

# Chapter 41

## Freedom of Religion, Belief and Opinion

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## 41.1 Introduction

### (a) Religion and the state before 1994

Prior to 1994, Christianity was South Africa's unofficial state religion. The pre-1994 Constitutions<sup>1</sup> and a host of legal rules expressly endorsed the tenets of the Christian faith.<sup>2</sup>

The promotion of Christianity by the state was accompanied by, and contributed to, the marginalisation of other religious communities. The Christian bias of the legal system caused adherents of other faiths, significant prejudice in respect of maintenance and other spousal benefits,<sup>3</sup> divorce,<sup>4</sup> succession,<sup>5</sup> and the law of evidence.<sup>6</sup>

1 Section 2 of the Republic of South Africa Constitution Act 110 of 1983 ('Tricameral Constitution') and s 2 of the Republic of South Africa Constitution Act 32 of 1961 both stated that 'The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God'. The Preamble to the Tricameral Constitution contained a pledge to 'uphold Christian values and civilized norms' and, like the 1961 Constitution, included a statement to the effect that the South African people 'are conscious of our responsibility towards God and man'. At some periods prior to Union in 1910, there were even established churches (the Nederduitsch Hervormde Kerk or the Nederduitse Gereformeerde Kerk) in the Zuid-Afrikaansche Republiek and the Free State.

2 These legal rules included: (1) non-recognition of Muslim and Hindu marriages on the basis that, being potentially polygamous, they were 'contrary to public policy'; *Ismail v Ismail* 1983 (1) SA 1006 (A), 1025F-G ; see also *Esop v Union Government (Minister of Interior)* 1913 CPD 133 and F Cachalia 'Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry' (1993) 56 *THRHR* 392, 398-9; (2) rules relating to 'Christian national education' for white students in public schools; see *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 149 (Sachs J) ('*Solberg*'); (3) censorship provisions; see the Publications and Entertainment Act 26 of 1963 and the Publications Act 42 of 1974; see too *Publication Control Board v Gallo (Africa) Ltd* 1975 (3) SA 665 (A) ('*Publication Control Board*'); *Human & Rousseau Uitgewers (Edms) Bpk v Snyman NO* 1978 (3) SA 836 (T), 849; (4) the crime of blasphemy (an offence based only on the Christian concept of God); *R v Webb* 1934 AD 493, 496; *Publication Control Board* (supra) at 671H; (5) laws restricting shopping, sporting and entertainment events on Sundays; J D van der Vyver 'Religion' in W A Joubert (founding ed) *The Law of South Africa* (Vol 23, First Reissue) at para 239; (6) the public holidays 'with a religious base' (Ascension Day and the Day of the Vow, as well as Good Friday and Christmas Day); and (7) penalties exacted on gays and lesbians. For a judicial survey of State bias in the pre-constitutional period, see *Solberg* (supra) at paras 149-153 (Sachs J). For earlier discussions of the relationship between church and State in South Africa (with specific reference to the position under the 1961 Constitution), see J G Wulfsohn 'Separation of Church and State in South African Law' (1964) 81 *SALJ* 90 and 226, and B v D van Niekerk "'Render unto Caesar . . .': A study of the Sunday Observance Laws in South Africa' (1969) 86 *SALJ* 27.

3 *Ismail v Ismail* (supra).

4 *Cf Ryland v Edros* 1997 (2) SA 690 (C), 1997 (10) BCLR 77 (C).

5 *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T).

6 *S v Johardien* 1990 (1) SA 1026 (C).

However, even the articulation of Christian belief was not unfettered under Apartheid. The brand of Christianity favoured by the state reflected a theology that advocated obedience to the government of the day. As a result, Christian groups and leaders that regarded their faith as requiring opposition to tyrannical

and unjust rulers often suffered government reprisals.<sup>7</sup>

Believers of other faiths who felt compelled to voice their opposition to government policies naturally found the state less than sympathetic<sup>8</sup>. Those who subscribed to secular ideologies such as communism were actively sought out and penalised.<sup>9</sup> In pre-1994 South Africa, religious freedom was certainly less severely impaired than in countries with regimes hostile to religion. But the post-1994 constitutional entrenchment of freedom of religion, conscience, thought and belief marks a clear break with the repressive and the biased policies of the past.

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7 The Christian Institute, headed by Dr. Beyers Naude, was banned in 1977 under s 4 of the Internal Security Act, Act 44 of 1950, after earlier having been declared an 'affected organisation' in 1975 under s 2 of the Affected Organisations Act, Act 31 of 1974. See the report of the mission sent to South Africa in 1987 by the International Commission of Jurists; G Bindman (ed) *South Africa: Human Rights and the Rule of Law* (1988) 55-7; A S Mathews *Freedom, State Security and the Rule of Law* (1986); J Van der Vyver (supra) at para 232. A prominent church leader like Beyers Naude (a former moderator of NGK in the Transvaal and later Secretary-General of the South African Council of Churches) was himself banned. Archbishop Desmond Tutu had his passport revoked in 1981 (when he was a Bishop in the Anglican Church); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T). Allan Boesak had his passport withdrawn in 1985 (when he was a minister in the NG Sendingkerk, as well as President of the World Alliance of Reformed Churches); *Boesak v Minister of Home Affairs* 1987 (3) SA 665 (C). Frank Chikane (Beyers Naude's successor as Secretary-General of the SACC, as well as general secretary of the Institute of Contextual Theology) was denied entry to South West Africa when invited in his clerical capacity by the Council of Churches in Namibia; *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A). Another example of an infringement of freedom of Christian belief under Nationalist rule was the infamous 'church clause' in the Blacks (Urban Areas) Consolidation Act, Section 9(7) of Act 25 of 1945. The clause empowered the relevant government minister, with the consent of the local urban authority, to prohibit the attendance of black people at church services in areas that had not been zoned for occupation by black people under the Group Areas Act, Act 36 of 1966. See D V Cowen *The Foundations of Freedom* (1961) 56, 63; J D van der Vyver (supra) at para 232. The passing of this Act, which was openly disobeyed by a number of denominations, had a tragic postlude. The Anglican Archbishop of Cape Town, Geoffrey Clayton, died of a heart attack after signing a letter to the Prime Minister, advising that he could not instruct his church to obey it. See A Paton *Apartheid and the Archbishop: The life and times of Geoffrey Clayton, Archbishop of Cape Town* (1973).

Many Christian and other religious organisations in South Africa and elsewhere (including the World Alliance of Reformed Churches) declared apartheid to be a heresy. A particularly strong statement to this effect was *The Kairos Document*, signed largely by left-wing Christians and Muslims. Another notable denunciation of apartheid was 'The Koinonia Declaration', produced by a group of Afrikaner clergy. See, generally, J W De Gruchy *The Church Struggle in South Africa*, and J W De Gruchy & C Villa-Vicencio (eds) *Apartheid is a Heresy*. The World Council of Churches also denounced racial discrimination as being contrary to Christian teachings in 1960. See *Cape Times* 15 December 1960; Cowen (supra) at 63. The South African Council of Churches condemned apartheid as being inconsistent with Christian principles in 1968. See L Thompson *A History of South Africa* (1990) 204-5.

8 The teachings of Mahatma Gandhi on *Satyagraha* — which drew inspiration from Hinduism — were developed in the context of opposition to the apartheid-style laws imposed on Indians in the Transvaal in the first decade of this century. For Gandhi's description of the origin of *Satyagraha*, see Shriman Narayan (ed) *The Selected Works of Mahatma Gandhi* (Vol 3, 1928) Chapters XII and XIII. See also Fatima Meer (ed) 'The South African Gandhi' in *An Abstract of the Speeches and Writings of M K Gandhi 1893-1914* (2nd Edition, 1996).

9 See, for example, the Suppression of Communism Act 44 of 1950; *Kahn v Louw NO and Another* 1951 (2) SA 194 (C); *R v Sachs* 1953 (1) SA 392 (A).

## (b) Provisions in the Final Constitution protecting religion

The right to freedom of religion, belief and opinion — s 15 of the Final Constitution<sup>10</sup> — reads as follows:

15(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;
- (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.

A number of other provisions in the Bill of Rights also affect religious belief. The most important is s 31's right to practise religion in a communal setting.<sup>11</sup> That provision reads as follows:

31(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

- (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.<sup>12</sup>

There was no equivalent to s 31 in the Interim Constitution. Nor was there a community right in any proposed text of the Final Constitution prior to the second

10 Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC')

11 See I Currie 'Minority Rights: Education, Culture and Language' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35; S Woolman 'Community Rights, Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

12 In the first certification decision, the Constitutional Court referred to s 31 as the provision which ensured the recognition and protection of the collective rights of self-determination mentioned in CP XII. 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), 1996 (10) BCLR 1253 (CC) at para 220.

Constitution Bill. The insertion of s 31 was apparently a last-minute concession to the Freedom Front and was conceivably motivated by a desire to ensure compliance with Constitutional Principle XII.

The relationship between the rights in s 15 and s 31 is not entirely clear. In particular, it is not evident whether, in the absence of any reference to manifestation of religious practice in s 15(1), religious practice should be regarded as being

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protected in the group right rather than the individual freedom. The Constitutional Court has now clarified the nature of the relationship between the two rights. Section 15(1) protects the practices of religious sects, groups, associations, communities and institutions. As Ngcobo J wrote in *Prince v President, Cape Law Society ('Prince II')*<sup>13</sup>:

. . . [ss] 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion.

Section 31, read with s 18, strengthens, rather than undermines, the force of the right to religious freedom enshrined in s 15(1).<sup>14</sup>

Another important provision in the Bill of Rights for the purposes of freedom of religion analysis is s 9, the right to equality. Subsection 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone *inter alia* on the grounds of religion, conscience or belief. Subsection 9(4) expands the protection against unfair discrimination to the private sphere by stipulating that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. It further requires that national legislation must be enacted to prevent or to prohibit unfair discrimination.<sup>15</sup> How s 9 both reinforces religious liberty and limits religious autonomy are subjects canvassed below.<sup>16</sup>

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As case law in foreign jurisdictions demonstrates, the manifestation of religion, conscience or belief can also implicate other rights that do not expressly refer to religion, such as the right to freedom of expression (s 16), the right to freedom of

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13 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at para 39.

14 See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. The Supreme Court of Appeal in *Nkosi v Bührmann* provision suggested that the internal limitation of the s 31 (found in s 31(2)) should be regarded as implicit in s 15(1), with the result that the s 15's right to practise religion must also be regarded as subordinate to the other rights in the Bill of Rights. 2002 (1) SA 372 (SCA) at para 43. That interpretation would not, however, appear to be warranted textually or be consistent with the Constitutional Court's decisions.

15 This legislation has been enacted as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Religion, conscience and belief are among the 'prohibited grounds' listed in s 1(1) thereof. In terms of s 6, 'discrimination', as defined in s 1(1), is forbidden on any of the prohibited grounds, if it is 'unfair'. The burden of proof in cases in which unfair discrimination has been alleged and the factors to be taken into account in determining unfair discrimination, are dealt with in ss 13 and 14 of the Act. See C Albertyn *et al* (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000)* 75-77.

assembly (s 17) and the 'associational' or institutional nature of religion protected by the right to freedom of association (s 18).<sup>17</sup>

### **(c) The origins and development of the religion clause**

#### **(i) The drafting of s 15 of the Constitution**

The wording of s 15 of the Constitution owes much to its predecessor. Section 14 of the Interim Constitution<sup>18</sup> reads:

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.'

The main differences between the freedom of religion, belief and opinion clauses in the Interim and Final Constitutions are: (1) the absence of a reference to academic freedom in subsection (1) of FC 15 (academic freedom is now protected under the right to freedom of expression); (2) the absence of the clause 'Without derogating from the generality of subsection (1)' at the beginning of subsection (2) of FC 15; (3) the fact that subsection (3) of FC 15 authorises legislation recognizing marriages concluded under any system of personal or family law, and not just religious law; and (4) and that FC 15(3) makes any legislation enacted in terms of that subsection susceptible to challenge under other provisions of the Constitution.

The changes to subsection (3) are potentially of substance. However, at least one commentator suggests that, even under IC s 14(3), legislation recognizing a system of personal or family law was required to be consistent with the other

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16 Other constitutional provisions which mention religion, but which are of little importance for the present chapter, are: s 6(5)(b)(ii) (which provides that a Pan South African Language Board established by national legislation, must promote and ensure respect for Arabic, Hebrew Sanskrit and other languages used for religious purposes in South Africa); s 35(2)(f)(iii) (which confers on all detained persons, including every sentenced prisoner, the right to communicate with and be visited by, that person's chosen religious counsellor); and Schedule 2, which provides for oaths or solemn affirmations by office bearers in the national and provincial spheres of government, with the oath concluding with the words 'So help me God', and s 29(4) (a clause in the section dealing with the right to 'Education', which allows state subsidies for private — and thus religious — educational institutions, and thus means that state subsidies for church schools or other educational institutions with a religious dimension or focus are constitutional).

17 See *Solberg* (supra) at para 149 (Sachs J); L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* 156. As regards s 18, the right to association, see S Woolman 'Association' (supra) at Chapter 44.

18 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

rights in the Bill of Rights.<sup>19</sup> The aforementioned amendments to subsections (1) and (2) are seemingly less significant. Academic freedom, for example, is more appropriately protected elsewhere in the Bill of Rights.<sup>20</sup>

Other differences between the Interim and Final Constitutions as far as religion is concerned are the inclusion in the Final Constitution of a right to religious community (s 31) and a change in the wording of the preamble.<sup>21</sup> As I have already noted, the inclusion of the group religious right in s 31 should only amplify the freedom protected in s 15. Substituting the invocation at the start of the Interim Constitution with the peroration in the Final Constitution should,

19 D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 27. The majority of writers, however, came to the opposite conclusion. See, for example, E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 45n44; F Cachalia et al *Fundamental Rights in the New Constitution* (1994) 52, 53; D Davis et al *Fundamental Rights in the Constitution* (1997) 107; J Sinclair *The Law of Marriage* (Vol I) 34.6.

20 Academic freedom was presumably included in s 14(1) of the Interim Constitution because of a desire to protect freedom of thought, belief and opinion in institutions of higher learning, and to protect such institutions from being subjected to closures, direct interference or economic harassment on account of the beliefs and ideologies espoused there. The more natural home for academic freedom would, however, have been the right to freedom of expression (where it is now located), which even under the Interim Constitution protected the freedom of artistic creativity and scientific research.

It is nevertheless of interest to note that there has traditionally been a connection between freedom of religion and certain South African universities. A feature of the Acts establishing and regulating the English-medium universities and some of the Afrikaans-medium universities prior to November 2001 was the presence of a 'conscience clause'. See s 21 of the University of the Witwatersrand, Johannesburg (Private) Act 15 of 1959; s 17 of the University of Cape Town Act 38 of 1959; s 21 of the University of Natal (Private) Act 7 of 1960; s 21 of the University of Port Elizabeth Act 1 of 1964. This clause prohibited a test of religious belief being imposed on any person as a condition of his/her becoming or continuing to be a student, graduate, or member of the academic staff of the University, or of that person's holding any office or emolument or exercising any privilege. It also forbade any preference being given to, or advantage being withheld from, a person on the ground of his/her religious belief. Thus, even in the pre-1994 era, freedom from religious coercion and discrimination was a foundational tenet of a number of South African universities and an integral part of their character and composition.

The statutes containing the conscience clauses were repealed by the Higher Education Amendment Act 23 of 2001. The objects and strictures of the 'conscience clauses' are, however, still protected, by virtue of the right to freedom of religion, and the right to freedom from discrimination on the basis of religion, conscience and belief. The opening words to s 14(2) were unnecessary and, arguably, inappropriate.

The words '[w]ithout derogating from the generality of subsection (1)', which prefaced s 14(2), were probably intended to indicate that s14(2) was not to be used to build restrictions into the general s 14(1) right, but rather to be viewed as regulating a particular situation covered by that right. But that interpretation should in any event have been apparent from the context; so nothing is lost by its exclusion from s 15(2). In any event, s 14(2) was arguably a qualification of the s 14(1) rights (just as s 15(2) qualifies the s 15(1) right), rather than an example of the sort of religious freedom enshrined in subsection (1), as suggested by the prefatory clause.

21 The Final Constitution, unlike the Interim Constitution, does not commence with the words 'In humble submission to Almighty God'. It does, in contrast with the Interim Constitution, conclude with the words '*May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika*'.

likewise, not have any substantive effect. The Constitutional Court's comments in relation to the meaning of the phrase 'In humble submission to Almighty God' in the Western Cape Constitution buttress this conclusion.<sup>22</sup>

The drafts of the text of s 15 of the Final Constitution reveal that there was seemingly little controversy among the members of the Constitutional Assembly or the panel of experts about the precise wording of subsections (1) and (2) of the right. The only change between the final approved text and the 'Working Draft of the New Constitution' distributed by the Constitutional Assembly on 22 November 1995 is the substitution of the words 'an appropriate authority' at the end of s 15(2)(a) with the phrase 'the appropriate public authorities'. The changes make it clear that rules for religious observances at state or state-aided institutions should conform to the principle of subsidiarity. That is, ideally such rules would be articulated and enforced by the body in closest proximity to the institution being regulated.<sup>23</sup>

The formulation of s 15(3) was apparently more contentious. The final wording of the clause showed every sign of having been drafted by committee. The Working Draft of 22 November 1995 included a subsection (3) that read as follows:

The Constitution does not prevent legislation recognising the validity of marriages concluded under a system of religious law [or other recognised traditions], or a system of personal and family law adhered to by persons professing a particular religion to the extent that the system is consistent with the Bill of Rights.

By the fourth edition of the Working Draft of the New Constitution, disseminated on 25 March 1996, this provision was changed to read:

- 3 (a) This section does not prevent legislation recognising —
- (i) marriages concluded under any tradition or a system of religious, personal or family law; and
  - (ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.
- (b) The legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.

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The fifth edition of the Working Draft, dated 15 April 1996, reflected a further change to subsection (3)(b).<sup>24</sup> The wording of s 15(3)(b) was then changed a final time prior to the second version of the Constitutional Bill adopted by the Constitutional Assembly on 8 May 1996. The amendments were largely cosmetic. However, the new text did insert a requirement that the legislation contemplated by subsection 15(3)(a) be consistent not only with the Constitution but also 'this section' (ie, s 15).

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22 *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape* 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) at para 28.

23 The Fifth Edition of the Working Draft for the New Constitution, released on 15 April 1996, placed an asterisk next to the words 'state or state-aided', noting that these words should be 'revisited and consistency with the wording in the ['Education' clause] (once it is settled) considered'. There was, however, no change to that phrase.

24 It read: 'Marriages, or systems of personal and family law, recognised by legislation referred to in paragraph (a) must be consistent with the provisions of the Constitution.'

It is unclear what the drafters intended by stipulating that s 15 does not prevent legislation consistent with section as a whole. That would seem self-evident.<sup>25</sup>

## (ii) The drafting of s 14 of the Interim Constitution

The Bill of Rights in the Interim Constitution was drafted by a Technical Committee appointed by the Negotiating Council (one tier of the Multi-Party Negotiating Process) between May and November 1993. This committee had a number of South African proposals for bills of rights to work from and also relied heavily on international human rights documents and Bills of Rights in

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25 The end-notes to the Fourth Working Draft of the New Constitution (of 25 March 1996), which reflected submissions from the public on the Working Draft published on 22 November 1995, indicate that a variety of submissions on the right to freedom of religion, belief and opinion were considered and rejected by the members of the Constitutional Assembly. For example —

(i) as regards subsection (1): individual members of the public requested that satanism be expressly excluded from freedom of religion; submissions were received for and against the legalisation of dagga for religious purposes (with over a thousand petitions being received from the Burning Spear Movement calling for the recognition of the rights of Rastafarians); an academic requested that the clause explicitly state that freedom of religion also includes the right to change religious allegiance, and the right to profess, practise and propagate the religion of one's choice (a clause along these lines appears in the Constitution of Botswana, section 11(1) whereof provides: 'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance'. See also, s 13(1) of the Constitution of Lesotho of 1993. The Conscientious Objector Support Group proposed adding the words 'including the right to conscientious objection to military service' (by way of comparison, Article 4(3) of the German Basic Law reads: 'No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by federal statute');

(ii) concern was expressed, *inter alia* by the National Professional Teachers Association of South Africa, that subsection (2) was both too vague and too restrictive; and

(iii) various Muslim organizations objected to the requirement that legislation enacted in terms of subsection (3) be consistent with the Bill of Rights, on the basis that Muslims regard their personal law as divine, binding and absolute and this law cannot be altered or subjected to any national law. A clause along the lines of IC s 14(3) was proposed.

other countries.<sup>26</sup> The Technical Committee that drafted the Bill of Rights was also assisted in drafting the freedom of religion clause by a proposed clause submitted by the South African Chapter of the World Conference on Religion and Peace (WCRP-SA).<sup>27</sup>

According to two members of that Technical Committee, Professors Corder and Du Plessis, IC s 14(1) was understood to be in conformity with the first sub-clause of the WCRP-SA proposal.<sup>28</sup> The second sub-clause of the WCRP-SA proposal was addressed in IC s 14(3). That clause did not go as far as recognising religious communities' systems of family law. It merely authorises the legislature to do so.

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26 Du Plessis & Corder (supra) at 25-33 and 46-48.

Among the indigenous human rights documents that provided the backdrop to individual rights provisions, such as the freedom of religion clause, in the Interim Constitution were the South African Law Commission's Interim Report on Group and Human Rights (1991), the ANC Bill of Rights in South Africa (1992), the Constitution for the State of KwaZulu-Natal (approved by the Legislative Assembly of KwaZulu in 1992) and the Charter for Social Justice (produced by a group of Western Cape human rights experts in 1992).

The Bill proposed by the Law Commission in its Interim Report included the following clause, as article 18 (headed 'Religious, linguistic and cultural rights'):

Everyone has the right, individually or in community with others, freely to practise the religion and culture and freely to use the language of his or her choice, so that there shall be no prejudice to or favouring of anyone on account of his or her religion, culture or language.

The Law Commission's proposal in its Final Report on Group and Human Rights of October 1994, was briefer, and more in line with formulations of the right in international human rights documents: 'Every person shall have the right to freedom of thought, conscience, religion and belief, and to manifest his or her religion or belief.'

The first two clauses of article 7 of the Charter for Social Justice (which was modelled in large part on s 2 of the Canadian Charter of Rights and Freedoms) provided that:

Everyone has the following freedoms:

freedom of conscience and religion;

freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.

27 Du Plessis & Corder (supra) at 155-157. The WCRP-SA's proposed clause read as follows:

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;
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 recognized by the state;
  - 2.3 to criticise and challenge all social and political structures and policies in terms of the teachings of their religion.

For a discussion of the WCRP-SA's proposed clause, see G Abraham 'Declaration on religious rights and responsibilities: A Catholic response' (1994) 111 *SALJ* 344.

Professors Du Plessis and Corder also note that '[d]uring the negotiations, it soon became clear that the negotiators had no intention whatsoever of using the Constitution and the Bill of Rights to erect walls to separate church and state'.<sup>29</sup> IC s 14(2) reflects this intention.

### (iii) Relevant clauses in international and foreign law

FC s 15(1) and IC s 14(1) of the Interim Constitution betray the influence of international, regional and domestic human rights documents.<sup>30</sup> The concatenation of thought, conscience, religion and belief in the same clause would appear to have been influenced by Art 18 of the Universal Declaration of Human Rights (1948) ('UDHR'),<sup>31</sup> Art 18(1) of the International Covenant on Civil and Political Rights (1966) ('ICCPR')<sup>32</sup> and Art 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ('ECHR').<sup>33</sup>

The brevity with which the right to freedom of religion is expressed in Chapter 2 of the Constitution does, however, stand in stark contrast to the wording of that right in international, regional and domestic human rights documents.<sup>34</sup>

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28 Du Plessis & Corder (*supra*) at 156.

29 *Ibid* at 155, 157.

30 *Ibid* at 47.

31 Article 17 of the UDHR provides that: 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.

32 Article 18 of the ICCPR states:

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 others 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 or belief of his choice. 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 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.

33 Article 9 of the ECHR 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 worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

34 An example of a more expansive right in a foreign constitution, which influenced the drafting of the South African Constitution is to be found in Article 4 of the German Basic Law ('Freedom of faith, of conscience, and of creed'), which has been translated as follows:

The minimalism of s 15(1) may well be attributable to s 2(a) of the Canadian Charter of Rights and Freedoms.<sup>35</sup> Section 15(1) of the Constitution has also been shaped by Art 21(1)(b) of the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia. That clause provides that:

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All persons shall have the right to . . . freedom of thought, conscience, and belief, which shall include academic freedom in institutions of higher learning.<sup>36</sup>

The texts of both s 14 of the Interim Constitution and s 15 of the Final Constitution are conspicuously different from that of the First Amendment to the United States Constitution. The US Constitution forbids laws 'respecting the establishment of religion or prohibiting the free exercise thereof'. Nevertheless, case law and academic commentary on the First Amendment has been heavily utilised by the Constitutional Court.<sup>37</sup> It has also been referred to extensively by South African writers.<sup>38</sup> While guidance and inspiration can profitably be sought from the decisions and analysis emanating from the United States,<sup>39</sup> the Constitutional Court has sounded its usual cautionary note that the South African Constitution 'deals with issues of religion differently to the US Constitution'.<sup>40</sup>

## 41.2 Freedom of religion, belief and opinion: section 15(1)

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(1) Freedom of faith and of conscience, and freedom to profess a religion or a particular philosophy [Weltanschauung], are inviolable.

(2) The undisturbed practice of religion is guaranteed.

(3) No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by federal statute.

See D Currie *The Constitution of the Federal Republic of Germany* (1994) 344.

35 Section 2(a) declares succinctly that the first of the freedoms to which everyone is entitled is 'freedom of conscience and religion'.

36 In contrast to s 15 of the Final Constitution (and s 14 of the Interim Constitution), Art 21 of the Namibian Constitution does, however, refer to religion alone in a further clause. Article 21(1)(c), which confers on all persons the right to 'freedom to practise any religion and to manifest such practice'.

37 See, in particular, the judgments of O'Regan and Sachs JJ in *Solberg* (supra) at paras 118-123, 137-138 and 153-163, and *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at paras 29-41 (Sachs J) ('*Christian Education South Africa*').

38 See, for example, D Davis 'Religion, Belief and Opinion' in H Cheadle *et al South African Constitutional Law: The Bill of Rights* 204, 204-208; and G Devenish *A Commentary on the South African Bill of Rights* Chapter 10.

39 See *Solberg* (supra) at para 141(Sachs J) ('If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their *dicta* articulate in an elegant and helpful manner problems which face any modern court dealing with what has been loosely called church / State relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.')

## (a) The importance of the right

Freedom of conscience and religion is said to be one of the oldest of the internationally recognised human freedoms.<sup>41</sup> Indeed some political philosophers have

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recently argued that it is the pre-eminent negative right in the liberal pantheon.<sup>42</sup> The right has lost none of its currency or centrality in recent constitutional documents.<sup>43</sup> The Constitutional Court appears to have accorded it singular status in *Prince v President, Cape Law Society & other*:

The constitutional right to practise one's religion is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.<sup>44</sup>

One of the reasons why the right remains so important is that the freedom is deemed to be integral to our dignity, growth and self-worth.<sup>45</sup>

## (b) Notable features of the clause

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40 See *Solberg* (supra) at para 99-100 (Chaskalson P) ('we should be careful not to blur [the] distinction' between the establishment and free exercise clauses, which have different concerns. Not only should one take care not to import establishment concerns into the South African freedom of religion clause, but one should also be alert to the fact that 'free exercise' doctrine in the United States has developed in a context in which there is an establishment clause, and may potentially have to be augmented or revised in the absence of such a clause.')

A further factor to bear in mind is that the South African Constitution, unlike the United States Bill of Rights, has a general limitation clause. Thus, when seeking to make use of the American free exercise test, one must determine which legs of the test belong in the religion clause enquiry and which legs should form part of the limitation clause evaluation.

41 See P Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law* (1984) 158, and J Humphrey 'Political and Related Rights' in Meron (op cit) 176.

42 P Macklem 'Freedom of Conscience and Religion in Canada' (1982) 40 *U of Toronto LR* 50. John Rawls asserts that the right to freedom of conscience and religion would be the first to be consented to in his hypothetical social contract. *A Theory of Justice* (1976) 206.

43 Close to two centuries after the protection of religious freedom was accorded precedence in the United States of America's Bill of Rights (1791), it was placed at the head of the list of protected rights and freedoms in s 2(a) in the Canadian Charter of Rights and Freedoms (1982).

44 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) at para 24.

45 As regards the connection between religion and dignity, see *Christian Education South Africa (CC)* (supra) at para 35:

The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has that capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.'

See also *Prince (CC 1)* (supra) at paras 48-50 (Ngcobo J).

## (i) The protection of non-religious thoughts and beliefs

The first significant feature about s 15(1) is that the clause does not merely protect *religious* freedom.<sup>46</sup> To secure protection under the ambit of s 15, one does not have to prove that one is an adherent of a 'religion' — something that in the past was not infrequently (although wrongly) equated with belief in

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a supreme being<sup>47</sup> — nor that one is affiliated with religious institutions in any conventional sense.<sup>48</sup>

The South African clause goes further than a number of other freedom of religion clauses in foreign constitutions in that it not only includes 'conscience' and 'religion', but also 'thought, belief and opinion'. It imports a decidedly overt secular element into the clause.<sup>49</sup> Thus s 15 encompasses a freedom not to believe in any religion, or, to phrase it more positively, the freedom to be a sceptic, agnostic or atheist.<sup>50</sup> It should embrace comprehensive views of the good life that are derived from political, sociological or philosophical ideologies<sup>51</sup> as well as purely personal moral codes. It may even cover opinions formed as a result of 'considerations of policy, pragmatism,

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- 46 In this respect, it is much like s 2 of the Canadian Charter of Rights and Freedoms, Art 4 of the German Basic Law, Art 18 of the ICCPR and Art 9 of the European Convention. FC s 9, which will no doubt play an important role in litigation on religious matters, also echoes the expansive nature of the s 15(1) right when it prohibits unfair discrimination on the grounds of 'religion, conscience, belief'.
- 47 See *Publications Control Board v Gallo (Africa) Ltd.* 1975 (3) SA 665 (A), 672 as cited in J D van der Vyver in 'Suspension, derogation and *de facto* deprivation of fundamental rights in Bophuthatswana' (1994) 57 *THRHR* 257, 267. See also *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 (HC) ('Probably most Europeans would regard religion as necessarily involving some idea or doctrine effecting the relation of man to a Supreme Being'). Note that the United States' 'Universal Military Training and Service Act once defined the term 'religious training and belief' as 'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation'. See *US v Seeger* 380 US 163, 85 S Ct 850 (1965) ('*Seeger*'). This definition is not dissimilar to that adopted by the South African Board for Religious Objection when interpreting the Defence Act 44 of 1957. See *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 922 (O). In *Hartman*, however, a full bench decision of the Orange Free State Provincial Division ruled that Theravada Buddhism, a non-theistic tradition of Buddhism, did in fact qualify as a 'religious conviction' in terms of the Act. The US Supreme Court did not read the phrase 'religious training and belief' as having a theistic requirement when applied to conscientious objectors — *Seeger* (supra) and *Welsh v United States* 398 US 333, 90 S Ct 1792 (1970) — despite the seemingly clear language of the statute to the contrary. These last three decisions are more in accord with contemporary norms.
- 48 In this regard, s 14(1) is similar to s 19(1) of the Zimbabwe Constitution. See *In re Chikweche* 1995 (4) SA 284 (ZS), 290H-I, 1995 (4) BCLR 533 (ZS) (Gubbay CJ) ('In any event, I am of the view that the reference in s 19(1) to freedom of conscience is intended to encompass and protect systems of belief which are not centred on a deity or religiously motivated, but are founded on personal morality.') McNally JA, who had 'reservations about the classification of Rastafarianism as a religion', in fact would have held for the applicant on this basis: 'But I have no doubt that it is a genuine philosophical and cultural belief, and as such falls under the protection of s 19(1) of the Constitution.' *Ibid* at 292F.
- 49 The equivalent provision in the Interim Constitution, s 14, introduced an even more secular tone by including within the right in s 14(1), 'academic freedom in institutions of higher learning'.
- 50 See J Humphrey 'Political and Related Rights' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 178.

or expediency'.<sup>52</sup> Views on abortion and euthanasia could therefore potentially be protected under s 15 even if they stem from 'personal morality that is not founded in religion' or from 'conscientious beliefs that are not religiously motivated'.<sup>53</sup>

There may well, however, be a difference between the extent of the protection conferred by s 15(1) on religious and other conscientiously held beliefs,<sup>54</sup> on the one hand, and other beliefs, thoughts, opinions, on the other hand. As the Constitutional Court has made clear, s 15(1), in line with international human rights norms, protects an adherent's right to *manifest* his or her religion in worship, observance, practice and teaching.<sup>55</sup> The Constitutional Court has not yet pronounced on the extent to which the s 15(1) right to thought, belief and opinion also includes an external dimension — or in other words, encompasses not only the right to *hold* a belief or opinion or adhere to a system of thought, but also to *act* thereon. However while the expressions, or external manifestations of 'thought, belief and opinion' may have been more appropriately protected under other provisions in the Bill of Rights,<sup>56</sup> and may be regarded as already enjoying some measure of protection there, one probably cannot read the protection of conduct associated with 'thought, belief and opinion' out of the section without doing undue violence to the text.<sup>57</sup>

## (ii) The protection of 'opinion'

An unusual feature of the right enshrined in s 15(1) is the inclusion of 'opinion' along with religion, conscience, thought and belief. In fact, the reference to 'opinion' in a clause protecting freedom of religion and belief is seemingly without precedent in international or foreign jurisprudence.

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51 See P Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 159 n243.

52 See *Seeger* (supra).

53 *R v Morgentaler* [1988] 1 SCR 30, 176-8 ('*Morgentaler*'); P Hogg *Constitutional Law of Canada* (4th Edition, 1992) § 39.2, 979 n12. In *Morgentaler*, Wilson J asserted that regulation of abortion is a denial of freedom of conscience and thus a violation of s 2(a) of the Canadian Charter.

54 See *Morgentaler* (supra)(Wilson J)(referring not only to a right to hold or articulate beliefs in relation to abortion but also a right to act thereon in accordance with one's conscience).

55 See §§ 41.2(b)(iii) and 41.2(c) *infra*.

56 See, eg, the right to freedom of expression (s 16), the right to assembly, demonstration, picket and petition (s 17), the right to freedom of association (s 18) or the right to make political choices (s 19), the right to freedom of movement and residence (s 21).

57 A reading that excludes protection for the manifestation of non-religious thoughts and beliefs would also unduly emasculate those rights. The right to hold a belief — and not be forced to renounce or forswear it — is a fundamental right. However, it has limited application in modern diverse societies, where it generally difficult, if not impossible, to discern the nature and content of a person's beliefs or ideologies without some external manifestation thereof. Furthermore, a prohibition on the manifestation of particular thoughts or beliefs would significantly prejudice persons who held such beliefs and thus, at least indirectly, significantly undermine their right to adhere to the beliefs in question.

One might argue that protecting opinion is out of place in a clause that is concerned with honouring and protecting a person's *convictions*. But that need not necessarily be so. Section 15 is aimed at ensuring that everyone is free to adhere to deeply held beliefs and values, whether they are derived from religion, a system of personal morality, or a secular world view. A set of deeply held opinions — or convictions — can form a comprehensive view of the good life comparable to any and all conventional religious faiths. Viewed in this light, the protection of 'opinions' is not inconsistent with the protection of thought or belief.<sup>58</sup> Nor is it necessarily incongruous in a clause concerned with recognising the individuality, freedom and dignity of every person and the diversity of ideas.

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As has been pointed out in the previous section,<sup>59</sup> the s 15(1) right is normally associated with a right to manifest religious beliefs in practice. Consequently, some doubt could be expressed about whether the right to 'freedom of opinion' amounts to anything more than the right to 'hold' an opinion. The airing of an opinion is after all protected elsewhere — most notably in the 'freedom of expression' clause (s 16).<sup>60</sup> But to suggest that there is no protection of the external manifestations of an opinion under s 15(1) is seemingly not justified, either textually or conceptually.<sup>61</sup> The articulation or external manifestation of opinion — like religion — should therefore probably be regarded as being protected under s 15(1), notwithstanding the overlap with rights such as s 16.

### **(iii) The absence of any express mention of religious practice**

There can be no dispute that s 15(1) entrenches the right to *hold* or *entertain* any religious or non-religious thoughts, beliefs and opinions.<sup>62</sup> It is, however, one thing to protect the holding of opinions, beliefs or thoughts, as we have already noted. It is another to protect the manifestation of those beliefs. The text of s 15(1) does not explicitly protect practice motivated by religion (or, for that matter, conscience).<sup>63</sup>

The lack of any direct reference to religious practice, while unusual,<sup>64</sup> has correctly been regarded by the Constitutional Court as being of little significance. The Court has adopted the interpretation of the right in Canadian law.<sup>65</sup> In particular,

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58 *The New Shorter Oxford English Dictionary* (Vol 2) 2007 defines 'opinion' as 'belief'.

59 § 41.2(b)(i) *supra*.

60 See *Solberg* (*supra*) at para 145 (Sachs J): 'Freedom of opinion and freedom of expression go hand in hand'. See art 19 of the UDHR, art 19 of the ICCPR and art 10 of the ECHR, where 'opinion' is linked with 'expression', rather than the 'thought, conscience and religion' which is located in the previous article. Compare art 5 (Freedom of Expression) of the German Basic Law and art 4 thereof, with s 2(b) of the Canadian Charter of Rights and Freedoms (which protects 'freedom of thought, belief, opinion and expression').

61 See the discussion in relation to the protection of manifestations of thought and belief in § 41.2(b)(i) *supra*.

62 A number of commentators have suggested that the right to hold or entertain thoughts and beliefs (whether religious or not) should be considered inviolable. See in this regard K Partsch 'Freedom of Conscience and Expression, and Political Freedoms' in L Henkin (ed) *The International Bill of Rights of Rights* (1981); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); and L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 158.

the Court has followed Dickson J's remarks in *R v Big M Drug Mart Ltd*<sup>66</sup> as to the scope of the Canadian freedom:

[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.<sup>67</sup>

The Court's interpretation is consistent with the rest of s 15. Section 15(2) makes provision for 'religious observances'. Section 15(3) deals with marriages and other details of family life governed *inter alia* by religious law. The marked distinction between protected religious belief and unprotected religiously dictated or motivated conduct that was drawn in 19th century American case law,<sup>68</sup> and in pre-Charter Canadian cases<sup>69</sup> has not been followed. The international consensus on the protection of religious practice requires that s 15(1) be interpreted as protecting the manifestation and practice of religious belief.<sup>70</sup>

63 Cf the German Basic Law (art 4(2) and (3)), art 18(1) of the ICCPR, art 9(1) of the European Convention, and, seemingly, the First Amendment to the American Constitution (which is concerned, in part, with the free *exercise* of religion) — which explicitly protect religious practice. With the exception of the First Amendment to the US Constitution, these provisions have been quoted above under § 41.1(c)(iii). The First Amendment to the US Constitution commences thus: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

64 In addition to the examples already mentioned, the following clauses also protect religious practice: art 18 of the UDR, art 3 of the American Declaration of the Rights and Duties of Man, art 12 of the American Convention on Human Rights, art 8 of the African [Banjul] Charter on Human and Peoples' Rights ('African Charter'), art 21(1)(c) of the Namibian Constitution, arts 25 & 26 of the Indian Constitution and art 19(1) of the Constitution of Zimbabwe.

65 See § 41.2(c) below.

66 [1985] 1 SCR 295, (1985) 18 DLR (4th) 321, 353 (SCC). (*Big M Drug Mart Ltd*).

67 *Ibid.* The last clause of this excerpt from Dickson J's judgment is virtually identical to art 18(1) of the ICCPR and art 9(1) of the European Convention.

This interpretation accords with the views of two of the members of the Technical Committee that drafted the Bill of Rights. See Du Plessis & Corder (*supra*) at 155-6. (The authors assert that IC s 14(1) accorded, in this respect, with the submission from the South African Chapter of the World Conference on Religion and Peace. That submission contained a provision claiming that all persons are entitled 'to profess, practise, and propagate any religion or no religion'.)

68 *Reynolds v United States* 98 US 145, 25 LEd 244 (1878) (After an examination of whether the First Amendment exempted from criminal prosecution for polygamy, people who practised bigamy on account of their Mormon religious beliefs, the Court held: 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices'.)

69 *Walter et al v Attorney-General of Alberta* [1969] SCR 83, (1969) 3 DLR (3d) 1 (SCC) ('The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not.'). See also D Gibson *The Law of the Charter: Equality Rights* (1990) 191-195.

#### (iv) The lack of an 'establishment clause'

The fourth notable feature of s 15(1) is the absence of an establishment clause. That is, the Final Constitution contains no clause mandating the separation of church and state.<sup>71</sup> This structured silence should not occasion much surprise. Establishment clauses are not very common in national constitutions or international covenants.<sup>72</sup> Nor are the two clauses necessarily as compatible in the same document as might at first be thought. The American establishment clause, for example, was originally conceived as complementary to the free exercise clause. However, the two clauses do pull in different directions.<sup>73</sup> As Louis Lusky notes:

In our society . . . there is continuing tension between the two Clauses. Sometimes, indeed, it has almost seemed that anything not forbidden by one is required by the other, and that — but for the Court's divine mediation — the same act or omission might be forbidden by one *and* required by the other.<sup>74</sup>

The drafters of South Africa's Constitutions were quite self-conscious about the traditional commitment of the state to religion writ large.<sup>75</sup> It is therefore not

70 South Africa ratified the ICCPR in 1998 and the African Charter in 1996. It thereby became obliged to ensure compliance with these documents in its domestic law. See J Dugard *International Law: A South African Perspective* (2nd Edition) 242-244. It would also be difficult to justify divergence from the UDHR. Although the UDHR was envisaged as merely a 'standard-setting' document, its status and prestige are such that it is not only regarded as the yardstick by which to measure compliance with human rights standards, but it has also come to be viewed as a legally binding instrument. See Dugard (supra) at 240-242; W Amien and P Farlam (eds) *Basic human rights documents for South Africans* 6. It should be borne in mind that in terms of Constitutional Principle II, the Final Constitution had to ensure that everyone enjoys 'all universally accepted fundamental rights, freedoms and civil liberties' by means of 'entrenched and justifiable provisions in the Constitution'. The Principle is enumerated in Schedule 4 to the Interim Constitution.

71 The 'establishment clause' consists of the injunction, at the start of the First Amendment, that 'Congress shall make no law respecting an establishment of religion'. According to the US Supreme Court in *Lemon v Kurtzman*, a statute will only comply with the establishment clause if: (i) it has a secular purpose; (ii) its primary effect is one that neither advances nor inhibits religion; and (iii) it does not foster excessive government entanglement with religion. 403 US 602, 91 SCt 2105 (1984).

72 Apart from the US Constitution, the Australian Constitution (s 116) and the Constitution of the Russian Federation (art 14) are seemingly the only constitutions with such clauses which provide for the separation of religion and the state, although see also, art 20.3 of the Japanese Constitution. Article 137(1) of the German Basic Law (part of the Weimar Constitution of 1919, which was incorporated by art 140 into the Basic Law) declares 'There shall be no state church', but it is clear from other provisions of the Basic Law (such as art 7) that the German Constitution imposes no strict divide between church and state. The German Constitutional Court has also not interpreted the clause as equivalent to the American establishment clause. See Currie *The Constitution of the Federal Republic of Germany* (supra) at 245ff.

73 See E S Corwin and J W Peltason's *Understanding the Constitution* (13th Edition, 1994) 194-5.

74 L Lusky *By What Right?* (1975) 167 (emphasis in original).

75 There were, for example, public holidays for Christmas, Good Friday, Easter and Ascension Day, as well as a day of thanksgiving and commemoration, previously called The Day of the Vow. There were also tax exemptions, state chaplains etc., as well as a well-developed Afrikaner 'civil religion'. See T D Moodie *Power, Apartheid and the Rise of Afrikanerdom* (1980); and C Villa-Vicencio *Trapped in Apartheid* (1988).

surprising that it soon became clear to the members of the Technical Committee responsible for the Interim Constitution's Bill of Rights that 'the negotiators had no intention whatsoever of using the Constitution and the Bill of Rights to erect walls to separate church and state'.<sup>76</sup> In its first decision dealing with IC s 14(1), the Constitutional Court expressly acknowledged that a strict separation of church and state was not required by the Constitution.<sup>77</sup>

The textual silence does not, however, mean that establishment clause concerns will enjoy no protection in South Africa. As discussed below,<sup>78</sup> the right to freedom of religion, belief and opinion requires at least some degree of separation

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between church and state. Moreover, s 9 specifically prohibits unfair discrimination, whether direct or indirect, on the grounds of religion, conscience or belief. The equality clause, in conjunction with s 15, could therefore also serve to outlaw some of the state practices that have been captured by the establishment clause in the United States.<sup>79</sup>

### (c) The core of the right to religious freedom

In *Prince*, the Constitutional Court confirmed that the right to freedom of religion in s 15(1) of the Constitution protects religious belief and the practice or manifestation of belief and prohibits coercion or restraint of religious belief or practice. Ngcobo J wrote:<sup>80</sup>

This Court has on two occasions [in *Solberg* and *Christian Education South Africa*] considered the contents of the right to freedom of religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the 'absence of coercion or restraint'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs'.<sup>81</sup>

Another way of itemising what lies at the heart of the right to freedom of

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76 See § 41.1(c)(ii) above. See also L Du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 155.

77 *Solberg* (supra) at paras 99-102 (Chaskalson P), 116, 118-119 (O'Regan J).

78 See § 41.2(d) below.

79 See *Solberg* (supra) at para 102 (Chaskalson P). That a concern for equality was one of values underlying the Establishment Clause is suggested by comments in James Madison's *Memorial and Remonstrance*, a tract that has been regarded by generations of Supreme Court justices as illustrative of the intention of the framers of the Establishment Clause. See, for example, *Everson v Board of Education* 330 US 1, 67 S Ct 504 (1947); *Engel v Vitale* 370 US 421, 82 S Ct 1261 (1962) ('*Engel*'). In *Memorial and Remonstrance*, one of Madison's criticisms of a contemporary bill was that it was violative of the principle of equality.

80 *Prince* (CC 1) at para 38. (Ngcobo J was writing for the minority, but the majority did not disagree with him on this point, nor was it open for them to do so in the light of the unanimous judgment in *Christian Education South Africa*.)

religion in s 15(1) is to distinguish the following four freedoms:<sup>82</sup> (a) freedom of religious choice; (b) freedom of religious observance; (c) freedom of religious teaching; and (d) freedom to propagate a religion.<sup>83</sup> A more comprehensive list of the kinds of religious practices or manifestations of religious belief that would be protected under s 15(1) can be discerned from art 6 of the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, passed by the United Nations General Assembly in November 1991. That article provides a number of concrete examples of the freedoms contained in the 'right of freedom of thought, conscience, religion or belief', and thus the type of conduct that should be protected under s 15(1) of the Constitution.<sup>84</sup> These include the freedom: (a) to worship or assemble in connection with a religion or belief, and to establish and maintain places 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 religious 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 requirements and standards 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 own religion or belief; and (i) to establish and maintain communication with individuals and communities in matters of religion and belief at the national and international levels.

The Constitutional Court has pointed out that the coercion prohibited by s 15(1) may be direct or indirect<sup>85</sup> and that constraints on religion may be imposed in subtle

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81 In interpreting the right to freedom of religion in this way, the Constitutional Court has adopted the definition of freedom of religion by Dickson J in *R v Big M Drug Mart Ltd*, in relation to s 2(a) of the Canadian Charter of Rights and Freedoms. See § 41.2(b)(iii) above. The Constitutional Court has also ensured that the main attributes of the right to freedom of religion and belief in the South African Constitution are the same as those of the rights to thought, conscience and religion enshrined in international documents like the Universal Declaration of Human Rights (1948) (Article 18), and the International Covenant on Civil and Political Rights (1966) (Article 18(1) and (2)). See also regional documents like the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 9(1) and (2)) and the African [Banjul] Charter on Human and Peoples' Rights (art 8 whereof reads: 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.')

82 See Y Dinstein 'Freedom of Religion and Religious Minorities' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* 145, 147; I Currie 'Minority Rights: Education, Culture and Language' *Constitutional Law of South Africa* (1st Edition)(supra) at § 35.4(d)(iii).

83 As Iain Currie notes, the last three freedoms may receive additional protection under s 31, but only insofar as the observance, dissemination and teaching of religious beliefs relates to the practice of a religion in community with other practitioners. Furthermore, atheism or agnosticism would not be covered by s 31, since such beliefs are merely held and not communally practised. Currie (supra) at §35.4(d)(iii).

84 The relevance of these examples to art 9 of the ECHR is noted by M Shaw 'Freedom of Thought, Conscience and Religion' in R St Macdonald, F Matscher & H Petzold (eds) *The European System for the Protection of Human Rights* 451-452. See also G Weigel 'A Preliminary Examination of Religious Freedom' in R Gastil (ed) *Freedom in the World: Political Rights and Civil Liberties* (1982) 136-40, who uses these eleven points as the basis for his Index for Religious Freedoms.

ways.<sup>86</sup> In order to determine whether there is an infringement of the right to freedom of religion, it is necessary not only to look at the purpose of the legislation (or conduct), but also its 'overall purpose and effect'.<sup>87</sup>

One of the most flagrant ways in which the State could breach the right to freedom of religion would be by law or action that intentionally, and directly, targeted particular religious organisations or believers (or religious organisations or adherents in general). An example of such a law would be one that banned a particular church<sup>88</sup> or religious group or order (such as Jehovah's Witnesses or Jesuits<sup>89</sup>) or prohibited a particular religious practice (either at all, or by a particular religion or sect).<sup>90</sup> The United States Supreme Court, in *Church of Lukumi Babalu Aye, Inc v City of Hialeah*,<sup>91</sup> struck down just such a statute. The municipal ordinance in question was construed as a thinly veiled prohibition of the animal sacrifice rituals of the Santeria religion.<sup>92</sup> Similarly, a law or decision that precluded adherents of a particular religious faith from being eligible for state jobs or being admitted into state-funded institutions would violate s 15.<sup>93</sup>

Another obvious violation of the right to freedom of religion would occur were the State to compel persons to profess allegiance to a particular faith, or partake in, or be connected with, activities of a particular religion.<sup>94</sup> The state cannot compel a

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85 *Solberg* (supra) at para 104 (Chaskalson P).

86 *Ibid* at paras 93 (Chaskalson P), and 114 (O'Regan J). 'Subtle' coercion is dealt with below under § 41.2(d).

87 *Ibid* at paras 127 (O'Regan J), and 161 (Sachs J).

88 An example of a flagrant violation of this nature was the Transkei Minister of Justice's banning of the Methodist Church of Southern Africa in 1978 (under the Undesirable Organisations Act 98 of 1975 (Tk)) and the Transkei legislature's subsequent passing of the Methodist Church of Transkei (Private) Act 41 of 1978 (Tk), in terms of which the Methodist Church of Southern Africa was divested of its assets. See *United Methodist Church of Southern Africa & others v Methodist Church of Southern Africa & others* 1991 (2) SA 138 (TkAD).

89 Norway, at one period of time, excluded Jesuits from the country and thus, had to make a reservation with respect thereto when it first ratified the ECHR. See D J Harris, C Warbrick & M O'Boyle *Law of the European Convention on Human Rights* (1995) 362.

90 See *Kokkinakis v Greece* (1994) 17 EHRR 397 (The European Court of Human Rights held that Greece had violated art 9 of the ECHR, the right to freedom of thought, conscience and religion, when its courts had convicted, and ordered the imprisonment of a Jehovah's Witness for proselytism — i.e., the evangelical activity of calling at houses to persuade occupiers to become Jehovah's Witnesses).

91 508 US 520, 113 S Ct 2217 (1993).

92 Earlier judgments of the US Supreme Court declared unconstitutional laws forbidding or imposing restrictions on the teaching of religious beliefs or the dissemination of religious tracts. See *Cantwell v Connecticut* 310 US 296, 60 S Ct 900 (1940); *Murdock v Commonwealth of Pennsylvania* 319 US 105, 63 S Ct 870 (1943).

person to take a religious oath as a condition of public employment or eligibility for an elected position.<sup>95</sup> Nor can one be forced to pay taxes to a

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church, of which one is not a member, in support of its religious activities.<sup>96</sup> Nor can the state pass legislation designed to compel all residents (including non-believers) to observe the holy day of one particular religion.<sup>97</sup>

Laws or conduct of the nature described in the previous two paragraphs — i.e., laws or conduct with a religious motivation or purpose — are still on the books. However, a more common form of state intervention in religious affairs is by means of facially neutral government actions. Facially neutral laws — laws that do not engage expressly with or refer to religious practice (or belief) — apply to religious organisations and adherents because such laws apply to everyone. While such 'neutral' interference would apparently be more benign (and ostensibly much less likely to be motivated by religious preferences or bigotry), it could have a severe impact on religious organisations or communities. A religious group's way of life or its rites of worship could effectively be prohibited. Believers could be coerced into acting in ways inimical to their faith.<sup>98</sup>

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The Constitutional Court has thus far considered two cases in which religious adherents or organisations requested exemptions from facially neutral statutes.<sup>99</sup> In both cases, the Court did not deny that the statutes violated the right to freedom of religion, notwithstanding the secular nature and purpose of the laws. The Court also accepted that the legislation could potentially be held to be unconstitutional by virtue of failing to include an exemption for religious adherents.<sup>100</sup> But in neither case was the religious challenge successful.

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93 *McDaniel v Paty* 435 US 618, 98 SCt 1322 (1978) (a state provision prohibiting members of clergy from serving in various state offices held to be unconstitutional). See also *Fowler v Rhode Island* 345 US 67, 73 SCt 526 (1953) (the State cannot penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities). A more contemporaneous example of a practice that would appear to violate the right to freedom of religion is the Bavarian government's prohibition on members of the Church of Scientology being employed by the state.

94 A provision outlawing such conduct expressly is in fact included in the German Basic Law. Article 136(4) of the Weimar Constitution, incorporated by art 140 of the Basic Law, declares that no-one can be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath.

95 *Torcaso v Watkins* 367 US 488 (1961) (person appointed as a notary public was required to take an oath declaring belief in God).

96 See Shaw (supra) at 453-454 (As the European Commission of Human Rights held as much in *Darby v Sweden* A 187 (1991) Comm. Rep.).

97 Thus, a Canadian federal statute, the Lord's Day Act RSC 1970 — which *inter alia* prohibited any work or commercial activity on the 'Lord's Day' (the Christian sabbath) — was found by the Canadian Supreme Court to have a religious purpose, as well as a religious effect, and consequently to infringe the right to freedom of conscience and religion impermissibly. See *Big M Drug Mart Ltd* (supra) at 321. In contrast, various Sunday observance laws in the US were held to no longer have a religious purpose and consequently to be constitutionally unobjectionable. See *McGowan v Maryland* 366 US 420 (1961) 81 SCt 1101; *Braunfeld v Brown* 366 US 599, 81 SCt 1144 (1961); *Gallagher v Crown Kasher Super Markets of Massachusetts, Inc.* 366 US 617, 81 SCt 1122 (1961); and *Two Guys from Harrison-Allentown, Inc. v McGinley* 366 US 582, 81 SCt 1135 (1961).

In *Christian Education, South Africa* (the first of the challenges to an overtly neutral law) the Court unanimously assumed that a statute prohibiting corporal punishment of juveniles in schools infringed the claimant's right to freedom of religion. It found, however, that any such infringement would be justified under

the limitation clause. In *Prince v President, Cape Law Society & others*, ('*Prince* (CC 2)'),<sup>101</sup> the Court found that there was a violation of s 15 (as well as s 31) of the Constitution vis-à-vis adherents of the Rastafari religion as a result of the prohibition on the use or possession of cannabis in two statutes.<sup>102</sup> A majority of the Court

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98 Examples of neutral statutes or requirements that have been challenged in the United States on the basis of violating a particular religious group's or adherent's right to the free exercise of their religion include: a Wisconsin law requiring compulsory school attendance until the age of 16, which was successfully challenged by the Amish (who argued that this requirement severely jeopardised the survival of their religion) in *Wisconsin v Yoder* 406 US 205, 92 S Ct 1526 (1972); a law prescribing payment of social security taxes, which was unsuccessfully challenged by a member of the Old Order Amish (on the basis that payment of taxes and receipt of benefits violated the taxpayer's Amish faith) in *United States v Lee* 455 US 252 (1982) (for another case in which the US Supreme Court dismissed a challenge to a generally applicable tax which did not provide an exemption for a religious organisation, see *Jimmy Swaggart Ministries v Board of Equalization of California* 493 US 378, 110 S Ct 688 (1990)); a government requirement that welfare applicants submit their social security numbers in order to receive benefits which was unsuccessfully attacked in *Bowen v Roy* 476 US 693, 106 S Ct 2147 (1986) ('*Bowen*'); statutory provisions denying state unemployment benefits to Seventh Day Adventists who refused to work on Saturdays (their sabbath), which were successfully challenged in *Sherbert v Verner* 374 US 398 (1963), 83 S Ct 1790 and *Hobbie v Unemployment Appeals Commission of Florida* 480 US 136 (1987), 107 S Ct 1046 (see also *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981), 101 S Ct 1425 ('*Thomas*') — US Supreme Court found that Indiana's denial of unemployment benefits to a Jehovah's Witness who had left his job producing armaments because of sincerely held religious beliefs violated the free exercise clause). See too *Employment Division Oregon Department of Human Resources v Smith* 494 US 872 (1990), 110 S Ct 1595 ('*Smith*') (a challenge to the criminal prohibition on the use of the drug peyote (a hallucinogen derived from a plant), which outlawed all ingestion of peyote, whether for sacramental purposes or not. A majority of the US Supreme Court rejected the free exercise challenge (although this decision was overturned by a national statute, which was then itself found to be unconstitutional by the US Supreme Court). By contrast, the California Supreme Court held unconstitutional the application of state criminal statutes to Native American Indians using peyote in a bona fide religious ceremony. See *People v Woody* 61 Cal 2d 716, 394 P2d 813 (1964). Jehovah's Witnesses also successfully challenged the failure to exempt them from a law which required saluting the national flag, on the basis that this violated the injunction in the Scriptures against worshipping graven images. See *West Virginia State Board of Education v Barnette* 319 US 624, 87 LEd 1628 (1943), 63 S Ct 1178.

99 See *Christian Education South Africa* (supra) and *Prince* (supra). See also *N Smith 'Freedom of Religion: The Right to Manifest our Beliefs'* (2002) 119 SALJ 690. The third freedom of religion case considered by the Constitutional Court thus far — *Solberg* (supra) — could potentially have been framed as a claim for exemption by adherents of religions (such as Judaism) whose day of rest or worship was a day other than Sundays, and who were thus faced with financial disadvantage if they honoured their religion. See, for example, the challenge mounted in *Edwards Books and Art Ltd. v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1 ('*Edwards Books and Art Ltd*'), where a majority of the Canadian Supreme Court found that there was a violation of the right to freedom of conscience and religion, but that this infringement was justified under s 1 of the Canadian Charter of Rights and Freedoms. The attack on the Liquor Act in *Solberg* (supra) was not, however, along these lines. Instead, it was alleged that the relevant statutory provisions fell to be struck down in their entirety by virtue of having an impermissible religious purpose.

100 The Supreme Court of Appeal stated in *Prince v President, Cape Law Society & others* 2000 (3) SA 845 (SCA), 2000 (7) BCLR 823 (SCA) at para 11 ('*Prince* (SCA)') that it may well be impermissible for a court to declare otherwise unobjectionable statutes unconstitutional by virtue of their failing to contain an exemption for *bona fide* religious users, because this would involve a court legislating. The Constitutional Court has, however, correctly pointed out that this is not so; it is

hearing that case found, however, that the infringement is justified under s 36 of the Constitution<sup>103</sup>

#### **(d) The penumbra of the right: the protection against subtle non-quantifiable coercion**

Although the Final Constitution contains no 'establishment clause' and does not mandate a 'wall of separation' between church and state, the state is not necessarily free to identify with or promote a particular religion. The extent to which the state remains able to do so depends on the dictates of the freedom of religion clause (s 15(1)), as well as the right to freedom from discrimination on the basis of religion, conscience and belief (s 9(1)). Although non-entanglement of church and state is not the direct focus of s 15(1) — unless there is coercion of adherents of other faiths to act (or refrain from acting) contrary to their beliefs<sup>104</sup> — it may be caught and constrained by the very logic of the right.

The question of whether it would be consistent with s 14(1) of the Interim Constitution (the equivalent of s 15(1) of the Final Constitution) for the state to give its *imprimatur* of approval to a particular religion arose for consideration by the Constitutional Court in *S v Lawrence*; *S v Negal*; *S v Solberg*. In *Solberg*, the appellants alleged that the Liquor Act 27 of 1989 (as amended), evinced a religious purpose (allegedly 'to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays or, perhaps, to compel the observance of the Christian sabbath and Christian holidays') and that such a sectarian aim constituted an infringement of the right to freedom of religion. A majority of the Constitutional Court found that the right to freedom of religion in s 14(1) of the Interim Constitution prohibited the 'endorsement' of religion by the State. O'Regan J wrote that 'explicit endorsement of one religion over others would not be permitted in our new constitutional order'.<sup>105</sup> Sachs J similarly opined that the State's endorsement would violate the freedom of religion clause if a 'reasonable South African (of any faith or none) who is neither hyper-sensitive nor overly insensitive to the belief in question, but highly

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attuned to the requirements of the Constitution' would deem there to be such.<sup>106</sup> However, Sachs J concluded that the infringement could be justified in terms of the

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perfectly competent for a Court to hold that a statute violates the right to freedom of religion insofar as its impact on a particular religious group is concerned. See *Prince (CC)* (supra) at paras 31-33.

101 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC). See also *Prince (CC 1)* (supra).

102 The Drugs and Drug Trafficking Act 140 of 1992 (s 4(b)) and the Medicines and Related Substances Control Act 101 of 1965 (s 22(a)(10)).

103 The decision in *Prince* turned in large part on whether or not it would have been practical or in the public interest for an exemption to be granted so as to permit Rastafarians to smoke cannabis or marijuana for religious purposes.

104 See the discussion in § 41.2(c) above.

105 See *Solberg* (supra) at para 123 (O'Regan J).

limitation clause. In the result, a majority<sup>107</sup> held that s 90(1) of the Liquor Act was consistent with the Interim Constitution.

What is significant about the *Solberg* decision is not so much the result but the fact that a majority of justices found that the right to freedom of religion in the Interim Constitution — which to all intents and purposes is the same as the right to religious freedom in the Final Constitution — precluded the state from showing a special affinity with Christianity.<sup>108</sup> Despite a lack of unanimity in reasoning,<sup>109</sup> the Court clearly supported the proposition that those endorsements of the kind effected by s 90(1) of the Liquor Act — which precluded the sale of wine under a grocer's licence on Sundays, Christmas Day and Good Friday — infringed the rights to religious freedom.

The question at this point is whether a prohibition on state involvement with religion (and particularly the endorsement of one particular religion) is required in order for there to be adequate protection from religious *coercion* (and thus full protection of religious *liberty*). A prohibition on certain forms of state identification with religion, such as endorsement of a 'favoured' religion, is necessary to protect against *subtle non-quantifiable coercion*. State endorsement of a particular religion results in indirect coercion of adherents of other faiths, agnostics and atheists. The presence of coercion of this nature may be particularly pronounced in a school environment.<sup>110</sup> A proscription on state endorsement of a favoured

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- 106 Ibid at para 162 (Sachs J). O'Regan J declared that s 90 of the Liquor Act 27 of 1989 had both a sectarian purpose and a sectarian effect and therefore impermissibly infringed the freedom of religion clause of the Interim Constitution. Sachs J wrote that 'the inescapable message sent out by the particular choice of these closed days [of the Liquor Act] is that despite the enactment of s 14, the state still shows special solicitude to Christian opinion or, to put it more accurately, to the views of certain Christians, and thereby infringes s 14'. Ibid at para 163.
- 107 Chaskalson P (with three Justices concurring) found that there was no violation of IC s 14(1). The opinion of Sachs J, upholding the provision of the statute under the limitation clause, was concurred in by Mokgoro J. Thus, five of the nine Justices who heard the case agreed that the constitutional challenge should be dismissed.
- 108 Restricting sale of alcohol on Sundays and other 'closed days' (as defined in the Liquor Act) did not further a religious purpose or impinge on anyone's faith, except in a legally irrelevant way. See, eg, the decisions of the US Supreme Court upholding Sunday observance laws: *McGowan v Maryland* (supra); *Braunfeld v Brown* (supra); *Gallagher v Crown Kosher Super Markets of Massachusetts, Inc.* (supra); and *Two Guys from Harrison-Allentown, Inc. v McGinley* (supra). There was moreover no evidence in *Solberg* (supra) that anyone's freedom of religion had in fact been infringed. There was consequently an 'air of artificiality' about the challenge and the attack on the consistency of the Liquor Act with s 14(1) of the Interim Constitution should arguably have been dismissed on this ground alone. Ibid at paras 140 and 154, (Sachs J). See also the Canadian Supreme Court decision in *Hy & Zel's Inc v Ontario (Attorney-General)* [1993] 3 SCR 675 (a challenge to Sunday trading restrictions was rejected on the basis that the appellants, who had adduced no evidence and did not allege that their rights had been violated, lacked standing.); *Edwards Books and Art Ltd* (supra) at 40-41, 65 (freedom of religion challenge of Hindus and Muslims was dismissed because of insufficient evidence to support a constitutional attack.)
- 109 O'Regan emphasised the importance equality or 'equitableness' of state support for religiously-based norms. See *Solberg* (supra) at paras 120-123 (O'Regan J) and para 148 (Sachs J).
- 110 See *Lee v Weisman* 505 US 577, 112 SCt 2649 (1992) ('*Weisman*') (US Supreme Court declared a purportedly non-denominational prayer at a high school graduation ceremony impermissible under the free exercise clause on the basis that, though voluntary, it resulted in indirect coercion).

religion is therefore appropriately located under the freedom of religion clause. While this coercion analysis can claim empirical evidence in its favour, the coercion becomes more subtle once one moves away from religious observances in captive environments such as schools or prisons (i.e., to activities not covered by s 15(2) of the Constitution).<sup>111</sup>

Support for the view that endorsement results indirectly in coercion, and thus must be prohibited to properly protect freedom of religion, is to be found in the judgment of O'Regan J in *Solberg*<sup>112</sup>. The same argument has been surfaced in the writings of South African academics such as Denise Meyerson<sup>113</sup> and Charles Villa-Vicencio<sup>114</sup> and the opinions of the US Supreme Court.<sup>115</sup> What is not directly addressed by the *Solberg* decision is the *extent* of state involvement with Christianity or any other religion that would be precluded by the constitutional right to freedom of religion by virtue of being indirectly coercive to adherents of minority faiths. Would any government actions with a religious purpose necessarily be precluded on the basis of being 'subtly coercive'? And would such a strict separation between the state and religion actually advance religious freedom?

The answer to both of these two questions is no. There is no reason why state involvement with religion, or government actions that have a religious purpose or effect, would necessarily be coercive (even indirectly or subtly) and thus be inconsistent with the penumbra of the right to religious freedom. There is furthermore no simple correlation between separation of church and state and total religious freedom. While complete identification of church and state clearly undermines religious freedom, a rigorous policy of state non-identification with religion would likely be violative of freedom of religion. The apex of religious freedom therefore

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- 111 A majority of the Supreme Court in *Weisman* endorsed the 'psychological coercion' analysis of Justice Kennedy. The majority's position prompted the quintessential Scalia riposte: 'interior decorating is a rock-hard science compared to psychology practiced by amateurs . . . [a] few citations of [r]esearch in psychology that have no particular bearing upon the precise issues here, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing'. Ibid at 636.
- 112 *Solberg* (supra) at paras 122-123.
- 113 See D Meyerson *Rights Limited* (1997) 32-33 ('[a]nother, perhaps less obvious, way in which the state may limit the right to religious freedom is by giving a preferred status either to religion as such or to one or more specific religions. Such a policy would obviously raise equality concerns, but it also raises concerns about religious freedom, because the preferral puts indirect pressure on citizens to adopt the religion favoured by the state.')
- 114 See C Villa-Vicencio *A Theology of Reconstruction* (1992) 264-268. Professor Villa-Vicencio discusses the importance of the separation of religion and state for freedom of religion. See J Klaaren 'Review of Stephen Carter's *The Culture of Disbelief*' (1994) 10 *SAJHR* 287, 289.
- 115 *Larson v Valente* 456 US 228, 245, 102 S Ct 1673 (1982) (Brennan J). See also *McCullum v Board of Education* 333 US 203, 227 (1948) (Frankfurter J); *Zorach v Clauson* 343 US 306, 325 (1952) (Jackson J); *School District of Abington Township, Pennsylvania v Schempp* 374 US 203, 287-294, 298-299, 305 (1963) (Brennan and Goldberg JJ); and *Engel* (supra) (Black J, admittedly in an establishment clause setting, discussed the indirect coercive pressure that could be exerted on religious minorities.)

lies somewhere between positive identification and negative identification.<sup>116</sup>

In establishing exactly where on the continuum of church-state identification maximum freedom of religion is attained it is useful to outline more nuanced models of church-state interaction. At one extreme lie *absolute theocracies*<sup>117</sup>. Next are countries with an *established church*: an established church is compatible either with a system in which there is a virtual monopoly in religious affairs, or one in which there is a substantial toleration of other beliefs. Thirdly, there are countries with an *endorsed church*: an endorsed church, while not formally affirmed as the official church of a nation, is accorded special acknowledgment and perhaps treatment (although freedom of religion and freedom from religious discrimination are protected). Fourthly, there are *co-cooperationist regimes* where no special status is granted to dominant churches although the state co-operates closely with churches in a number of ways. (It may arrange religious education, maintain churches or even collect taxes for churches). Fifthly, there are *accommodationist regimes*. Such states 'might be thought of as co-operationism without the provision of any direct financial subsidies to religion or religious education'.<sup>118</sup> Under these latter regimes the state is able to accommodate religion and the religious wishes of citizens by, for example acknowledging the importance of religion as part of national or local culture, allowing religious symbols in public settings, and permitting tax, dietary holiday, Sabbath and other kinds of exemptions. Sixthly, there are *separationist regimes*. Such regimes can vary dramatically. At the very least they differ from accommodationist regimes by being less accepting of state involvement with religious activities (even on an equitable basis). In separationist regimes religious teaching in schools would be prohibited, while any suggestion of public support for religion would be considered inappropriate. Seventhly, there are political arrangements marked by *inadvertent insensitivity* to religion. Finally, there are legal orders characterised by *hostility and overt persecution* of religious orders and adherents.

There may be disagreement about which of the middle four systems outlined above would be most likely to maximise religious liberty in any particular context. (The first two and last two involve some restrictions on religious practices and adherents.) Perhaps the most persuasive case can be made for an *accommodationist*

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*regime*.<sup>119</sup> Accommodationism certainly results in greater freedom than a system that allows endorsement.<sup>120</sup>

An accommodationist approach would also appear to be preferable to a separationist stance because it would permit a government, in certain circumstances, to enact laws that have the primary or incidental purpose of benefiting a particular religion (but do not constitute endorsement). Such measures

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116 A useful discussion of religious freedom in this context is to be found in W Cole Durham, Jr. 'Perspectives on Religious Liberty: A Comparative Framework', in J D Van der Vyver and J Witte Jr. (eds) *Religious Human Rights in Global Perspective: Legal Perspectives* (1996) 1-44. I have previously employed Cole Durham Jr's framework when analysing the Constitutional Court decision in *Solberg*. See P Farlam 'The Ambit of the Right to Freedom of Religion: A Comment on *S v Solberg*' (1998) 14 *SAJHR* 298, 320-323.

117 Durham (*supra*) at 19.

118 *Ibid* at 21.

may well be required for the full protection of religious liberty.<sup>121</sup> Worship or expressions of faith can have a public, as well as a private, dimension. Refusing to permit religious observances or other expressions or manifestations of faith in public *fora* can therefore constitute an infringement of the religious faith of certain adherents.<sup>122</sup> Stated differently, a policy banning all worship or religious instruction from state institutions is not neutral vis-à-vis different religions (or even all adherents of one religion<sup>123</sup>), or between religious adherents, atheists and agnostics. This proposition has been acknowledged and affirmed by the German Constitutional Court.<sup>124</sup>

The Court wrote:

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119 This model is favoured by a number of American academics who are dissatisfied with the restrictions on religious freedom that they feel are concomitant on a policy of rigid church-state separation as well as some South African writers. As regards American writers, see, in addition to Durham (supra), M W McConnell 'Accommodation to Religion' 1985 *Supreme Court Review* 1 and 'Accommodation of Religion: An Update and a Response to Critics' (1992) 60 *George Washington LR* 685. For South African support for an accommodationist position, see D Davis 'Religion, Belief and Opinion' in H Cheadle, D Davis & N Haysom *South African Constitutional Law: The Bill of Rights* (2002) 209-210; W Freedman 'The Right to Religious Liberty, The Right to Religious Equality, and S 15(1) of the South African Constitution' (2000) 11 *Stell LR* 99, 113-114. See also Farlam (supra) at 320-323.

120 As regards 'endorsement', Durham says the following: 'Of course, substantial religious liberty can also exist in co-operationist or endorsed church regimes, at least where genuine religious equality is present. However, there is always a sense in such regimes that smaller religious communities have a kind of second-class status, and to the extent that public funds are directly supporting programs of majority churches, there is a sense that members of religious minorities are being coerced to support religious programs with which they do not agree.' See Durham (supra) at 24.

121 See *Solberg* (supra) at para 122 (O'Regan J).

122 This was recognised by the framers of the Interim and Final Constitutions — hence the inclusion of ss 14(2) and 15(2).

123 For example, the view — seemingly influential among the drafters of the First Amendment of the US Constitution — that the ideal model for the church is the small, non-hierarchical institution of the first few centuries (i.e. before Constantine made Christianity the official religion of the Roman Empire), and the attitude that the essence of religion is a personal relationship between the believer and his/her God, were all Puritan beliefs that stemmed in part from disaffection with the religious practice in Europe in the 17th and 18th centuries. Thus, not only were these not impartial religious truths then, (or, for that matter, now) they had never even been the most widely accepted Christian views. A more optimistic view about the Church and its ability to preserve its integrity in the face of worldly temptations, a more generous view of who should appropriately be accepted as church members, and a less intensely private view about the nature and content of religious practices would probably be more reflective of mainstream Christian belief. Thus, a policy whereby churches are denied any co-operation or assistance from government authorities, and are consequently small and perhaps less hierarchical and bureaucratic, is a policy that favours beliefs that churches should conform to this model, while equally clearly disadvantaging those who believe that more worldly structures (like the Catholic Church) reflect an appropriate ecclesiastical structure.

124 See D Currie *The Constitution of the Federal Republic of Germany* (supra) at 253. See also *Mozert v Hawkins County Public Schools* 647 FSupp 1194 (E Tenn 1986) and *Mozert v Hawkins County Public Schools* 827 F2d 1058 (6th Cir 1987) (concerning whether schools should be required to exempt students from readings and discussions that offended their religious beliefs).

Similarly, in the later decisions respecting school prayers and interdenominational public schools the claims of dissenting children to be free from state-sponsored exposure to religion were subordinated to the rights of religious children and their parents, based upon Article 4, to the free exercise of their religion.<sup>125</sup>

In its first decision on school prayers in interdenominational public schools, the German Constitutional Court noted that the complaining parents' desire to keep their children's education free from religious influence conflicted with the wishes of other parents to provide their children with a Christian upbringing. The Court then advanced a number of propositions. First, to eliminate all traces of religious thinking from the schoolroom would not be neutral with respect to religion. Second, it would disadvantage those parents who preferred a religious education<sup>126</sup>. Third, resolution of competing claims to religious liberty was basically entrusted to the democratic process. Finally, so long as public schools did not become 'missionary schools' or attempt to breach the infallibility of Christian beliefs, a curricular affirmation of Christianity more cultural than confessional infringed no one's religious freedom.<sup>127</sup>

In *Solberg*, there was no unanimity over whether the impugned provisions of the Liquor Act violated the right to freedom of religion. There was, however, a clear majority (if not consensus) in support of the proposition that subtle and potentially non-quantifiable coercion (such as state support for a particular religion) could infringe the right to religious freedom. This proposition was explicitly articulated by O'Regan J and the two justices who concurred with her. The same proposition was unequivocally endorsed by the four Justices who found that there was no violation of the right to freedom of religion in *Solberg*:

I am not unmindful of the fact that constraints on the exercise of freedom of religion can be imposed in subtle ways and that the choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result adherents of other religions may be made to feel that the State accords less value to their beliefs than it does to Christianity.<sup>128</sup>

At the same time, the Court, in *Solberg*, made it clear that government measures favouring or benefiting a religion in a particular context would not necessarily amount to endorsement of that religion. Thus, such measures would not inevitably be prohibited under the freedom of religion clause because they were indirectly or subtly coercive.<sup>129</sup>

It is not clear from the various judgments in *Solberg* precisely what the attitude of the Court would be as regards 'accommodationism'. However, the analyses of O'Regan and Sachs JJ display an awareness of the need to tolerate state involvement with religion, while at the same time restricting displays of state favouritism.

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125 41 BVerfGE 29 (1975); 52 BVerfGE 223 (1979).

126 41 BVerfGE 29 (1976) 49-50.

127 41 BVerfGE 29 (1975) 50-52, 64.

128 *Solberg* (supra) at para 93 (Chaskalson P).

129 *Ibid* at para 122.

The approach of Chaskalson P acknowledges the reality of coercion and warns against an establishment-clause style 'wall of separation'. Thus all three opinions in *Solberg* would seem consistent with such an accommodationist approach.

### **(e) The penumbra of the right: religious equality**

A more contentious issue than whether s 15(1) protects 'subtle coercion' as part of the guarantee of religious liberty, is whether the right also contains a guarantee of equality. This issue was the primary source of disagreement between the majority and minority opinions in *Solberg*.<sup>130</sup> O'Regan and Sachs JJ argued that it was apparent from both the text and the broader context that equality (or equity) considerations were an integral part of the right to freedom of religion in IC s 14(1). Chaskalson P, on the other hand, felt that neither textual nor policy considerations warranted the inclusion of equality considerations in IC s 14(1).<sup>131</sup>

The Constitution undeniably manifests a concern for equality and a respect for diversity. Nevertheless, it would not seem to be textually required, or conceptually coherent, for the right to freedom of religion, belief and opinion in s 15(1) to be read to require equal treatment.<sup>132</sup> As Chaskalson P stated in *Solberg*:

The Constitution deals with unequal treatment and discrimination under s 8. Unequal treatment of religions may well give rise to issues under s 8(2), but that section was not relied upon by the appellant in the present case. To read 'equitable considerations' relating to State action into s 14(1) would give rise to any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the 'establishment clause' of the US Constitution<sup>133</sup>.

The freedom of religion jurisprudence of Canada reflects similar concerns.<sup>134</sup> As Katherine Swinton has noted,<sup>135</sup> early decisions of the Supreme Court of Canada, such as *Big M Drug Mart Ltd* and *Edwards Books and Art Ltd* suggested that the right to freedom of conscience and religion enshrined in s 2(a) of the Canadian Charter of Rights and Freedoms contained an equality (or 'equal liberty') component.<sup>136</sup> However, this dimension was not the 'essence of the concept' of freedom of religion as described in *Big M Drug Mart*. The reference to equality in these early cases may

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130 See Davis (supra); Farlam (supra) at 310.

131 For a discussion of the debate over equality in the *Solberg* judgment, see Farlam (supra) at 310-318; J De Waal I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition) 297-301; Freedman (supra) at 108 -114.

132 See De Waal et al (supra) at 301.

133 *Solberg* (supra) at para 102.

134 The Canadian freedom of religion and conscience clause bears some similarity to s 15(1) of the Constitution, as discussed above. See §§ 41.1(c)(iii), 41.2(b)(iii) & (c) supra.

135 K Swinton 'Freedom of Religion' in G A Beaudoin & E Mendes (eds) *The Canadian Charter of Rights and Freedoms* (3rd Edition, 1996) 4-5.

136 *Big M Drug Mart Ltd* (supra) at 353.

well have been influenced by the fact that the right to equality in s 15 of the Canadian Charter only came into effect on 17 April 1985, three years

after the rest of the Charter, and after both *Big M Drug Mart Ltd* and *Edwards Books* had been argued before the Supreme Court. The question of whether the challenge should have been brought under s 15 of the Charter could not arise in *Big M Drug Mart Ltd*, and was considered by the Supreme Court in *Edwards Books* to be inappropriate to consider.<sup>137</sup> By contrast, in the main decision on Sunday trading after April 1985 — the Ontario Court of Appeal's judgment in *Peel (Regional Municipality) v Great Atlantic*<sup>138</sup> — there was greater concern with coercion than equality.<sup>139</sup> The same emphasis on coercion is to be found in the leading Canadian judgments on religious education handed down between *Edwards Books* and *A & P*.<sup>140</sup> The case law of Canada therefore suggests that the references to equality considerations in early cases (for quite understandable textual reasons) have become somewhat less relevant as the jurisprudence has matured.<sup>141</sup>

### 41.3 The stages of the freedom of religion enquiry

As indicated in § 41.2 above, the Constitutional Court has, on a few occasions, commented on the ambit of the right to freedom of religion. There is, however, less clarity as yet as to the test to be employed in determining whether or not the right to freedom of religion has been infringed. Would legislation or conduct that impeded the exercise of religion to any degree or in any respect violate the right? If not, what kinds of impediments would fall afoul of the freedom of religion guarantee? And to what extent should the courts engage in an analysis of whether the claimant has correctly described or characterised the prejudice that the state actions would allegedly inflict upon his or her religious faith or practice? These are some of the issues that will have to be confronted, and answered, prior to the crystallisation of the test for determining contraventions of the right to religious freedom.

It is not necessary to examine the stages of the freedom of religion enquiry in the context of government measures (be they laws or conduct) with the clear intent of impairing religious freedom. The first stage of the analysis would be satisfied by such clear intent. All that would then be required would be a determination of whether the limitation on religion was justified under s 36 of the Constitution. Determining contraventions of s 15(1) by ostensibly neutral laws that may have a

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137 *Edwards Books and Art Ltd* (supra) at 54-55 (Dickson CJC), and 59 (Beetz J) and 75 (La Forest J).

138 (1991) 78 DLR (4th) 333 (Ont CA). Leave to appeal to the Supreme Court of Canada was granted: (1991) 85 DLR (4th) viii (note). The appeal was withdrawn: 11CRR (2d) 383.

139 See Swinton 'Freedom of Religion' (supra) at 4-14 to 4-15.

140 Ibid at 4-14 n68. See, for example, *Zylberberg v Sudburg (Board of Education)* (1988) 52 DLR (4th) 577 (Ont CA); *Canadian Civil Liberties Association v Ontario (Min. of Education)* (1990) 65 DLR (4th) 1 (Ont. CA).

141 See Hogg (supra) at Chapter 39 (no mention of an 'equal liberty' dimension). See also R Sharpe & K Swinton 'Freedom of Conscience and Religion' in *The Charter of Rights and Freedoms* (1998)(no mention of equality as regards freedom of belief, conscience or religion).

disparate effect on various religions and from which some affected believers consequently request an exemption is a more complex

matter. In those cases it would be necessary for a court to determine whether (a) there is a *sincerely held belief* (whether held by the complainant or other persons in relation to whom the challenge is brought), (b) that has been *sufficiently burdened*. In making these enquiries, the court should avoid becoming entangled in doctrinal disputes or imposing its own views as to the validity or worth of the religious beliefs in question.

### (a) Sincerity of belief

The first issue to be considered by a court when faced with an allegation that a secular and otherwise unimpeachable law impinges upon the s 15(1) right is the believer's sincerity.<sup>142</sup> The court cannot simply accept without any enquiry that a religious belief has been affected by legislation or state conduct. At the same time, the court should be sensitive to the varieties of beliefs and the constitutional commitment to diversity. Religious beliefs do not have to be objectively reasonable or sophisticated to be worthy of protection for the adherence thereto to be regarded as sincere.<sup>143</sup> The fact that a doctrine might not be regarded as particularly reasonable or coherent does not mean that it is not genuinely believed. Nor is the sincerity of a complainant's beliefs necessarily called into question by the fact that other members of a religion disagree with his or her interpretation or views as to what actions are prohibited by the religion,<sup>144</sup> or the fact that the beliefs are apparently not held by any organised religious group.<sup>145</sup> It is not for the court, or the state, to prescribe what is orthodox or heretical.

Only in exceptional cases will the court conclude that a religious belief is not sincerely held. This might occur where, for example, there is little or no evidence of true devotion to a religion, or where the evidence suggests that claims of adherence to a belief have been trumped up in an attempt to obtain an exemption to cater for personal predilections. Thus far in South Africa, no court has held that a belief has not been sincerely held and thus falls outside the protective ambit of the freedom of

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142 *Prince (CC2)* (supra) at paras 40, 41 and 43; *In re Chikweche* (supra) at 289I-J; *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092, 1100B-D (SE), 1999 (9) BCLR 951 ('*Christian Education South Africa (SE)*'); L Tribe *American Constitutional Law* (2nd Edition) §14-12. See also *Christian Education South Africa (CC)* (supra) at paras 6, 14 and 16.

143 See Tribe (supra) at § 14-6 and § 14-12; *Thomas* (supra); *United States v Ballard* 322 US 78, 86-87 (1944).

144 *Thomas* (supra) (Jehovah's Witness resigned from a munitions factory because of a sincere belief that such work violated his religion, even though other members of his religion disagreed with his views as to what actions the beliefs forbade).

145 *Bowen* (supra) (The claimants therein sought to bar the government from using their daughter's social security number, on the basis that this would 'rob the spirit of their daughter and prevent her from obtaining greater spiritual power').

religion clause.<sup>146</sup> In *Prince*<sup>147</sup>, the genuineness (or sincerity) of the appellant's religious beliefs were put in issue by the Director-General of Health. This contention was swiftly dispatched by the Court.

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Another issue that arises at this stage of the freedom of religion enquiry is whether the beliefs in issue in a particular case should properly be characterised as 'religious'. The right in s 15(1) does not merely cover religious beliefs. It also extends to views derived from political, sociological or philosophical ideologies (and includes the right *not* to be religious). To the extent that organisations and adherents are committed to comprehensive visions of the good life, there may well be no difference between the extent of the protection afforded under s 15(1) to religious practices, on the one hand, and secular ideologies or systems of thought, belief, conscience or opinion, on the other.<sup>148</sup> However, freedom of religion, thought and belief clauses in international human rights documents do not appear to accord the same degree of protection to practices motivated by non-religious beliefs as to ones dictated by religious faith. Nor has the question of the protection to be afforded to non-religiously motivated practices yet been addressed by the Constitutional Court. Consequently, there may still be some significance attached (albeit limited) to whether a belief can be classified as 'religious' or not.<sup>149</sup>

The definition given to the term 'religion' in various contexts (and in different countries) has been canvassed above.<sup>150</sup> The concept was often equated in the past with belief in a supreme being. Such a definition is undoubtedly too limited. It would fail, for example, to include a faith like Theravada Buddhism.<sup>151</sup> The term 'religion' requires a much broader extension.<sup>152</sup>

It is, however, impossible to define religion in advance or in the abstract.<sup>153</sup> The question of whether a system of beliefs qualifies as a religion would therefore have to be evaluated in every case, with regard to precedent,<sup>154</sup> comparative case

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146 On the other hand, a finding of sincerity was made in *Christian Education South Africa (SE)* (supra) at 1100I-1101J. The Court's findings in relation to whether it had been shown that a religious belief was implicated will be dealt with under § 41.3(b).

147 *Prince (CC2)* (supra) at paras 43, 97 and 111.

148 Talking about a belief will probably be regarded as being protected in the first instance under the right of freedom of expression, rather than the freedom of conscience, religion, thought, belief and opinion. However it should still enjoy protection under the latter right.

149 In *Prince (CC2)*, the Constitutional Court dealt with the question of whether Rastafarianism was a religion. *Prince (CC2)* (supra) at paras 15-18 and 97.

150 See § 41.2(b)(i) (supra)

151 See *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 922 (O) ('Hartman') (Faith qualifies as a 'religious conviction' in terms of the Defence Act 44 of 1957).

152 See *Christian Education South Africa (CC)* (supra).

law,<sup>155</sup> and religious and academic writings.<sup>156</sup> It would also require sensitivity to the fact that it would not be appropriate or desirable for a court to stand in judgment of the verity or acceptability of beliefs.<sup>157</sup>

### **(b) Sufficient burden**

The second leg of the freedom of religion enquiry in cases in which the invalidity of or religious exemptions from ostensibly neutral statutes are at issue concerns the nature of the burden that has to be imposed on a religion in order for there to be a violation of the right to freedom of religion and belief. The right is clearly infringed where government measures impinge upon practices such as worship, teaching and observance,<sup>158</sup> or where they relate to other actions concerning the viability or existence of religious organisations or precepts of a faith. In other words, religious practices *central* to a faith are protected. What is less clear is whether practices that

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153 See G van der Schyff 'The Legal Definition of Religion and its Application' (2002) 119 *SALJ* 288-294; E Peñalver 'The Concept of Religion' (1997) 107 *Yale LJ* 791; The Hon Mr Justice D Malcolm 'Religion, Tolerance and the Law' (1996) 70 *Aust LJ* 976, 978-980. For a list of *indicia* as to what constitutes a religion, see also *Malnak v Yogi* 592 F2d 197 (3d Cir 1979) and *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120, 132, 173, 174.

154 South African Courts have held the following belief systems to be religions: Theravada Buddhism, (see *Hartman* (supra)); Rastafarianism, (see *Prince (CC2)* (supra) at paras 40, 97)) and Scientology, (see *Church of Scientology in SA Incorporated Association Not for Gain v Readers' Digest Association SA (Pty) Limited* 1980 (4) SA 313 (C), 314G-H). As regards Jehovah's Witnesses, see *Simonlanga & Other v Masinga & Other* 1976 (4) SA 373 (W).

155 For a case in which a practice was not held to be 'religious' for the purpose of art 18 of the ICCPR, see *MAB, WAT and J-AYT v Canada* (Communication No 570/1993, Inadmissibility decision of April, 1994) 1994 HRC Rep, Vol II. In that matter, the Human Rights Committee dismissed a claim for protection under the right to freedom of thought, conscience and religion by three Canadian citizens, who said they were leading members and 'plenipotentiaries' of an organisation named 'Assembly of the Church of the Universe', the beliefs and practices of which, according to the authors of the complaint, necessarily involved the care, cultivation, possession, distribution, maintenance, integrity, and worship of the 'Sacrament' of the church (which they referred to as 'God's tree of life', and which is generally known as cannabis or marijuana). The Human Rights Committee held that there was no violation of the right as the expression 'religion or belief' did not encompass 'a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug'. See also B G Tahzib *Freedom of Religion or Belief* (1996) 278-279; *United States v Meyers* 95 F3d 1475, 1479 (10th Cir. 1996) (defendant tried to avoid conviction for drug violations by arguing that he was the 'founder and Reverend of the Church of Marijuana' and that it was 'his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet Earth).

156 See Tribe (supra) at 1181-1182:

The most common approach to defining religion is to draw analogies to generally accepted religions. When such analogies focus on the externalities of a belief system or organization, they unduly constrain the concept of religion. As the theologian Harvey Cox has written: '[A] man-in-the-street approach would surely have ruled out early Christianity, which seemed both subversive and atheistic to the religious Romans of the day. The truth is that one man's 'bizarre cult' is another's true path to salvation . . .'. Externalities upon which courts cannot properly rely include the belief system's age, its apparent social value, its political elements, the number of its adherents, the sorts of demands it places on those adherents, the consistency of practice among different adherents, and the system's outward trappings- e.g., prayers, holy writings and hierarchical organizational structures. To be sure, courts should be wary of sudden births of religions that entitle practitioners to special rights or exemptions. But the proper place for that inquiry is in the assessment of the believer's sincerity, not in any evaluation of the belief's externalities.

157 See Woolman 'Association' (supra) at §§ 44.1(b), 44.1(c) and 44.3(c)(viii).

are not prescribed or proscribed by the organisation to which the individual belongs, but are simply motivated by, derived from, or related to the organisation's creed and commands, or the individual's faith, can be protected as part of the right to religious freedom. An ancillary issue is the extent to which it is competent or appropriate for a court to make such determinations.

Lower courts in South Africa have demonstrated little reluctance in engaging in debates as to what practices are truly dictated by religion, or whether a restriction on such practices constitutes a substantial burden on a claimant's faith. They have also shown no hesitation in finding that where impeded practices are not central to a faith, or when the burden on the faith is not substantial, a freedom of religion challenge should be rejected. In *Christian Education South Africa (SE)*, the High Court held that the claimants had not shown that it was part of their *religious* beliefs that teachers and schools be empowered to administer corporal punishment to learners.<sup>159</sup> Liebenberg J stated that he had come to the conclusion that, on the applicant's own showing, the impugned section of the statute<sup>160</sup> 'does not constitute a *substantial* burden on the freedom of religion as practised in the applicant's constituent schools'.<sup>161</sup>

The Constitutional Court by contrast has shown a greater sensitivity to the claims of religious adherents.<sup>162</sup> In *Christian Education South Africa (CC)*, Sachs J accepted that the appellant's members sincerely believed that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children and also accepted that the impact of the relevant provision of the South African Schools Act was 'far from trivial'.<sup>163</sup> The case was therefore decided under the limitation clause, rather than on the basis of a failure to prove a violation

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158 These practices are specifically mentioned as corollaries of the right to freedom of conscience, thought, belief and religion in art 18(1) of the ICCPR and art 9(1) of the ECHR.

159 See *Christian Education South Africa (SE)* (supra) at 1101G-1102A.

160 South African Schools Act 84 of 1996.

161 *Christian Education South Africa (SE)* (supra) at 1102E-1103H. See M du Plessis 'Doing Damage to Freedom of Religion' (2000) 11 *Stell LR* 295-305 (criticising the decision in *Christian Education South Africa (SE)* (supra) on the basis that the court inappropriately disputed the contents of the applicant members' religious beliefs).

See also *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society* 1999 (2) SA 257 (C), 272D-H (Conradie J found that the respondent had not made out a case on the papers for a finding that electronic amplification of the call to prayer was a fundamental tenet of Islamic religion: 'there is evidence on the affidavits that it has become a widespread practice for calls to prayer to be electronically amplified but there is nothing to suggest that such amplification has become a precept of the Islamic religion after centuries of call to prayer without sound equipment.')

162 However, for criticism of the Constitutional Court's approach in *Christian Education South Africa* (supra), see M Pieterse 'Religious Confusion' (2001) 64 *THRHR* 672; S Woolman 'Association' (supra) at § 44.3(c)(viii). As far as the approach of the Supreme Court of Appeal is concerned, see *Nkosi v Bürhmann* 2002 (1) SA 372 (SCA) at paras 45 and 46 (Court considered the contents of a particular adherent's religious beliefs relating to funerals and graveside rites and rituals).

163 *Christian Education South Africa (CC)* (supra) at para 37.

of the right to freedom of religion. In a later case, *Prince (CCII)*,<sup>164</sup> the Constitutional Court had no difficulty in concluding that the use of cannabis was central to the Rastafari religion and thus covered by s 15(1). Ngcobo J warned against courts enquiring too readily into the centrality of religious practices:<sup>165</sup>

. . . as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may

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freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

The comments of the Constitutional Court in *Prince (CCII)* echo those of the Supreme Court of the United States. In *Lyng v Northwest Indian Cemetery ('Lyng')*, O'Connor J wrote:

The dissent thus offers us the prospect of this court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think that such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play.<sup>166</sup>

The US Supreme Court has, however, applied a 'substantial burden' test to determine whether there was an infringement of the free exercise of religion in cases such as *Sherbert v Verner*<sup>167</sup> and *Wisconsin v Yoder*.<sup>168</sup> The judgment of the US Supreme Court in *Employment Division, Oregon v Smith* prompted the United States

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164 *Prince (CCII)* (supra) at paras 42 and 97.

165 *Ibid* at para 42.

166 485 US 439, 108 Sct 1319, 1329-30 (1988). Ironically, the U.S. Supreme Court's reluctance in *Lyng* to engage in an evaluation of what is 'central' or 'indispensable', rather than peripheral or insignificant, to religious beliefs and practices, may have had the consequence of upholding conduct that would 'virtually destroy the Indians' ability to practice their religion' and thus have 'devastating effects on traditional Indian religious practices'. *Lyng* (supra) at 133 (Brennan J dissenting).

See also *Smith* (supra) where Scalia J stated 'nor is it possible to limit the impact of respondents' proposal by requiring a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion. It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in a free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims'. [Repeatedly] and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.'

Congress to enact a statute — The Religious Freedom Restoration Act of 1993 — restoring the ('substantial burden') free exercise of religion test.<sup>169</sup>

Like the United States Supreme Court and the South African Constitutional Court, the German Constitutional Court has been reluctant to second-guess the religious claims of applicants or to reinterpret their own beliefs for them. In *Rumpelkammer*,<sup>170</sup> the Court overturned a lower court's decision, which, on the

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grounds of unfair competition with commercial rag dealers, had forbidden a Catholic youth organisation (not incorporated into the Catholic church but institutionally connected with it) from encouraging practitioners to contribute rags and other old clothes to raise money for hunger relief.<sup>171</sup> In holding that charitable collection was an exercise of religion the Court reasoned as follows:

In determining what is to be regarded as the free exercise of religion, we must consider the self-image of the religious or ideological community. The state would violate the independence of ideological associations and their internal freedom to organize accorded by the Constitution if it did not consider the way these associations see themselves when interpreting religious activity resulting from a specific confession or creed.

The Catholic and Evangelical churches view the exercise of religion as encompassing not only the freedom of worship and believe but also the freedom to act on those beliefs in the real world. The active love of neighbour is understood by both Catholic and Evangelical churches as a fundamental religious duty. It follows from the nature of religious freedom outlined here that a charitable collection has a religious character and may claim the protection of Article 4(2) of the Constitution only if it meets certain conditions.<sup>172</sup>

The German Constitutional Court did not attempt to establish for itself whether the activities in question were truly central to, or core tenets of, the Catholic faith. At the same time, it did not abdicate all responsibility and simply accept the *ipse dixit* of the applicants.

The judgment in *Religious Oath*<sup>173</sup> further illustrates the deferential approach of the German Constitutional Court. An evangelical pastor was fined because he refused to be sworn in as a witness in criminal proceedings. His justification — that,

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167 374 US 398 (1963).

168 406 US 205 (1972).

169 The Religious Freedom Restoration Act was held to be unconstitutional. See *City of Boerne v Flores, Archbishop of St. Antonio* 521 US 507, 117 SCt 2157, 138 LEd 2d 624 (1997).

170 24 BVerfGE 236 (1968).

171 See Currie *The Constitution of the Federal Republic of Germany* (supra) at 258-259.

172 Ibid at 261-2 n94. See also D Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 447.

173 33 BVerfGE (1972) 23.

according to Christ's word from the Sermon on the Mount, it was impermissible for him to take any oaths, even non-religious ones — was accepted by the Constitutional Court. His conviction was overturned.

*Religious Oath* is notable both for the majority and dissenting judgments. The majority judgment evinces an admirable tolerance for divergent religious positions. By contrast, the dissent, which rejected the pastor's claim on the grounds that he had misread the Sermon on the Mount, embodies an approach which could have disastrous consequences for religious freedom and, in particular, minority viewpoints.<sup>174</sup>

The majority impliedly criticises the dissent when it says that the pastor's view 'finds some support from the Bible', and that, in any event, '[t]he state may not evaluate its citizens' religious convictions or characterize these beliefs as 'right' or

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'wrong'.<sup>175</sup> The majority's judgment is replete with a number of statements to the effect that 'the numerical strength of a particular faith or its relevance in society cannot be determinative', that Article 4(1) 'protects those infrequently occurring convictions which diverge from the teachings of the churches and religious communities' and that the state 'permits even outsiders and sects to develop their personalities in keeping with their subjective convictions, free of harassment'.<sup>176</sup>

In contrast to the approach of the South African Constitutional Court, the US Supreme Court and the German Constitutional Court, the Canadian courts have shown a far greater readiness to dip into the murky waters of religious doctrine. In *Jones v The Queen ('Jones')*<sup>177</sup> a pastor of a fundamentalist church in Alberta, who ran his own schooling programme, refused to apply for approval for his academy from the Department of Education as he was required to do by statute. He claimed that to do so would violate his religious convictions. In particular, he claimed that he could not make such an application, because to do so would acknowledge that the school board, a secular institution, was the source of his right and obligation to educate his children rather than God. He was, however, prepared to accept that the board could, of its own initiative, send an official to vet his academy. Furthermore, he was prepared to abide by the board's decision. His only concern was that he not be compelled to ask the state to permit him to perform God's will.

The approach of the majority of the *Jones* Court was to hold that even though the pastor claimed that he was being compelled to act contrary to his conscience, the statute was actually not contrary to his religious beliefs. Wilson J concluded that

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174 According to Justice von Schlabrendorff, in dissent, the Sermon on the Mount 'does not apply to the state', 'is not a law and, above all, is not a law for the earthly millennium. As a consequence, one may only read and understand the Sermon on the Mount from the standpoint of eschatology'. See Kominers (supra) at 456-457. Currie terms this dissent 'astounding' and suggests that it is surely 'up to the individual, within the limits of sincerity, to say what his own religion required'. Currie (supra) at 261-262 n 94.

175 It is not objectionable for a Court to assert that religious convictions do *not* automatically trump the demands of citizenship. But what the State cannot do is assess whether, in its opinion, a believer has misunderstood the religious beliefs to which she adheres.

176 Kominers (supra) at 454-456.

177 [1986] 2 SCR 284, 31 DLR (4th) 569.

being required to recognise a secular role for the school did not entail that Jones 'replace God with the school board as the source of his right and his duty to educate his children'.<sup>178</sup> Wilson J was also of the view that, even if the legislation did compel action contrary to Jones' religious beliefs, 'any impact at all on [his] freedom of conscience and religion . . . is an extremely formalistic and technical one'. It would not give rise to a violation of s 2(a) of the Charter.<sup>179</sup>

This sort of judicial intervention is inappropriate. Courts should not assert that believers (and particularly ministers of religion) have incorrectly interpreted what their religion requires them to do. Indeed, the minority in *Jones* stated that 'a court is in no position to question the *validity* of a religious belief, notwithstanding that few share that belief'.<sup>180</sup>

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Lower courts in Canada have also shown a willingness to involve themselves in such doctrinal enquiries regarding burdens, centrality and sincerity. In *Salvation Army, Canada East v Ontario (A-G)*,<sup>181</sup> the Ontario General Division ruled that the Pension Benefits Act (requiring that payment of pension benefits be guaranteed to members of the Salvation Army) did not violate the Salvation Army's freedom of religion because the principle and practice of 'voluntarism' is not a fundamental tenet or essential of the faith and therefore does not fall within the freedom covered by s 2(a). Even if the freedom was impaired, the court reasoned, the burden imposed by the requirement of compliance with the relevant statute was trivial or insubstantial. The Court found that the practices in question were really only an administrative or pastoral in nature and did not derive from one of the deeply held convictions of the faith.<sup>182</sup>

The same approach has been employed by the European Commission of Human Rights. According to Shaw, the Commission has 'posited a distinction between actions expressing a belief, which may be protected under Article 9 if 'they are intimately linked' to the sphere of personal beliefs and religious creeds, and actions

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178 Ibid at 575-8, 577-8.

179 Ibid at 578. (Wilson J claimed that the effect of the statutory machinery for Jones' religion was 'trivial or insubstantial'.)

180 Ibid at 591 (emphasis in the original). Even the approach of the minority is not, however, beyond criticism. La Forest J seemed to consider as relevant to a determination of the *sincerity* of Jones's religious convictions whether or not his beliefs on this score are typical or unusual. This again portrays a bias towards orthodox and mainstream beliefs that is inappropriate for a freedom of conscience and religion enquiry.

181 (1992) 88 DLR (4th) 238.

182 For further examples of a seemingly inappropriate determination as to the precepts of a faith, see *Ontario (Attorney-General) v Dieleman* (1994) 117 DLR (4th) 449, 748b-c ('*Dieleman*'). In that matter, Adams J, when (apparently correctly) dismissing a freedom of religion challenge, and granting an interlocutory injunction to restrict picketing protesting abortion, stated: 'If Umbertino's belief that her protest activity is required by her religion is not shared by the vast majority of the members of her religion, which is the case, it is difficult to conclude that her conduct constitutes the exercise, practice or manifestation of her religion.' The reasoning of Adams J is open to criticism on the basis that it could result in prejudicing of unusual views and the stifling of religious diversity and privileges religious conformity over individual conscience. In this regard, it is notably different from the judgment of the US Supreme Court in *Thomas*.

merely motivated or influenced by such beliefs or creeds, which will not be so protected'.<sup>183</sup>

As the cases above suggest, there is no uniformity in approach in open and democratic societies when it comes to determining which practices fall to be protected under the right of freedom of religion and belief. The preferred approach would, however, seem to be the one adopted by the South African Constitutional Court, the United States Supreme Court and the German Constitutional Court. According to this approach courts are not required to accept every claim of faith as the basis for a *prima facie* infringement of the right and then move immediately to a limitation clause analysis. However if freedom of religion is to be truly respected, even the most unorthodox beliefs and convictions should be

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given some credence. All the court need require is credible explanation for the religious practice under scrutiny.<sup>184</sup>

Nevertheless, in certain cases, a court will quite rightly examine how closely linked the practices for which protection is claimed are to the actual religious *beliefs* of the claimant.<sup>185</sup> Two cases, *Arrowsmith v UK* ('*Arrowsmith*')<sup>186</sup> and *Grandmaison and Fritz v Federal Republic of Germany* ('*Grandmaison*').<sup>187</sup> — both adjudicated in

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183 Shaw (*supra*) at 458-9.

184 Owing to the difficulty, in part, in evaluating the claims of religious adherents under the free exercise clause for this reason, it is important that cases be decided under other rights, when they are implicated. See Tribe (*supra*) at §14-12, 1249-1. Challenges brought *inter alia* under the free exercise clause may be upheld on the basis of freedom of expression. See *West Virginia State Board of Education v Barnette* 319 US 624 (1943) (Jehovah's Witnesses challenged school regulations requiring students to salute the American flag — something which they regarded as equivalent to worshipping a 'graven image'); *Wooley v Maynard* 430 US 705 (1977) (the refusal of Jehovah's Witnesses to be coerced into displaying New Hampshire's state motto, 'Live Free or Die', on their car licence plates.) See also *Heffron v International Society for Krishna Consciousness (ISKCON)* 452 US 640 (1981) (decided (and rejected) on the basis of the right to freedom of expression, notwithstanding the allegation that the regulations in question suppressed religious rituals. Challenge was by a religious society espousing the views of the Krishna religion to rules prohibiting the sale or distribution at a state fair of printed or written material, except from booths, on the basis that it was a religious ritual for members of the Krishna religion to go into public places to distribute or sell religious literature.)

185 See Woolman 'Association' (*supra*) at §§ 44.1(c) and 44.2(b). See also *American Life League v Reno* 855 FSupp 137, 144 (ED Va 1994). (That case concerns picketing and physical obstruction of abortion clinics by anti-abortion activists, contrary to the Freedom of Access to Clinic Entrances Act of 1994, which was sought to be justified on the basis of the free exercise of religion clause. This kind of activity would appear to fall under s 17 (the right to assembly, demonstration, picket and petition) or even s 16 (the right to freedom of expression). Consequently, unless claimants in a comparable case in South Africa could show that a prohibition on picketing abortion clinics was integrally linked to their faith, their claims should not be able to succeed under s 15(1). The District Court may however have gone too far in its centrality enquiry, as evidenced by the following comments in the judgment: 'It suffices here to note that the plaintiffs have not alleged in any of their three complaints and do not contend in their memoranda that physical obstruction of abortion clinics is a sacrament or important ritual necessary to their observance of their faith'. Nevertheless, the court was seemingly correct to enquire whether picketing was sufficiently closely linked to Catholicism to warrant protection under the guarantee of freedom of religion. See also *Dieleman* (*supra*) at 748b-c (a freedom of religion justification for picketing in protest against an abortion clinic.)

186 No 7050/75, 19 DR 5 (1980).

terms of art 9(1) of the ECHR<sup>188</sup> — provide germane examples of situations in which conduct has not been held to fall within the ambit of the right to freedom of religion, conscience, thought and belief because it could not be linked closely to belief.

In *Arrowsmith*, the Commission held that although pacifism comes within the ambit of freedom of thought or conscience, distribution of leaflets which did not 'actually express the belief concerned' was not protected under Article 9(1). The fact that the distribution was motivated or influenced by pacifist convictions was

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held to be too attenuated a link. In *Grandmaison*, the distribution of leaflets to soldiers was viewed as undermining military discipline. The distribution of the leaflets was not regarded as capable of being the manifestation or expression of a belief. Once again the conduct was not held to be a protected 'practice'.<sup>189</sup>

*Arrowsmith* and *Grandmaison* are, however, cases that concern expressions of conscience rather than religious belief. Though there may be no good reason to favour religious belief over conscience,<sup>190</sup> courts may be inclined to grant more scope for making centrality enquiries in respect of matters of conscience.

### (c) The problem of doctrinal entanglement

A constant refrain in the United States Supreme Court decisions referred to above is the need for a court to avoid becoming enmeshed in debates about the validity, merits or truths of religious beliefs, or their importance to believers. In short, the Courts need to avoid doctrinal entanglement.

The United States Supreme Court's desire to avoid making judgments that call for investigation into religions and of individual beliefs is no doubt partly motivated by a desire to avoid any state entanglement with religion. US Courts would foreground Establishment Clause concerns.<sup>191</sup> But, as the Court explained in *United States v*

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187 53 DR 150 (1987).

188 As already mentioned, art 9(1) grants everyone the freedom, 'either alone, or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance'.

189 Compare *X v Federal Republic of Germany* 24 DR 137 (the wish of a man to be buried on his own land), with the decision of the Supreme Court of Appeal in *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) (the refusal of an orthodox Jew to hand over the letter of repudiation (guett or 'get') to his ex-wife after their divorce). (As regards Jewish divorces and 'gets' in South African law, see s 5A of the Divorce Act, 70 of 1979 (inserted by the Divorce Amendment Act, 95 of 1996); the Hon Mr Justice M W Friedman 'Jewish divorces — a purposeful and pragmatic solution by the South African Law Commission' (1994) 111 SALJ 97; and *Raik v Raik* 1993 (2) SA 617 (W).)

190 It might perhaps be contended that, inasmuch as religious beliefs could involve matters of divine revelation or precepts of faith, they are less readily susceptible to rational, objective analysis than matters of conscience. There may be some truth in this, but people can conscientiously hold beliefs that are worthy of protection even if they cannot articulate coherently the justifications therefor.

191 See *Lemon v Kurtzman* 403 US 602 (1971)(the third requirement of the establishment clause is stated to be that a statute 'not foster 'an excessive government entanglement with religion').

*Ballard*,<sup>192</sup> the desire to avoid doctrinal entanglement also rests on separate free exercise grounds.<sup>193</sup>

The dangers of doctrinal entanglement have been recognised by South African courts, most notably in *Ryland v Edros*,<sup>194</sup> *Worcester Muslim Jamaa v Valley & others*,<sup>195</sup> and *Mankatshu v Old Apostolic Church of Africa & others*.<sup>196</sup> Doctrinal entanglement is the guiding principle for enquiries into both the sincerity of beliefs and the burden of government measures on religious faiths. This principle could well result in courts becoming more reluctant to interfere in internal disputes of religious organisations.<sup>197</sup>

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192 322 US 78 (1944).

193 For other cases (involving internal church disputes) in which it has been held that courts should refrain from deciding matters of religious doctrine in order not to impinge upon religious autonomy, see *Jones v Wolf* 443 US 595 (1979); *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440 (1969); *Kedroff v St Nicholas Cathedral* 344 US 94 (1952); *Serbian Orthodox Diocese v Milivojevich* 426 US 696 (1976).

194 1997 (2) SA 690 (CC), 702F-703D, 1997 (10) BCLR 1348 (CC). Farlam J (as he then was) stated:

'I myself raised the doctrinal entanglement point after reading the instructive article by F Cachalia 'Citizenship, Muslim family law and a future South African Constitution: A preliminary enquiry' (1993) 56 *THRHR* 392, 400 in which the following statement appears: 'Thus Islam is a 'revelational culture', which does not differentiate between law and religion, positive legal rules and moral precepts, the religious and the profane, and the public and the private. . . .' Mr Cachalia also states, as did the witnesses who testified at the trial, that the

Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constituted the *ipsissima verba* of Almighty God. The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed form a body of commandments (sharia) which govern all aspects of a Muslim's life, including marriage, divorce and devolution of property on death.

That being so, 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 such as *Jones v Wolf* (supra), 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 s 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* (supra): *cf* also the approach of the majority in the German Constitutional Court in the *Religious Oath Case* (supra), a decision on art 4 of the Basic Law, which deals with freedom of faith, conscience and creed.

195 2002 (6) BCLR 591 (C).

196 1994 (2) SA 458 (TCA).

197 For example, disputes as to ownership of property or whether there was proper adherence to ecclesiastical rules in elections or disciplinary proceedings. See Woolman 'Association' (supra) at §§ 44.1(b) and (c), and § 44.3(c)(viii). For US Supreme Court cases on these questions, see *Jones v Wolf* (supra), *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* (supra), *Kedroff v St Nicholas Cathedral* (supra), *Serbian Orthodox Diocese v Milivojevich* (supra).

## 41.4 Limitations on the right to freedom of religion

After the infringement of the right to freedom of religion is established, it is necessary to examine whether the contravention of the right is justifiable in terms of the limitation clause.<sup>198</sup> The limitation clause enquiry is apt to be of

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greater import in freedom of religion cases given the deference that is likely to be accorded claims of religious adherents.<sup>199</sup> While the nature of this exercise is addressed in some detail elsewhere in this work<sup>200</sup>, it is appropriate to make some observations at this juncture of the specific relevance of s 36 analysis in the freedom of religion cases.

### (a) Reasonable and justifiable limitations on religious practice

An important distinction in relation to the limitation of religious freedom is traditionally regarded as being between the *holding* of religious or non-religious beliefs, on the one hand, and the *practice* of religion, on the other. Many commentators write that the right to hold a religious belief, or any other belief or world-view is inviolable.<sup>201</sup> This would seem to be correct. Thus persons could not constitutionally be required to forswear allegiance to any religion; nor could persons be obliged to pledge allegiance to, or be forced to join, a particular religion in order to qualify for state benefits or admission to state institutions. However, apart from these limited examples, it is difficult to see how — in the absence of telepathy and mind control — the freedom to hold a belief can be meaningfully restricted.

The right to *manifest* religious or other conscientiously held beliefs in practice is, however, clearly capable of being limited. International and regional human rights instruments expressly recognize this potentiality.<sup>202</sup>

Bans or restrictions on suicide cults or religious sects whose activities could

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198 *Prince (CCII)* at para 45.

199 For a discussion of s 36(1) in freedom of religion cases, see *Christian Education South Africa (CC)* (supra) at paras 29-31; *Prince (CCII)* (supra) at paras 45-47 (Ngcobo J); 128 (the Majority); 151, 155 (Sachs J). In *Christian Education South Africa (CC)*, the Constitutional Court confirmed, to the extent that this may have been necessary, that there is no requirement on the state to show a 'compelling interest' in order to justify an infringement of the right to freedom of religion — even where the burden on religion is demonstrably substantial. The extent of the burden imposed on religion would, however, be a factor that would go into the balancing or proportionality enquiry, which *inter alia* involves a consideration of the 'nature and extent of the limitation' (s 36(1)(c) of the Constitution).

200 See S Woolman and H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

201 See De Waal et al (supra) at 296; D Meyerson *Rights Limited* (1997) 2; L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 158. No limitation of that right is, for example, permitted under art 18 of the ICCPR or art 9 of the ECHR. See K Partsch in L Henkin (ed) *The International Bill of Rights* (1981); M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993); D J Harris et al *Law of the European Convention on Human Rights* (1995) 365-366.

potentially cause physical harm to the general public would likely pass constitutional muster. To the extent that the existence and activities of such religious groupings were not prohibited by existing legislation, more specific statutes could potentially outlaw them.<sup>203</sup>

The jurisprudence of the U.S. Supreme Court reveals a readiness to uphold restrictions on religious freedom when confronted with religious demands made within prison or within the military. The Court has upheld regulations forbidding a religious observance like the wearing of a yarmulke by a devout Jew while in Air Force uniform,<sup>204</sup> and regulations that restricted the freedom of a prisoner to observe religious practices.<sup>205</sup> A number of rulings of the European Commission confirm this trend.<sup>206</sup> The Commission has, for example, upheld a ban on a Buddhist prisoner growing a beard,<sup>207</sup> and refused to accept an argument that religious precepts should be taken into account when providing prison food.<sup>208</sup> The grounds, in such cases, for differentiating prison and military populations from other classes of citizens is suspect at best. On the other hand, the basis for other restrictions seem obvious. The European Commission was quite correct in giving short shrift to a Sikh who argued that high-caste Sikhs are not allowed by their religion to clean floors<sup>209</sup> and in denying a prisoner access to a religious book which contained an illustrated chapter on martial arts techniques.<sup>210</sup>

Laws or regulations that endorse or display a clear preference for one religion would violate the right to freedom of religion of adherents of other faiths.<sup>211</sup> The constitutional concern with diversity, as well as the constitutional values of freedom

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202 For example, Art 1(3) of the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1991) (this clause qualifies the religious practices listed in art 6 of the Declaration), Art 18(3) of the ICCPR, Art 9(2) of the ECHR, and Art 12(3) of the American Convention on Human Rights (1978) all use roughly the same words to describe permissible limitations (that the freedom to manifest one's religion and/or beliefs 'shall 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').

203 See *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 (a schoolteacher publicly disseminated the opinion that Christian civilization was being destroyed by an international Jewish conspiracy. The bulk of the punishment meted out to Ross was held to be a justifiable limitation of his right to freedom of religion and conscience.)

204 *Goldman v Weinberger* 475 US 503, 106 S Ct 1310 (1986).

205 *O'Lone v Estate of Shabazz* 482 US 342 (1987).

206 See also *Arrowsmith* (supra) and *Grandmaison* (supra).

207 *X v Austria* 1753/63 Yearbook VIII (1965) 174 (184).

208 See P Van Dijk & G J H van Hoof *Theory and Practice of the European Convention on Human Rights* (2nd Edition) 404, 404n1062).

209 *X v UK* 28 DR 5, 27, 38 (1982). See also Van Dijk & Van Hoof (supra) at 404; Shaw (supra) at 459-460.

210 *X v UK No. 6886/75* 5 DR 100 (1976).

and equality, would seemingly prevent the sectarian motivation underlying such laws from being accepted as a legitimate government objective, and thus preclude any such laws being upheld under the limitation clause.<sup>212</sup> To survive s 36 analysis government laws that directly or indirectly benefit a particular religion (without endorsing it), or that, conversely, restrict or prejudice the practices of a

particular faith, must therefore be supported by an objectively reasonable purpose, or what Denise Meyerson has called 'neutral reasons'<sup>213</sup>.

An ancillary question is whether sectarian religious reasons can be considered by the legislature when engaging issues such as corporal punishment, abortion, or school curricula. This issue has generated considerable debate amongst political and legal philosophers. According to John Rawls and Kent Greenawalt, faith-based reasons *simpliciter* are insufficient justification for political action.<sup>214</sup> Rawls argues that choices of political representatives should be justifiable on the basis of 'public reasons'. Greenawalt asserts that 'explicit reliance [by legislators] on any controversial religious or other comprehensive view would be inappropriate',<sup>215</sup> because when legislators speak on political issues, they represent all their constituents. However, neither philosopher denies that religious dictates can be the basis or motivation for the legislator's position. Thus, while the kinds of crassly sectarian religious motivations that were so prevalent prior to April 1994 may be prohibited in the new constitutional era, banishing religion entirely from political fora, and precluding adherents from attempting to influence public debates, would itself violate the right to religious freedom.<sup>216</sup>

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211 See § 41.2(d) above.

212 See *Ryland v Edros* 1997 (2) SA 690, 707G (C): 'It is quite inimical to all the values of the new South Africa for one group to impose its values on another'. This passage is quoted with approval in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA), 1329C-D and *Solberg* (supra) at 1228A-B. See S Wooman 'Limitations' (supra).

213 See Meyerson *Rights Limited* (supra) at 21. Professor Mayerson also wrote that:

the reference in the limitation clause to an open and democratic society based on human dignity, equality and freedom implies that no limit on the right to religious freedom is permissible unless justified in terms of reasons which would carry at least some weight with all reasonable people who relate to each other as possessors of equal moral status' and that 'such reasons will be public reasons, or reasons which are independent of particular intractably disputed religious views and those views' own internal standards of justification.

Ibid at 19. For example, a legislature may prohibit the followers of a particular religion from making human sacrifices at their ceremonies on the basis of preventing physical harm — the involuntary loss of innocent life. As Meyerson points out, the status of such measures 'can be defended in terms of which any reasonable person, regardless of their religious beliefs, would accord at least some weight'. Ibid. See also D Meyerson 'Reading the Constitution through the Lens of Legal Philosophy', Inaugural Lecture, University of Cape Town, 8 October 1997 at ss II and III.

214 See K Greenawalt *Religious Convictions of Political Choice* (1988); K Greenawalt *Private Consciences and Public Reasons* (1995); J Rawls *Political Liberalism* (1992); J Rawls 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago LR* 765; Michael J Perry *Religion in Politics: Constitutional and Moral Perspectives* (1997).

215 Greenawalt *Private Consciences and Public Reasons* (supra) at 157.

## (b) Infringements by neutral, generally applicable, measures

The most common form of state interference with religious liberty is by means of facially neutral government measures that are not intended to prejudice any particular religion but which have the effect of doing so. The extent to which it is

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appropriate to limit religious freedom in this manner (by not providing for an exemption for adherents of affected religions) is therefore of critical importance to freedom of religion analysis.

Courts are often reluctant to grant such exemptions: especially when a religious institution seeks an exemption from a criminal prohibition.<sup>217</sup> The Australian High Court, in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*<sup>218</sup>, refused to extend legal immunity to conduct contravening a criminal law of general application. The Court wrote:

The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. Religious conviction is not a solvent of legal obligation.

The United States Supreme Court adopted a similar approach in *Employment Division, Department of Human Resources of Oregon v Smith*.<sup>219</sup> The majority held that an Oregon law prohibiting the knowing or intentional possession of a 'controlled substance', including the hallucinogenic drug peyote, was not unconstitutional by virtue of failing to make an exception for the ingestion of peyote for sacramental purposes at ceremonies of the Native American Church.<sup>220</sup>

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216 See *Chamberlain v Surrey School District No. 36* [2002] 4 SCR 710 (Case concerning whether a school board had exceeded its authority under the School Act by making a decision to exclude books depicting same-sex parented families from Kindergarten-Grade One in order to accommodate the moral and religious beliefs of some parents that homosexuality was wrong. The majority of the Canadian Supreme Court in that case, although overturning the decision of the British Columbia Court of Appeal and setting aside the school board's decision, held that s 76 of the School Act — which required school boards to conduct schools on 'strictly secular and non-sectarian principles' and to inculcate 'the highest morality' while avoiding the teaching of any 'religious dogma or creed' — did not preclude decisions motivated in whole or in part by religious considerations, provided they were otherwise within the Board's powers.)

217 See John Locke *A Letter Concerning Toleration* (1689) (reprinted in J Locke *A Letter Concerning Toleration in Focus* (1991) 36-37). Locke argues that neither a religion nor its adherents should not be exempted from a neutral criminal prohibition enacted for the good of society.

218 (1983) 154 CLR 120, 135-136 (Mason ACJ and Brennan J). See also the Hon Mr Justice D Malcolm 'Religion, Tolerance and the Law' (1996) 70 *Aust LJ* 976, 980.

219 494 US 872 (1990).

220 The US Supreme Court had previously mandated an exemption in a criminal law in *Wisconsin v Yoder* (supra). It had also been predisposed to require that personal choices arising out of religious motivations be exempted from formally neutral state requirements. See Tribe (supra) at §14-7, 1193. As regards the approach of Canadian courts to exemptions, see W Freedman 'Up in Smoke: Judicially Mandated Constitutional Exemptions for Religiously Motivated Conduct' (2002) 13 *Stell LR* 135, 140-144.

The South African Constitutional Court has not expressed the same reservations as regards the granting of religious exemptions from generally applicable statutes. However, it has refused to grant exemptions in both cases in which one has been sought.<sup>221</sup> The recognition of the need for exemptions and the refusal to grant them automatically is captured by the following passage from *Christian Education South Africa (CC)*<sup>222</sup> (and reiterated by the majority in *Prince (CCII)*):

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,

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wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.<sup>223</sup>

### (c) Conflicts with other constitutional rights

Rights to religious freedom can potentially be outweighed by other constitutionally protected rights. Religious freedom will conflict with and sometimes give way to rights such as the rights of the child (s 28),<sup>224</sup> the right to freedom of expression (s 16),<sup>225</sup> the right to dignity (s 10),<sup>226</sup> the right to freedom and security of the person (s 12),<sup>227</sup> and the right to equality (s 9).

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221 See § 41.2(c) above.

222 *Christian Education South Africa (CC)* (supra) at para 35.

223 *Prince (CCII)* (supra) at para 115.

224 See *Kotze v Kotze* 2003 (3) SA 628 (T) (A provision in a settlement agreement in an unopposed divorce requiring that '[b]oth parties undertake to educate the minor child in the Apostolic Church and to educate the minor child in the religious activities of that church' not made an order of court as not in the child's best interests); *Duncombe v Willies* 1982 (3) SA 311 (D) (an application for variation of a custody order to deny the non-custodian father, a Jehovah's Witness, who refused to refrain from attempting to inculcate in his children the tenets of his faith, access to the divorced parties' minor children); *Allsop v McCann* [2000] 3 All SA 475 (C) (an application by a custodian parent to prevent a child from attending the non-custodian parent's church). For commentary on the case, see E Bonthuys & M Pieterse 'Divorced parents and the religious instruction of their children: *Allsop v McCann* (2001) 118 SALJ 216. See also *P v S* (1993) 108 DLR (4th) 287 (SC) (a case concerning whether the imposition of restrictions on the right of access of a divorced father (a Jehovah's Witness) to his child contravened his right to freedom of religion under the Canadian Charter); and *Young v Young* [1993] 4 SCR 3 (relating to a restriction in a custody order precluding the father from discussing the Jehovah's Witness religion with his children when he had access to them). For cases involving the refusal of a Jehovah's Witness parents to consent to a blood transfusion for their child; *B (R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315, (1995) 122 DLR (4th) 1 (SC).

225 See *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34 (upholding the seizure and forfeiture of a film found likely to offend the religious feelings of Catholics, despite the infringement on the right to freedom of expression).

Religious freedom is apt to run up most often against demands for equality.<sup>228</sup> These demands will be most compelling with regard to discrimination on the basis of race, sex or sexual orientation.<sup>229</sup> The extent to which religious institutions

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are permitted to (continue to) differentiate on these grounds is captured by the following three scenarios.<sup>230</sup>

The first scenario involves discrimination against a person with *spiritual responsibilities* (such as priest or a candidate for ordination). Few exercises are more central to religious freedom than the right of a church to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any of the other enumerated grounds in the equality clause, a disqualifying factor for the priesthood, the effect on many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders.<sup>231</sup> Where the appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination.<sup>232</sup> One way in which this could be achieved would be by exempting the church-minister relationship from labour relations legislation on the grounds that 'ministry' is a

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226 See *Tobacco Atheist* 12 BVerfGE 1 (1960) (Case concerns a convict whose parole application had been denied on the ground that he had attempted to bribe fellow inmates by offering them tobacco to forswear their religion. The German Constitutional Court held that the denial of parole did not infringe his religious freedom, as the right to proselytise did not permit proselytisation inconsistent with the dignity of others). See also Currie *The Constitution of the Federal Republic of Germany* (supra) at 253; Kommers (supra) at 452-453.

227 See *Christian Education South Africa (CC)* (supra) at paras 39-47 (prohibition on corporal punishment of learners challenged on the basis of a violation of the right to freedom of religion); *X, Y & Z v Sweden* 5 EHRR 47 (1983) (a complaint that the Swedish criminal law which prohibited parents from physically chastising their children was a violation of freedom of religion).

228 Two statutes likely to elicit equality challenges to religious practices are the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Labour Relations Act 66 of 1995.

229 Religious institutions must be allowed to differentiate on the basis of religion or belief. See De Waal et al (supra) at 292; C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000* (2001) 76; S Woolman 'Association' (supra) at §§ 44.1(b) and (c) and 44.2(b).

230 See P Farlam 'Liberation Through the Law? The Constitution and the Church' in P Germond & S de Gruchy (eds) *Aliens in the Household of God* (1997) 136-141.

231 In the light of the history of South Africa, the principle of racial equality is particularly fundamental. If a church sought to justify this racial discrimination in the choice of clergy on biblical or theological grounds, it might therefore not escape legal sanction. A Court would no doubt examine closely the basis for the discrimination and scrutinise the justification therefor (while still hopefully being mindful of the danger of doctrinal entanglement).

232 See *McClure v Salvation Army* 460 F2d 553 (5th Cir 1972). The Salvation Army was deemed not to be in violation of the prohibition on sex discrimination when it fired McClure, a female officer of the Salvation Army.

'calling' involving duties to God, and thus does not involve an employment relationship.<sup>233</sup> Indeed, in *Church of the Province of Southern Africa, Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration*<sup>234</sup>, the Labour Court held that an ordained priest was not an 'employee' for the purposes of the 1995 Labour Relations Act.<sup>235</sup>

The second scenario relates to discrimination against *employees of a seminary or Christian school*. Factors militating against legal intervention might include the job

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description of the person suffering the discrimination and the impact on religious freedom of not granting the religious institution an exemption. If, for example, the seminary or theological faculty could show that a teaching post involved substantial religious responsibilities, the seminary might be able to succeed in obtaining an exemption from anti-discrimination legislation using the analogy of the 'church-minister' exemption. In the United States, the Catholic University of America succeeded in defeating a job discrimination suit by a nun who claimed she was denied tenure in the university's canon law department on the basis of her sex.<sup>236</sup> Furthermore, if a Christian school could show that leading an 'exemplary Christian life' was an important part of every teacher's job description — 'exemplary', of course, being interpreted by the church in accordance with its own tenets — then it is conceivable that the church would be given some latitude to flout the legal prohibition on employment discrimination.<sup>237</sup>

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233 See *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 (HL). See also, *Diocese of Southwark v Coker* [1998] ICR 140 (CA); *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 and *Knowles v The Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47. The possibility of this sort of approach being adopted in New Zealand to safeguard the right of religious freedom under the Human Rights Act 1993 was discussed by P Rishworth 'Coming Conflicts over Freedom of Religion' in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 247.

234 2002 (3) SA 385 (LC), [2001] 11 BLLR 1213.

235 The 'church minister' exemption might also be available for a person such as a church organist or a director of music at a church, whose ecclesiastical functions involve sufficient pastoral or liturgical leadership for them to be considered to occupy analogous posts to ministers. For US cases in which the 'church-minister' exemption has been extended to such musical figures, see *Walker v First Presbyterian Church* 22 Fair Empl Prac Cases (BNA) 762 (Cal Superior Ct 1980) (a church that dismissed a gay organist was granted immunity from action under a city ordinance forbidding discrimination on the basis of sexual preference), and *Assemany v Archdiocese of Detroit* 434 NW 2d 233 (Mich App 1988) (a church that dismissed a musical director was similarly immunised on the basis of the 'church-minister' exemption).

236 *EEOC & McDonough v Catholic University of America* (CA DC, No 94-5263, 14/5/96). See also *EEOC v Southwestern Baptist Theological Seminary* 651 F2d 277 (5th Cir. 1981) (the court held that all academics in the theological seminary qualified as ministers, and that the 'church-minister' exemption therefore applied to all of them. It has not, however, been held that teachers and administrators in a religious school are 'ministers' for the purpose of this exemption); *EEOC v Tree of Life Christian School* 751 FSupp 700 (SD Ohio 1990).

237 In Canada, religious schools have escaped legal sanction after dismissing teachers for indulging in practices (such as having an extra-marital relationship or remarrying after a divorce) which the religious institutions deemed inconsistent with their teachings. See *Caldwell v Stuart* (1984) 56 NR 83; *Garrod v Rhema Christian School* (1991) 18 CHRR 47; *Kearley v Pentecostal Assemblies Board of Education* (1993) 19 CHRR 473.

Apart from these sorts of special circumstances, however, religious institutions — like schools, seminaries or universities — would probably not be deemed exempt from an anti-discrimination law. In general, one's gender, marital status, ethnic or social origin, pregnancy or language (to list just a few of the s 9(3) prohibited grounds) could not be legitimately considered a negative factor by a Christian educational body when evaluating a person for a teaching post. It is that much more true of applicants for non-teaching positions. Consequently, if a Christian college dismissed a laboratory co-ordinator or a computer systems analyst or a secretary, on finding out that the person was homosexual, it would not avail the educational institution to say that 'it holds strong religious views against homosexuality or homosexual practices'.<sup>238</sup> The same reasoning would seemingly be applicable where a church dismissed an employee engaged in a non-spiritual task — for example, a receptionist or typist<sup>239</sup> on the basis of one of the prohibited grounds. A different outcome might, however be required if employment as a secretary was made conditional on church membership, and the person so employed was subsequently excommunicated from the church because of his or her involvement in a gay or lesbian relationship.<sup>240</sup> The logic of the distinction is that the secretary understood the membership criteria of the church when she joined the church and bound herself to them.

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In a third set of scenarios, a religiously affiliated publisher, bookshop, hospital or other business may attempt to dismiss an employee, or refuse to hire an applicant on the basis of that person's gender, sexual orientation, or marital status. It is extremely unlikely that the church-minister analogy or the role model exemption, which could be used to justify discrimination under the previous scenarios, would be available to an employer in this context.<sup>241</sup> Nor would religious freedom be likely to be undermined in any substantial way by a ruling prohibiting discrimination on any of the grounds listed in s 9(3) (other than religion or belief). Some may even query whether there is any infringement of religious freedom in this context. It may be argued that it is a secular, and not a religious, activity that is being regulated, and thus the right to freedom of religion is not implicated. A court should, however, exercise caution before making such a ruling, due to the problem of doctrinal entanglement and the danger of ignoring, or stifling, the diversity of religious and secular beliefs.

#### **(d) Waiver of the right to religious freedom**

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238 King's College in Edmonton, Alberta, Canada fired an employee who performed a secular task: see *Vriend v Alberta* [1998] 1 SCR 493. See also *Vriend v Alberta* 132 DLR (4th) 595, 599a-b (Alb CA) (1996).

239 *Whitney v Grater NY Corp of Seventh-Day Adventists* 401 FSupp 1363 SDNY (1975) in which the free exercise claim of the religious employer was rejected.

240 See *Geraci v Eckankar* 526 NW 2d 39 (Minn Ct App 1995).

241 There are numerous American cases holding the 'church-minister' exception inapplicable to employees holding jobs in secular, albeit religiously affiliated, businesses. See, for example, *EEOC v Pacific Press Publishing Association* 676 F2d 1272 (CA 9th Cir 1982), where an editorial secretary of a publishing house was held not to be a 'minister'; and *Lukaszewski v Nazareth Hospital* 764 FSupp 57 (ED Pa 1991), in which a director of a physical plant at a hospital was not considered a 'minister'.

The question of whether a person is capable of waiving the right to religious freedom has thus far arisen in a number of High Court cases.

In *Wittmann v Deutscher Schulverein, Pretoria, & others*,<sup>242</sup> the High Court was required to consider whether a private school infringed the right of freedom of religion protected by IC s 14 when it compelled a pupil to attend religious instruction classes and morning assemblies that included prayers. The religious instruction sessions were not devotional in nature, but the prayers at assembly were. The plaintiff wanted compelled attendance at both to be declared unconstitutional. The school had previously allowed children to opt out of the religious instruction classes. But it changed its policy and had, since the introduction of a more academic form of religious instruction, made it virtually impossible to opt out of the classes. The plaintiff's child was admitted to the school after it had made more restrictive its policy on religious instruction.

Van Dijkhorst J characterized the issue in terms of religious freedom. As a result, he had to decide as whether, if the religious instruction was of a confessional nature, the German School acted unconstitutionally in enforcing attendance at these classes.<sup>243</sup> Van Dijkhorst J found that this private school was not a 'state-aided school' in terms of IC s 14(2) and was also not an organ of state. IC s 14(2) therefore did not apply. Van Dijkhorst J then went on to hold that even if the

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school had been a state-aided one, the compulsion would have been constitutional because the parent had voluntarily agreed to abide by the school rules and had thus waived any right of non-attendance in terms of IC s 14(2).<sup>244</sup>

In *Garden Cities Incorporated Association Not For Gain v North Pine Islamic Society*,<sup>245</sup> the High Court was faced with the question of whether the right to freedom of religion (or, for that matter, any other right protected by the Constitution) could be waived in a written contract. The applicant was in the business of developing townships. The respondent had been formed to establish a mosque in an area under development. The respondent had agreed, in a contract for the purchase of property in the township, not to conduct any activities on the property that would, in the opinion of the applicant, cause a nuisance or in some other way disturb the other owners in the township. In particular, the respondent had undertaken not to use any sound amplification on or in the buildings or structures to be erected on the land and not to issue any audible 'calls to prayer'. Instead, a light would be switched on at the appointed hour of prayer. By its own admission, the respondent never intended to honour clause 20 of the agreement of sale that set out these restrictions. Instead, it claimed that the clause infringed its right to freedom of religion protected by s 15(1) of the final Constitution.

Conradie J held that the applicant's freedom of religion had not been infringed.<sup>246</sup> The contract did not more than 'consensually regulate a particular ritual practised at

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242 1998 (4) SA 423 (T), 1999 (1) BLCR 92 (T).

243 *Ibid* at 438F-G.

244 *Ibid* at 455E.

245 1999 (2) SA 268 (C).

a particular place'.<sup>247</sup> He also concluded that the respondent could waive any religious rights in the contract and that the sanctity of the contract should be upheld. In support of his conclusion Conradie J cited the words of Van Schalkwyk J in *Knox D'Arcy Ltd & another v Shaw & another*<sup>248</sup>:

It must be understood that there is a moral dimension to a promise which is seriously given and accepted. It is generally regarded as immoral and dishonourable for a promissory to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual.

The result in both cases is correct.<sup>249</sup> However, the waiver of fundamental rights and freedoms is best avoided if at all possible. Simply put, allowing rights and freedoms to be bartered or sold diminishes their value.

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## 41.5 Religious observances in state or state-aided institutions: section 15(2)

In an attempt to avoid a debate — such as that which has taken place in the United States of America,<sup>250</sup> and to a lesser extent in Canada<sup>251</sup> — as to whether prayers, Bible-readings and other devotional activities are allowed in schools or other state institutions at all (and, if so, to what extent), the drafters of s 14 of the Interim Constitution inserted a clause (s 14(2)) regulating such observances.<sup>252</sup> It has essentially been retained intact in FC s 15(2). In terms thereof, religious observances

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246 See *Garden Cities* (supra) at 271H-I. Ibid at 271B.

247 Whether it is correct, or at least advisable, for a Court to grapple with what constitutes a tenet of the Islamic faith is an issue dealt with under § 41.3(b) supra.

248 1996 (2) SA 651 (W), 1995 (12) BCLR 1702 (W) (Constitutionality of a restraint of trade clause).

249 See *Kotze v Kotze* (supra) at 631C (as regards a waiver of the right to freedom of religion).

250 See *Engel* (supra) (purportedly non-denominational prayer composed by Regents appointed by the school board in New York declared unconstitutional); *Abington School District v Schempp* 374 US 203 (1963) (reciting of Lord's Prayer and reading of the Bible as start of each school day deemed unconstitutional); *Wallace v Jaffree* 472 US 38 (1985) (period of silence for 'meditation or voluntary prayer' unconstitutional); *Lee v Weisman* 112 S Ct 2649 (1992) ('non-sectarian' invocation and benediction by rabbi at school graduation ceremony unconstitutional). See also *Stone v Graham* 449 US 39 (1980) (posting of Ten Commandments in schools was unconstitutional).

251 See *Zylberberg v Sudbury Board of Education* (1988) 65 OR (2d) 641 (CA), (1988) 52 DLR (4th) 577; *Russow v BC (AG)* (1989) 35 BCLR (2d) 29 (SC); *Canadian Civil Liberties Association v Ontario* (1990) 71 OR (2d) 341 (CA). See also B Sokhansanj 'Our Father who art in the classroom' (1992) 56 *Sask LR* 47.

252 See *Du Plessis & Corder* (supra) at 157 (IC s 14(2) is a 'prime example of a provision attesting to the negotiators' unwillingness to erect walls of separation between church and state'.)

at state or state-aided institutions are allowed subject to two provisos: (i) that 'such religious observances are conducted on an equitable basis'; and (ii) that 'attendance at them is free and voluntary'.<sup>253</sup> Both provisos are deliberately open-ended. Both provisos allow the 'appropriate public authorities', who ideally would be in direct or at least fairly immediate contact with the institutions under scrutiny, the discretion to regulate observances in the manner best suited to the particular context. It will be difficult to lay down any fixed principles as to what s 15(2) should mean in practice. That said, a few comments are required on the meaning of the terminology used in s 15(2).

What is the meaning of the requirement that observances be conducted on an *equitable basis*? The word 'equity', according to Etienne Mureinik, means something less than equal.<sup>254</sup> It is more akin to 'fair' and 'just'.<sup>255</sup> 'Equitable basis' does not require the equal treatment and parity of observance for all religious faiths. Further guidance can be gleaned from *Solberg*:

In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, s 14(2) makes clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most

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appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'.<sup>256</sup>

What constitutes *religious observances*? In *Wittmann v Deutscher Schulverein, Pretoria, & others (Wittman)*, the Court concluded that a religious observance was in the nature of an act of worship, and should be distinguished from religious education:

'Religious observance' is an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance. Religious education is not.<sup>257</sup>

What is the meaning of the words *state-aided*? Does this include any school, university or hospital that receives any state funding, no matter how small? In

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253 See De Waal et al (supra) at 302-305.

254 E Mureinik 'Let's Privatise God' *Mail and Guardian* 10-11 November 1995; W Freedman 'Understanding the Freedom of Religion Clause in the South African Constitution Bill, 1996' (1996) 1 *Human Rights and Constitutional LJ of Southern Africa* 35, 36.

255 See *Solberg* (supra) at paras 121-123 (O'Regan J) (The Justice brackets fairness with equity, and states that 'at the least, the requirement of equity demands the State act even-handedly in relation to different religions').

256 *Solberg* (supra) at para 103.

257 *Wittman* (supra) at 449E.

*Wittmann*,<sup>258</sup> the Court concluded, in the light of an analysis of the applicable statutory context<sup>259</sup> that 'private schools' as defined in the latter Act were not 'state-aided institutions', despite being eligible to apply annually for the prescribed subsidy.

What is meant by the requirement that religious observances be *free and voluntary*? In terms of this proviso, is it sufficient that the attendance at such observances, or participation therein, not be compulsory? The Canadian courts have held that religious observances can have coercive effects despite not being compulsory. This observation is undoubtedly correct. As a result, regulations permitting prayers and other religious observances have been struck down in Canada, even though pupils who did not want to participate could apply for an exemption.<sup>260</sup> However if a similar approach were adopted in South Africa, s 15(2) could be rendered nugatory.<sup>261</sup> Surely the framers of the Interim or Final Constitutions were concerned with compulsion and not simple coercion. And that is a distinction with a difference. The purpose of s 15(2) is to allow religious observances in such institutions, provided that cognisance is taken of the need not to violate the religious beliefs of persons of other faiths.<sup>262</sup>

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## 41.6 Statutory recognition of religious family law

FC s 15(3) states that s 15 does not preclude legislation recognising (a) marriages concluded under any tradition or a system of religious, personal or family law, or (b) systems of personal or family law adhered to by any tradition or religion. However, s 15(3) contains the rider that any such legislation must be consistent both with s 15 and with the Constitution.

The last-minute insertion<sup>263</sup> into s 15(3)(b) of the requirement of consistency with s 15 is difficult to fathom. Subsections 15(1) and (2) could hardly preclude legislation

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258 *Wittman* (supra) at 450H-453B.

259 The Education and Training Act 90 of 1979 (which dealt with black education) and the Private Schools Act (House of Assembly) 104 of 1986.

260 See Hogg (supra) at § 39.7, 985-986; D Gibson *The Law of the Charter: Equality Rights* (1990) 199, 200; P Macklem et al *Canadian Constitutional Law* (Vol II, 1994) 310-4.

261 See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 45-46.

262 The jurisprudence of Germany may be of assistance in this regard. See Currie *The Constitution of the Federal Republic of Germany* (supra) at 244-269. Arts 7(2) and (3) of the Basic Law permit and regulate the holding of religious classes in public schools. Article 7(2) provides that: 'The person entitled to bring up a child have the right to decide whether the child shall attend religious classes'. Article 7(3) states that: 'Religion classes shall form part of the ordinary curriculum in public schools, except in secular schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.' For a comparison of school prayer in Germany, the USA and Canada, see J Waltman 'Communities in Conflict: The School Prayer in West Germany, the United States and Canada' (1991) 6 *CJLS/RCDS* 27.

263 See § 41.1(c)(i) above.

that was not inconsistent with them. Conversely they could not permit legislation that was in conflict with them. The reference to 'this section' in s 15(3)(b) should therefore be disregarded. It does no work.

The requirement of consistency with the other provisions of the Constitution is significant. It avoids a debate — such as that which ensued in relation to IC s 14(3) — over whether legislation recognising a system of personal and family law could be immune from challenge under other clauses of the Bill of Rights.<sup>264</sup> It is now clear that any legislation that recognises religious or customary law marriages or systems of family law *must* comply with the equality clause and thus cannot, for example, discriminate on the basis of sex or gender. As a result, if Parliament chooses to enact legislation contemplated by s 15(3), it faces the unenviable task of trying to be true to the religion or custom in question while avoiding all unfair discrimination.

Only one statute of the kind envisaged in s 15(3) has been enacted: the Recognition of Customary Marriages Act 120 of 1998.<sup>265</sup> That statute allows polygamy, provided that the husband has a written contract approved by a court that will regulate the matrimonial property system of his marriages.<sup>266</sup>

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Section 15(3)(a) is, in the final analysis, a weak provision. It merely *permits* the state to pass legislation. It does not require it to do so<sup>267</sup>. It then stipulates that such legislation is subject to (and thus subordinate to) all the provisions of the Constitution.<sup>268</sup> One might therefore question whether s 15(3)(a) serves any purpose

264 The majority of academics who commented on s 14 of the Interim Constitution concluded that it precluded any judicial scrutiny of legislation that fell within the purview of s 14(3)(a) and (b), whether on account of a violation of the right to equality or any other basis. See Mureinik 'A Bridge to Where? (supra) at 45 n44; Cachalia et al (supra) at 52-53; D Davis, H Cheadle & N Haysom 'Fundamental Rights in the Constitution' (1997) 107; J D Sinclair *The Law of Marriage*, Vol I (supra) at §34.6.

265 See *Thembisile v Thembisile* 2002 (2) SA 209 (T) at 214A ('*Thembisile*'), where it is stated that the Recognition of Customary Marriages Act is part of the legislation referred to in s 15(3).

266 As to whether the statute involves any discriminatory provisions, see J Pienaar 'African Customary Wives in South Africa: is there Spousal Equality after the Commencement of the Recognition of Customary Marriages Act?' (2003) 14 *Stell LR* 256. Also note that one of the provisions in that Act was challenged as being in conflict with s 9 of the Constitution, but the issue was ultimately held over for adjudication at a separate hearing. See *Mabuza v Mbatha* 2003 (7) BCLR 743 (C) ('*Mabuza*').

The South African Law Commission has recently produced a report on 'Islamic Marriages and Related Matters'. South African Law Commission Discussion Paper 101 '*Islamic Marriages and Related Matters*' Project 59 (December 2001). The Department of Justice has begun drafting legislation on the recognition of Muslim marriages. As regards gender equality in Muslim law, see N Goolam 'Gender equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings' (2001) 12 *Stell LR* 199.

267 See ss 9(4), 32(2) and 33(3) of the Constitution, which *require* Parliament to enact legislation of the kind envisaged in those sections.

268 Interestingly, two of the members of the technical committee that drafted the Bill of Rights in the Interim Constitution, Professors Du Plessis and Corder, commented that IC s 14(3), by merely authorising the legislature to pass legislation recognising a system of family law rather than requiring it to do so, was of a 'provisional nature'. They attributed this provisional nature to the fact that the recognition religious family law rites was raised at a very late stage in the negotiating process and in conjunction with the highly controversial issue of customary law. See Du Plessis &

at all, and whether the concerns that it was designed to address were not adequately catered for in other clauses.

That said, s 15(3) does indeed have value.

First, s 15(3)(a) emphasises the fact that, contrary to pre-1994 judgments like *Ismail v Ismail*,<sup>269</sup> there is nothing objectionable or *contra bonos mores* about recognising the validity of marriages, or other elements of the family laws, of non-Christian faiths or traditions.<sup>270</sup> Such marriages or systems of family law can be recognised by the legislature, and by the courts. The significance of this shift cannot be overestimated. Prior to 1994, family law conformed strictly to Western and Christian norms. A particularly pernicious result of this ethnocentrism was that marriages concluded according to a number of non-Christian religious rites were not recognised as valid civil marriages. This refusal had deleterious consequences for spouses in relation to succession, evidence and determination of marriages.<sup>271</sup> Section 15(3) makes it clear that this deficiency of the pre-constitutional era is now a thing of the past and can be set right.<sup>272</sup> The courts and the legislature have begun this task.<sup>273</sup>

The second benefit that flows from the inclusion of s 15(3)(a) in the Constitution is that it removes any argument that legislation which recognised, say,

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Muslim family law could be vulnerable to attack on the basis that it was *prima facie* discriminatory because it afforded official recognition to Muslims that was not available to Hindus, Jainists, or Buddhists. Absent a provision such as s 15(3), there may have been a danger that, irrespective of its content, a statute that recognised a system of personal or family law adhered to by a particular religious community could have been challenged by religious groups whose own systems of family law had not yet been accorded similar treatment.<sup>274</sup>

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Corder (supra) at 157. Nevertheless, the 'provisional nature' of the subsection dealing with religious family law has been retained in the Final Constitution.

269 1983 (1) SA 1006 (A).

270 See *Mabuza* (supra) at para 129; *Thembisile* (supra) at paras 23-25. See also L du Plessis 'Legal and Constitutional Means Designed to Facilitate the Integration of Diverse Cultures in South Africa: A Provisional Assessment' (2002) 13 *Stell LR* 367, 377-378.

271 See *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Kalla v The Master* 1995 (1) SA 261 (T), 1994 (4) BCLR 79 (T); and *S v Johardien* 1990 (1) SA 1026 (C).

272 See, as regards the courts' protection of the rights of women under African Customary Law, *Bhe & others v The Magistrate, Khayelitsha* (Unreported judgment of the Cape High Court delivered 25 September 1993) (Ngwenya J). See also *Chawanda v Zimnat Insurance Co Ltd* 1990 (1) SA 1019 (ZHC), *Katekwe v Mushabaiwa* 1984 (2) ZLR 112 (SC) ('the Courts by their judgments should seek to heal the pangs inflicted on African women by their legal disabilities').

273 See *Ryland v Edros* (supra), *Amod v Multilateral Motor Vehicle Accidents Fund* (supra) and *Daniels v Campbell NO* [2003] 3 All SA 139, 154c-155i (C), 2003 (9) BCLR 969 (C). See also the amendments to legislation such as the Civil Proceedings Evidence Act 35 of 1965, the Criminal Procedure Act 51 of 1977, the Government Employees Pension Law 1996 (Proclamation 21 of 1996), the Transfer Duty Act 40 of 1949, and the Child Care Act 74 of 1983.



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274 That is, a constitutional challenge might have been possible under s 15(1), given that the government cannot favour one religion over another, or religion over non-religion.