatest degree of religious freedom in South Africa, but also to ensure stability, tolerance and peace among a religiously, ethnically, economically and politically diverse population.

11 *Perspectives* 7-12.

12 This impression was reinforced by the religious wars that ravaged Europe until the Lockean era. See the discussion in ch 2.

13 In the South African constitutional context Du Plessis 2001 *BYU-LR* 104 states that "[t]he explicit protection of the right to freedom of religion and the right to religious equality must be understood as part of this project of cultivating tolerance".

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2. ARTICLES

Abbreviations:

<i>BYU-LR</i> :	Brigham Young University Law Review
<i>Cilsa</i> :	The Comparative and International Law Journal of Southern Africa
<i>DR</i> :	De Rebus
<i>Emory Int'l L Rev</i> :	Emory International Law Review
<i>Loy LA Int'l & Comp LJ</i> :	Loyola LA International and Comparative Law Journal
<i>LQR</i> :	Law Quarterly Review
<i>SAJHR</i> :	South African Journal for Human Rights
<i>SALJ</i> :	South African Law Journal
<i>SAPL</i> :	South African Public Law
<i>Stell LR</i> :	Stellenbosch Law Review
<i>THRHR</i> :	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>TSAR</i> :	Tydskrif vir die Suid-Afrikaanse Reg
<i>WPNR</i> :	Weekblad voor Privaatrecht, Notariaat en Registrasie

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