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## Constitutional Perspective of Church-State Relations in South Africa

*Johan D. van der Vyver\**

When one considers the constitutional history of South Africa, two aspects of its legal arrangements of yesteryear always come to mind: the systematic institutionalization by the state of racist structures; and, in the context of religious matters, a distinct bias for (a certain brand of) Christianity. These two seemingly contradictory attributes of the South African social, economic, political, and legal make-up have at least this in common: they denote the fabric of a totalitarian regime both in the sense of the state's interference in the private lives of individuals and of the state's regulation of the internal affairs of non-state social institutions.

For reasons that will be stipulated later, the meaning and implications of the current constitutional dispensation cannot be fully appreciated without an insight in, and due consideration of, the country's past history. But there is yet a further contingency brought about by the constitutional transformation of South Africa in 1994 which has an impact on the interpretation of legally regulated South African institutions. It can perhaps best be depicted as the Africanization of those institutions.

Ever since the first white settlement in Southern Africa in 1652, governmental control and economic power were, by and large, the preserves of the country's minority white elite, and were consequently deliberately designed and executed according to a distinctly Western, and more precisely, European, model. Typically, this system indeed accommodated African social and legal structures, but only for Africans who, through personal choice or the pressures of involuntary circumstances, upheld a "traditional" life-style and were decidedly segregated from the patterns of mainstream living. The "new" South Africa

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seeks to be of Africa; its institutions must therefore be seen to reflect “typical African values.”<sup>1</sup>

### I. THE HISTORICAL PERSPECTIVE

The political and legal system of pre-1994 South Africa was particularly noted for the totalitarian interference of the state in the private sphere of people’s day-to-day lives.<sup>2</sup> In apartheid South Africa, the state prescribed, with race as the prime criterion, whom one could marry, where one could reside and own property, which schools and universities one would be allowed to attend, and which jobs were reserved for persons of a particular race. The state dictated to sports clubs whom they could admit as members, and against whom they were permitted to compete. The sick had to be conveyed in racially exclusive ambulances, could only receive blood transfusions from donors of their own race, and only qualified for treatment in racially defined hospitals. The state even regulated, with race as the primary criterion, who would be allowed to attend church services in certain regions, and where one could be buried.<sup>3</sup> These racist appendices of a totalitarian regime did not reflect the “spirit” of, at least, the victims of their practical impact, which—as everyone knows—constituted a vast majority of the South African nation. Nor were they supported by the religious convictions of the people, or of a majority of the people, or for that matter of any distinct section of the people.

Deliberate attempts to resort to the power of the sword as an instrument for the enforcement of the scruples of a dominant religion was also a distinct feature of the institutionalized structures of South Africa. The law regulating publications control thus provided: “In the application of this Act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognised.”<sup>4</sup> The law that regulated the educational system for

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1. CHRISTOF HEYNS, *WHERE IS THE VOICE OF AFRICA IN OUR CONSTITUTION* 1 (1996).

2. See Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 *EMORY L.J.* 745, 746-48 (1991).

3. See also *Ferreira v. Levin* NO, 1996 (1) BCLR 1 (CC), para. 51 (Ackermann, J., concurring).

4. § 1 of Publications Act 42 of 1974. *But see* Johan D. van der Vyver, *General Aspects of the South African Censorship Law*, in *CENSORSHIP* 9, 22-24 (T. Coggin ed.,

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whites mandated the ideology of Christian-national education,<sup>5</sup> while another statute required that education in black (African) schools maintain a Christian character<sup>6</sup> (without the “national” component that applied in the case of segregated white schools). The common-law offence of blasphemy applied to the slandering of the God confessed by Christianity only.<sup>7</sup> This offence also applied to “blasphemous matter” contained in publications or objects, public entertainments or intended public entertainments, and films that would render the publication or object, public entertainment or intended public entertainment, or film “undesirable” and therefore subject to censorship.<sup>8</sup> And then, of course, there was also an array of Sunday observance (national) statutes and (provincial) ordinances applying to commerce and industry,<sup>9</sup> as well as to entertainment and recreation.<sup>10</sup>

The constitution that was in place before political transformation occurred in 1994 included a rather absurd constitutional confession of faith which proclaimed: “The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God.”<sup>11</sup> While the “Almighty God” referred to in the corresponding provision in South Africa’s first

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1983); Johan D. van der Vyver, *Religion*, in 23 THE LAW OF SOUTH AFRICA para. 242 (W.A. Joubert & T.J. Scott eds., 1986); JOHAN D. VAN DER VYVER, SEVEN LECTURES ON HUMAN RIGHTS 44-45 (1976) [hereinafter SEVEN LECTURES].

5. See § 2(1)(a)-(b) of National Education Policy Act 39 of 1967.

6. See § 3(a) of Education and Training Act 90 of 1979.

7. See Publications Control Board v. Gallo (Africa) Ltd., 1975 (3) SA 665 (A), 671; R. v. Webb, 1943 A.D. 493, 496.

8. See § 47(2)(b) of Publications Act 42 of 1974; see also *Gallo (Africa) Ltd.*, 1975 (3) SA 665 (A) 671; and see the judgments of the Publications Appeal Board in *Play with Fire*, 1975 PAB 17, and *Kalki*, 1978 PAB 4.

9. For an example of a law relating to mineral rights which prohibited the pegging of a claim on a Sunday and on public holidays with a religious base, namely Good Friday, Ascension Day, the Day of the Vow (December 16th), and Christmas Day (see § 2 of the Public Holidays Act 5 of 1952), see § 48(4)(a) of Mining Rights Act 20 of 1967. The Minerals Act 50 of 1991 repealed this provision.

10. See, e.g., The Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 1977 (rendering it an offence to exhibit, save with the consent of the Minister of Justice or an officer of the Department of Justice acting under the Minister’s authority, a film on Sundays or on religiously-based public holidays at any place where an admission fee or any other form of consideration is charged). The Prohibition of the Exhibition of Films on Sundays and Public Holidays Amendment Act 102 of 1992 amended the Act to replace ministerial permission with that of the local authority.

11. S. AFR. CONST. of 1983, (Act 110), § 2.

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republican Constitution of 1961<sup>12</sup> arguably referred to the Holy Trinity professed by Reformed Christianity,<sup>13</sup> “Almighty God” in the 1983 Constitution was more likely intended to denote a “pot-pourri god” that could be interpreted by all and sundry to suit their own personal conception of the deity.<sup>14</sup> Needless to say, this fallacious statement comprised a confession of faith and as such did not constitute a rule of law.<sup>15</sup> It consequently altogether lacked juridical relevance.<sup>16</sup>

As far as church-state relations are concerned, it is important to note that there was no established church in South Africa<sup>17</sup>—though during the previous century, that had

12. See S. AFR. CONST. of 1961, (Act 32).

13. See JOHAN D. VAN DER VYVER, *DIE BESKERMING VAN MENSEREGTE IN SUID-AFRIKA*, 75-77 (1975) [hereinafter *DIE BESKERMING*]; JOHAN DAVID VAN DER VYVER, *DIE JURIDIESE FUNKSIE VAN STAAT EN KERK: 'N KRITIESE ANALISE VAN DIE BEGINSSEL VAN SOEWEREINITEIT IN EIE KRING* 148-57 (1972) [hereinafter *DIE JURIDIESE*]; SEVEN LECTURES, *supra* note 4, at 42-44; F. Venter, *Die Staatsregtelike Soewereiniteit van God*, *TYDSKRIF VIR DIE SUID-AFRIKAANSE REG* 64, at 67 (1977). *But see* N.J.C. VAN DEN BERGH, *DIE GOD VAN DIE GRONDWET EN PRESIDENTSRAAD VAN DIE REPUBLIEK VAN SUID-AFRIKA*, 87-89 (1982).

14. This is more evident from the Afrikaans text of the two constitutions than would appear from the English version. In 1961, the constitutional confession of faith attributed the pertinent belief to “die volk van . . . Suid-Afrika,” while the 1983 Constitution claimed this belief to be that of “die bevolking van . . . Suid-Afrika” (emphases added). “Volk” denotes an ethnically defined people, while “bevolking” signifies the population. While the “volk” to which the 1961 Constitution referred was probably meant to denote that section of the South African population which for the greater part subscribed to the tenets of Christianity, the “bevolking” clearly comprised large sections of the South African population who were not Christians, including proponents of the Jewish, Muslim, Hindu, and Buddhist faiths. The terms of § 11(1) of the 1983 Constitution, furthermore, required the State President to take an oath invoking the name of “Almighty God,” and since nothing precluded a non-Christian from becoming State President, “Almighty God” was clearly not intended to refer to the God of Christianity only. See S. AFR. CONST. of 1983, (Act 110), § 11(1).

15. It is of the essence of a law in the juridical sense that it should entail the modal aspect of retribution in the sense of sanctioning the consequences that follow upon any change in the legal order brought about by the occurrence of a legal fact. Section 2 of the 1983 Constitution (and its counterpart in the 1961 Constitution), although part of the body of the constitution, lacked that essential constitutive element of a juridical norm.

16. See *DIE BESKERMING*, *supra* note 13, at 75-77; JOHAN DAVID VAN DER VYVER, *DIE GRONDWET VAN DIE REPUBLIEK VAN SUID-AFRIKA* 63 (1984); *DIE JURIDIESE*, *supra* note 13, at 148-57; J.D. VAN DER VYVER & D.J. JOUBERT, *PERSONE- EN FAMILIEREG*, 402-03 (1991); SEVEN LECTURES, *supra* note 4, at 44; Johan D. van der Vyver, *The Function of Legislation as an Instrument of Social Reform*, 93 S. AFR. L.J. 56, 63 (1976). *But see* Venter, *supra* note 13, at 68-70.

17. See *Buren Uitgewers (Edms.) Bpk. v. Raad Van Beheer Oor Publikasies*, 1975 (1) SA 379 (C), 419; *Aronson v. Estate Hart*, 1950 (1) SA 539 (A), 561.

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not always been the case.<sup>18</sup> There were, however, laws in place that, in some instances, authorized state interference in the internal affairs of religious bodies and, in other instances, amounted to the repression of religious institutions.

Perhaps the most telling example of the first of these two sets of laws is the infamous Church Clause,<sup>19</sup> enacted in 1957. This law conferred on the Minister of Co-operation and Development (as he was then called)—who administered the Department that had jurisdiction in matters concerning Africans—the power to prohibit, with the consent of the local authority involved, Blacks from attending church services and functions in urban areas other than those set aside for Blacks under the Group Areas Act.<sup>20</sup> The criterion which the Minister had to apply when imposing the ban was whether or not the presence of Blacks in the urban area concerned would constitute a nuisance to residents of the area or, alternatively, whether or not the Black presence in the urban area would be “undesirable”, in view of the location of the premises where the church service or function was to be held. The enactment of this provision caused an outcry from almost all of the mainstream religious institutions, including the government supporting

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18. The Church Order of 25 July 1804, promulgated by Commissioner-General J.A. de Mist, decreed that no ecclesiastical bodies other than those that operated in the Cape when the Batavian Republic (the Netherlands) took control of the colony in 1803 would be permitted to conduct religious ceremonies or hold public gatherings. See § 4 of *Provisioneele Kerken-Orde voor de Bataafsche Volksplanting aan de Kaap de Goede Hoop* of 1804. In terms of § 20 of the *Grondwet van de Zuid-Afrikaansche Republiek* of 1858, the *Nederduitsch Hervormde Kerk* (a variety of the Dutch Reformed churches) was the established church of the Republic (until 1889), and § 32 of the Constitution reserved the franchise for members of this church (until the *Volksraadsbesluit* of 20 September 1858). Section 21 of the Constitution denied residential rights in the Republic to Roman Catholics and other persons who did not subscribe to the tenets of the Belgic Confession of Faith (until the *Volksraadsbesluit* of 1 June 1870). In the Orange Free State, the *Nederduitsch Hervormde Kerk* (until 1866) and subsequently the *Nederduitse Gereformeerde Kerk* (until 1902) were proclaimed the established church of the Republic (§ 22 of the *Constitutie van den Oranjevrijstaat* of 1854; § 24 of the *Gewijzigde Constitutie* of 1866). The Dutch Reformed Church was never regarded as an established church in the Cape Colony. See *De Waal and Others v. Van Der Horst and Others*, 1918 T.P.D. 277, 281; *Burgers v. Murray*, (1865) 1 Roscoe's Rep. 258, 265; *Loedolf & Smuts v. Robertson*, (1863) 4 Searle's Rep. 128, 143; see also *Bredell v. Pienaar*, 1922 C.P.D. 578, 581-82.

19. § 9(7) of Blacks (Urban Areas) Consolidation Act 25 of 1945, amended by § 29(d) of Act 36 of 1957.

20. Act 36 of 1966.

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Dutch Reformed Church, and was probably for that reason never implemented.

Repression of religious institutions occurred under auspices of security legislation. The Internal Security Act,<sup>21</sup> for example, authorized the banning of organizations in cases where, in the opinion of the Minister of Law and Order, the organization engaged in activities which endangered, or were calculated to endanger, the security of the state or the maintenance of law and order. Alternatively, an organization could be banned under this Act if the Minister was satisfied that the organization upheld relations with communism in any of a variety of ways specified in the Act.<sup>22</sup> Under the terms of the Affected Organizations Act,<sup>23</sup> the State President could, if he was satisfied that an organization engaged in politics with the aid of, or in cooperation or consultation with, or under the influence of, an overseas organization or any person abroad, declare the organization to be an "affected organization."<sup>24</sup> The consequence of such an executive decree was that the organization would forfeit all foreign financial support.

Religious bodies were not immune from these draconian laws. One such organization that fell victim to both was the Christian Institute of South Africa.<sup>25</sup> Individual church dignitaries who voiced their critique of unjust and repressive state regulations and practices in many instances also experienced the wrath and harsh retributory responses of the powers that be. In their analysis of the role of religion with regard to race discrimination in South Africa, Meiring and others recalled the "drawn-out series of altercations between government and church authorities" through which, as far as members of the Anglican communion and the Roman Catholic Church were concerned,

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21. Act 74 of 1982.

22. *See id.* § 4.

23. Act 31 of 1974.

24. *Id.* § 2.

25. *See* Government Notice (GN) R132/1975, GOVERNMENT GAZETTE (GG) 4728 (declaring the Christian Institute an "affected organization"); GN R287, GG 5784 (banning the Christian Institute).

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[p]eople like Archbishops [Geoffrey] Clayton<sup>26</sup> and [Joost] De Blank,<sup>27</sup> the Very Rev. Gonville French-Beytagh,<sup>28</sup> Fr Trevor Huddleston<sup>29</sup> and others, and most recently the Rev. David Russell,<sup>30</sup> have become public figures

26. Weeramantry recorded the tragic death of Archbishop Clayton, who "defied the government's racial legislation and made a declaration of open disobedience," and, after signing the document, collapsed over his desk. C.G. WEERAMANTRY, *APARTHEID: THE CLOSING PHASES?* 107 (1980); *see also id.* at 240.

27. Joost de Blank, Anglican Archbishop of Cape Town in the period of 1957-1963, was "[a]n outspoken and uncompromising opponent of *apartheid* during his six years in Cape Town." KEESINGS CONTEMPORARY ARCHIVES: WEEKLY DIARY OF WORLD EVENTS 11953B (1963-1964). After having suffered coronary problems, he returned to England in 1963 on medical advice.

28. The persecution of the Very Reverend French-Beytagh (Anglican dean of Johannesburg) is evidence of government action against Anglican clergy members. *See S. v. French-Beytagh* (1), 1971 (4) SA 333 (T); *S. v. French-Beytagh* (2), 1971 (4) SA 426 (T); *S. v. French-Beytagh* (3), 1971 (4) SA 571 (T) (emanating from the detention and interrogation of the accused in terms of § 6 of the Terrorism Act 83 of 1967). In 1971, he was sentenced to five years imprisonment for alleged acts of terrorism as defined in the Terrorism Act 83 of 1967. His conviction and sentence was set aside on appeal. *See S. v. French-Beytagh*, 1972 (3) SA 430(A). He left South Africa on the day of the judgment in the Appellate Division of the Supreme Court (as it was then called).

29. Father Trevor Huddleston (Roman Catholic), author of *Naught for Your Comfort* (1956), came to South Africa in 1943 as Priest-in-Charge of the Community of the Resurrection's Mission in Sophiatown (a black township in Johannesburg). The Blacks affectionately called him *Makhalipile* ("the dauntless one," after a bold warrior adopted by a foreign tribe when their own leader was lost or had been captured). He left South Africa in 1956 but remained active in the anti-apartheid movement in England, and returned to the country, at the age of seventy-nine, for a visit in 1991 to witness the changes that had occurred since 1990. *See T. HUDDLESTON, RETURN TO SOUTH AFRICA: ECSTASY AND THE AGONY* (1991). Upon his death in 1998, commemoration services were held in England and South Africa, and a wide range of South African dignitaries, including President Nelson Mandela, attended.

30. Among those placed under banning orders in October 1977, in terms of South Africa's repressive security legislation, was the Reverend David Russell (Anglican). *See WEERAMANTRY, supra* note 26, at 107, 240. In December 1979, he was charged with breaking the conditions of his banning orders by attending the Cape provincial synod of the Anglican Church in Southern Africa, and in February 1980 he received a one year prison sentence plus a further suspended sentence, totaling twenty-seven months, on eleven other charges. While he was on bail pending an appeal, he received a further suspended sentence for breaking his banning orders. In February 1977, David Russell was sentenced to three months imprisonment for refusing to disclose to the police the names of three witnesses of acts of police brutality (for fear of retaliation by the police against those witnesses). Russell, together with three other ministers of religion, were charged (and acquitted) in 1980 under the Publications Act 42 of 1974 for publishing two pamphlets: *The Role of Riot Police in the Burning and Killings, Nyanga, Cape Town, Christmas 1976* and *Message for 1977—To Those in Authority and to White South Africa*. *See S. v. Russell*, 1980 (2) SA 459 (C); *see also S. v. Russell*, 1981 (2) SA 21 (C) (stating that the accused was charged and convicted under the Publications Act 42 of 1974 for being in



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through their concern and work for social change, and through the subsequent reaction of the authorities: threats, deportations, prosecutions and bannings have been applied to ministers of the church in a series of attempts to "bring it into line."<sup>31</sup>

Members of the Dutch Reformed churches who, by reason of their rejection of apartheid in matters of religion, suffered the effects of retaliatory intolerance at the instance of the state and their peers, included the Reverent Beyers Naudé<sup>32</sup> and theology Professor Albert Geysers.<sup>33</sup>

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possession of a banned pamphlet, entitled *Crossroads Residents—Personal Accounts of Conditions During the Period of Arrest Following the September 1978 Police Raids*).

31. Piet Meiring et al., *Religion*, in RACE DISCRIMINATION IN SOUTH AFRICA: A REVIEW 186, 197 (Sheila T. van der Horst & Jane Reid eds., 1981); see also AN ILLUSTRATED HISTORY OF SOUTH AFRICA 287 (Trehwella Cameron & S.B. Spies eds., 1986) (mentioning Father Trevor Huddleston, Archbishop Joost De Blank, and Bishop Ambrose Reeves as clergymen of the English language churches in South Africa who, in the 1960s, subjected Prime Minister Hendrik Verwoerd to "a barrage of vehement criticism").

32. Beyers Naudé, editor of *Pro Veritate*, a journal founded by him in 1962 to promote ideals of the nonracial ecumenical movement, and founder in 1964 of the (nonracial ecumenical) Christian Institute, was—due to these endeavors—compelled to resign from the ministry of the *Nederduitse Gereformeerde Kerk* (NGK). In 1975, the Christian Institute was proclaimed an "affected organization" in terms of the Affected Organizations Act 31 of 1974, which, in effect, meant that the organization could no longer receive financing from foreign sources. See *supra* note 25. The Institute, together with seventeen other organizations, was altogether banned in 1977 by terms of the Internal Security Act 44 of 1950 (superseded by the Internal Security Act 74 of 1982). See *supra* note 25. *Pro Veritate* was simultaneously also banned. See Proc R300, GG 5784, at 6. These bans were proclaimed on the eve of publication of the causes of Steve Biko's death, who in September of that year had died of head injuries he sustained while the police held him in "detention without trial," and the banning orders were clearly prompted by an attempt to silence those individuals and organizations that were likely to be most pronounced in publicly proclaiming their indignation and who would most likely act upon their outrage. Beyers Naudé was also placed under banning orders (1977-1984), which, in effect, almost amounted to house arrest. See the consolidated list of banned persons—the first to be published after banning orders were served on him in 1977—in GN 1539, GG 6576, at 4; as to the lifting of his banning orders, see GN 2228, 2229, GG 9455, at 6. As to the conversion of Beyers Naudé from a proapartheid to an antiapartheid activist, see JOSEPH LELYVELD, *MOVE YOUR SHADOW: SOUTH AFRICA, BLACK AND WHITE* 310-14 (1985); for a brief biography of Beyers Naudé, see Charles Villa-Vicencio, *A Life of Resistance and Hope*, in RESISTANCE AND HOPE: SOUTH AFRICAN ESSAYS IN HONOUR OF BEYERS NAUDÉ 3-13 (Charles Villa-Vicencio & John W. de Gruchy eds., 1985); S.M. de Gruchy-Patta, *Beyers Naudé: A Bibliography*, in RESISTANCE AND HOPE: SOUTH AFRICAN ESSAYS IN HONOUR OF BEYERS NAUDÉ 27-35 (Charles Villa-Vicencio & John W. de Gruchy eds., 1985).

33. In 1962, Prof. Geysers was excommunicated from the *Nederduitse Hervormde Kerk* (NHK) and deprived of the chair he had held since 1946 as Professor

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## II. LESSONS FOR THE FUTURE FROM A REPRESSIVE PAST

The history of discrimination and repression in South Africa, and its effects within the realm of religion, serve as a telling example of the consequences that might emerge in a society where the government *qua* repository of *political* power proclaims a mission to preserve the national, ethnic, cultural, or religious identity of the peoples under its political control. In the case of South Africa, that history also, in a very special way, points to the future.

Constitutional change in South Africa that took effect on April 27, 1994, was designed to innovate social, political and legal structures that would be radically different from those of the country's past history. The new constitutional dispensation in that sense emanated from a reactionary response to the evils of the preceding era.<sup>34</sup> The 1996 Constitution,<sup>35</sup> while thus recognizing "the injustices of our past,"<sup>36</sup> accordingly depicted the new South Africa as "an open and democratic society based on human dignity, equality and freedom."<sup>37</sup> The constitutional Bill of Rights<sup>38</sup> provided the legally enforceable backing for such a society: any institution associated with the discrimination and repression of apartheid South Africa must be taken to be

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in New Testament Science in the theology faculty of the University of Pretoria because of his protests against Art. 3 of the NHK's Statute, which (until recently) reserved membership of the Church for whites only. The University of the Witwatersrand subsequently offered Prof. Geysler a chair, and he established the Department of Religious Studies in the Arts Faculty of that University. Action taken by Prof. Geysler to contest the legality of his excommunication was eventually settled upon conditions that were not at all favorable to the Church. Geysler and Beyers Naudé subsequently instituted an action for libel against Prof. J.G.M. Dreyer, editor of *Die Hervormer*, official mouthpiece of the NHK, and against Prof. Adriaan Pont, church historian in the Theological School of the NHK in Pretoria, on account of a series of defamatory articles concerning the plaintiffs, written by Pont and published in *Die Hervormer*. The case against Dreyer was settled out of court, and the action against Pont, who refused to apologize for the libel, was successful, the court awarding to the plaintiffs substantial compensation (R.20,000 each). See Geysler En 'n Ander v. Pont, 1968 (4) SA 67 (W). The Appellate Division of the Supreme Court (as it was then called) rejected an appeal in respect of the *quantum* of the award. See Geysler En 'n Ander v. Pont, 1968 (2) SA 545 (A).

34. See Du Plessis v. De Klerk, 1996 (5) BCLR 658 (CC), para. 90 (Ackermann, J.); van der Vyver, *supra* note 2, at 785-87, 789.

35. S. AFR. CONST. (Act 108).

36. *Id.* preamble.

37. *Id.* §§ 36(1), 39(1)(a); see also *id.* § 7(1).

38. *Id.* ch. 2.

incompatible with the values embodied in the kind of society the country now aspires to be.<sup>39</sup> Defining “an open and democratic society based on human dignity, equality and freedom” with a view to the evils of the past it was intended to avoid, finds support in several judgments of the Constitutional Court. In *S. v. Makwanyane*, Justice O’Regan observed:

The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government. . . .

In interpreting the rights enshrined in Chapter 3,<sup>40</sup> therefore, the Court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution. . . . But generally section 35(1)<sup>41</sup> instructs us, in interpreting the Constitution, to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition.<sup>42</sup>

In a presentation at a symposium at Emory University on April 3, 1997, Justice Langa in the same vein referred to the South African Constitution as sanctioning a “never again” dispensation.<sup>43</sup>

### III. THE AFRICAN CONNECTION

Colonialism has brought to sub-Saharan Africa an impressive variety of Christian religions. Contemporary

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39. See *Brink v. Kitshoff* NO, 1996 (6) BCLR 752 (CC), para. 33 (O’Regan, J.); see also *S. v. Solberg*, 1997 (10) BCLR 1348 (CC), para. 123 (O’Regan, J.); *Ferreira v. Levin* NO, 1996 (1) BCLR 1 (CC), para. 51 (Ackermann, J.); *Shabalala v. Attorney-General of the Transvaal*, 1995 (12) BCLR 1593 (CC), para. 26 (Mahomed, J.); *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC), para. 218 (Langa, J.), 262 (Mahomed, J.), 322 (O’Regan, J.); *De Klerk v. Du Plessis*, 1994 (6) BCLR 124 (T), 131 (Van Dijkhorst, J.).

40. Chapter Three of the Interim Constitution has become Chapter Two of the 1996 Constitution.

41. See S. AFR. CONST. (Act 108), § 35(1).

42. 1995 (6) BCLR 665 (CC), para. 322-23; see also *Ferreira*, 1996 (1) BCLR 1 (CC), para. 51 (Ackermann, J.).

43. See also the concurring judgment of Justice Langa. See *Case v. Minister of Safety & Security and Others*, 1996 (5) BCLR 609 (CC), para. 100 (Langa, J., concurring) (referring to “South African society . . . grappling with the process of purging itself of those laws and practices from our past which do not fit in with the values which underpin the Constitution if only to remind both authority and citizen that the rules of the game have changed”).

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religious trends in the region bear evidence of a remarkable spread of Christianity. Africa is in fact the only continent in the world today where Christianity is not on the decline. At the same time, apostasy from the mainstream churches is as evident in Africa as it is in other parts of the world.

This is evidenced by the typical African responses to the spread of Christianity and Islam in the sub-Saharan region of the continent. Studies conducted under auspices of the Law and Religion Program of Emory University have revealed widespread perceptions among Africans identifying Christianity with colonialism and Islam with totalitarian domination and intolerance. The foreign, mostly Western, religious groups that compete for the souls of Africa stand accused of transplanting their religious rivalries onto African soil and, in so doing, of promoting adversarial religious perceptions and conflict within previously like-minded and peaceful communities. Those engaged in advocating the cause of extraneous religions are almost invariably totally insensitive to the values imbedded in traditional African religions.<sup>44</sup> Abandonment of indigenous African institutions and the customary African lifestyle—ranging from the clothes they wear and the food they eat to the education they receive and the language they speak—is mostly insisted upon as a *conditio sine qua non* of religious conversion.

Understandably, indignation founded upon such perceptions has provoked a certain nostalgia for indigenous values and customary practices. Consequently, there has in recent years been a remarkable revival in Africa of traditional religions with their emphasis on homage to the ancestors and inter-individual caring and sharing (encapsulated in the African concept of *ubuntu*). There has also been a remarkable escalation of independent Christian churches within the African communities. In South Africa alone, there are more than 6,000 varieties of such Christian sects. Religious services in those communities are joyful occasions, attended, in true African tradition, by much singing, dancing, and hand clapping.

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44. See generally Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 417 (Johan D. van der Vyver & John Witte Jr. eds., 1996).

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It is interesting to note that the only mainstream denomination in Southern Africa that has not experienced a radical decline in its African membership in recent years is the Roman Catholic Church. This might be due to the policy of inculturation practiced by Catholic congregations in the African community, by which the liturgy and even sacraments of the Church seek to accommodate traditional African practices.

These trends coincide with increasing constitutional secularization in Africa. European influences have indeed remained visible in Africa through references in the constitutions of many sub-Saharan countries to ideological statements that pay tribute to the deity of Christian religions. Some examples include the following. Ghana proclaimed its constitution "IN THE NAME OF ALMIGHTY GOD."<sup>45</sup> Liberia testified to its "gratitude to God" and recognized "His Divine Guidance for our survival as a Nation."<sup>46</sup> The National Council for Development of Rwanda, which is responsible for establishing and adopting their constitution, placed its "[t]rust [] in God Almighty."<sup>47</sup> The people of Seychelles confessed their gratitude "to Almighty God that we inhabit one of the most beautiful countries in the world" and expressed their conscious pride for having learned as descendants of different races to live together as one nation under God.<sup>48</sup> Although said to be a secular state,<sup>49</sup> the Democratic Republic of Madagascar bore testimony in its constitution of the Malagasy people's "belief in God the Creator."<sup>50</sup> The Republic of Congo, while likewise professing to be a secular state,<sup>51</sup> acknowledged its "responsibility before God."<sup>52</sup>

There is a clear tendency in Africa, if not in the world, for non-Muslim states to move away from such religiously-based constitutional testimonies. Proclaiming a state to be "Christian" still enjoys some appeal in many (non-African) countries where Roman Catholicism predominates, but even there, one finds the

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45. GHANA CONST. preamble.

46. LIBER. CONST. preamble.

47. RWANDA CONST. preamble.

48. SEY. CONST. preamble.

49. *See* MADAG. CONST. art. 1.

50. *Id.* preamble.

51. *See* CONGO CONST. preamble, art. 1.

52. *Id.* preamble.

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tendency to do away with the established status of the Church.<sup>53</sup> Except in the context of an established church, ideological statements in a constitution of non-Muslim states has very little juridical relevance, if any relevance at all.

Zambia recently reversed the trend of eliminating a special state commitment to Christianity. An amendment to its constitution which entered into force on May 1, 1996, included a preambular clause declaring "the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion."<sup>54</sup> President Frederick Chiluba of Zambia and his Vice-President, General Miyanda, the driving forces behind this constitutional amendment, are both "Born Again Christians."

It is to be expected that, in spite of this development in Zambia, more and more countries will follow the example of those who have avoided constitutional confessions of faith. Burundi, perhaps, has set the example of religiously neutral ideological statements in constitutional instruments. Its constitution simply charges citizens to "contribute to the establishment of a morally healthy society."<sup>55</sup> As we have seen, the type of political community which South Africa currently seeks to establish is depicted in the 1996 Constitution as "an open and democratic society based on human dignity, equality and freedom."<sup>56</sup>

#### IV. ESTABLISHMENT OF RELIGION UNDER THE CURRENT SOUTH AFRICAN CONSTITUTION

As far as religion and religious diversity are concerned, the South African Constitution can be described as one of profound toleration and accommodation. It in general allocates to church institutions as juristic persons the privileges under the Bill of Rights;<sup>57</sup> guarantees the free exercise of religion;<sup>58</sup> sanctions

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53. See Johan D. van der Vyver, *Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE, *supra* note 44, at xl.

54. ZAMBIA CONST. (Amendment Act 18), preamble.

55. BURUNDI CONST. art. 46.

56. S. AFR. CONST. (Act 108), §§ 36(1), 39(1)(a); *see also id.* § 7(1).

57. See S. AFR. CONST. (Act 108), § 8(4). The question of whether or not a church institution has the right to freedom of religion has not been settled in South Africa. Gerrit Pienaar argues that the church as a juristic person is not capable of

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freedom of assembly<sup>59</sup> and freedom of association of “[e]veryone”;<sup>60</sup> protects the right to self-determination of religious communities<sup>61</sup> and makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;<sup>62</sup> and it envisions the establishment, by means of national legislation, of a Pan South African Language Board charged, *inter alia*, with promoting and ensuring respect for “Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.”<sup>63</sup>

The South African Constitution also endorses human rights concerns over majoritarian sentiments. It has been estimated that eighty percent of the South African population is in favor of capital punishment, yet the Constitution outlaws the death penalty.<sup>64</sup> Estimates suggest that about the same percentage of the population opposes abortion on demand, yet the Constitution guarantees the right of everyone “to make decisions concerning reproduction”<sup>65</sup> and “to security in and control over their body.”<sup>66</sup> Perhaps even a greater percentage condemns homosexuality, yet the constitution proscribes discrimination founded on sexual orientation<sup>67</sup> by the State,<sup>68</sup> as

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having a faith or a conscience and that the constitutional clauses on freedom of religion consequently do not apply to a church. *See* Gerrit Pienaar, *Konstitusionele Voorskrifte rakende Regspersone*, 60 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 564, 581 (1997). Malherbe, on the other hand, proclaims outright that the constitutional provisions under consideration afford to church institutions as juristic persons the right to freedom of religion. *See* E.F.J. Malherbe, *Die Grondwetlike Beskerming van Godsdiensvryheid*, TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 673, 679 (1998).

58. *See* S. AFR. CONST. (Act 108), § 15(1).

59. *See id.* § 17.

60. *See id.* § 18.

61. *See id.* §§ 31, 235.

62. *See id.* §§ 181(1)(c), 185-86.

63. *Id.* § 6(5)(b)(ii).

64. *See* S. v. Makwanyane, 1995 (6) BCLR 665 (CC).

65. S. AFR. CONST. (Act 108), § 12(2)(a).

66. *Id.* § 12(2)(b). The constitutionality of the Choice on Termination of Pregnancy Act 108 of 1996, which was based on these provisions, was upheld in *Christian Lawyers Assn. v. Minister of Health*, 1998 (4) SA 1113 (T) (holding that a foetus is not entitled to the constitutionally protected right to life).

67. *See* Voris E. Johnson, *Making Words on a Page Become Everyday Life: A Strategy to Help Gay Men and Lesbians Achieve Full Equality Under South Africa's Constitution*, 11 EMORY INT'L L. REV. 583 (1997). In *S. v. Kampher*, 1997 (4) SA 460 (C), punishment for sodomy was held to be in conflict with the constitutional proscription of discrimination based on sexual orientation. *See also* Langemeet v. Minister of Safety & Security, 1998 (3) SA 312 (T) (holding that regulations issued

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well as by persons in general.<sup>69</sup> In a landmark death penalty case, President Chaskalson observed: “The question before us . . . is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the constitution allows the sentence.”<sup>70</sup>

Church state relations implicate another set of constitutional decrees: those that regulate what, in American constitutional parlance, has come to be called the “establishment of religion,” in contradistinction to “the free exercise of religion.” “Establishment,” in the American sense, comes into play under several provisions of the 1996 South African Constitution. These include:

- deity (the Preamble and Schedule 2);
- freedom of religion, belief and opinion (§ 15(1));
- religious observances in state and state-aided institutions (§ 15(2)), and the establishment of parochial schools (§§ 29(3) and (4));
- marriages concluded under a system of religion (§ 15(3));
- equality before the law and equal protection and benefit of the law (§§ 9(1) and (2)), and nondiscrimination on ground of religion (§§ 9(3)-(5));
- unlawful conduct in the name of religious; and
- resolution of legal disputes that involve doctrinal issues.

#### A. A Testimony to Theism

South Africa has come a long way since its Constitution asserted that the peoples of the country believe in the

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under the Police Act 7 of 1958—superseded by the South African Police Services Act 68 of 1995—which excluded the partner in a same-sex union from medical aid benefits afforded to the “dependant” of a police officer are unconstitutional). For a note on *Kampher*, see Peter Havenga, *Same-Sex Unions, The Bill of Rights and Medical Aid Schemes*, 61 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 722 (1998). See also *National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC) (holding that the common law crime of sodomy and statutory provisions based on the proscription of sodomy are unconstitutional); *National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs*, Case No. 3988/98 (C) (Feb. 12, 1999) (holding a provision of the Aliens Control Act of 1991, which authorized the issuing of an immigration permit to the spouse of a permanent resident to be unconstitutional because it did not similarly apply to same-sex couples).

68. See S. AFR. CONST. (Act 108), § 9(3).

69. See *id.* § 9(4). In this instance, the Constitution mandates national legislation “to prevent or prohibit unfair discrimination.” *Id.*

70. *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC), para. 87.



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sovereignty and guidance of Almighty God.<sup>71</sup> In the current Constitution, the name of God is only invoked in the closing phrases of the Preamble, where God is called upon to “protect our people,” and in the opening lines of the national anthem, where the words “God bless Africa” are repeated in six of the official languages. Schedule 2 of the Constitution prescribes the form of the oath or solemn affirmation attending the assumption of office of different state officials and judges, and directs that those preferring to take the oath shall confirm their commitment with the words: “So help me God.”

The latter provision, while it holds out the option of either taking an oath or making an affirmation and furthermore is not at all specific as to the god whose name is to be invoked by persons preferring to take the oath, retained adequate state neutrality to escape establishment censure. The preambular reference to “God,” on the other hand, is offensive to at least Christians, atheists, and persons adhering to a nontheistic religion (such as Buddhism).<sup>72</sup>

Atheists and persons professing a nontheistic religion might well, and with good cause, regard the reference to “God” in the preamble of the constitution as a sign of religious favoritism that leaves them out in the cold. Christians would find the preambular testimony to “God” objectionable exactly because it seeks to maintain a certain neutrality in regard to all religions; it thus depersonifies the deity and therefore, from the Christian perspective, pays homage to an idol. A constitutional confession of faith in a nondescript god is as good an example as one might wish to find of taking God’s name in vain.

When the Constitutional Court was called upon to certify compliance of the 1996 Constitution with the constitutional

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71. See *supra* text accompanying notes 11-16.

72. In *Publications Control Board v. Gallo (Africa) Ltd.*, 1975 (3) SA 665 (A), 672, Chief Justice Rumpff decided that “religion” essentially involves the belief in, some kind of commitment to, and the serving of, a supreme being or unseen power. See also REPORT OF THE COMMISSION OF INQUIRY INTO SCIENTOLOGY (R.P. 55 of 1973), para. 13.10 (holding that the “Church of Scientology,” being “a religion without God and without reverence to a higher power” (para. 13.11(b)) cannot be regarded as a religion or a church (para. 13.16 and 15.3(c)). However, in *Hartman v. Chairman, Board for Religious Objection*, 1987 (1) SA 922 (O), it was decided that Theravada Buddhism, although a nontheistic religion, was nevertheless a “recognized religious denomination” within the meaning of the provision in the Defense Act 44 of 1957 pertaining to conscientious objections.

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principles specified in the Interim Constitution,<sup>73</sup> petitions were submitted to the Court raising objections to the preambular references to deity. The Court did not invite the concerned petitioners to submit oral arguments, and indeed did not deal with their objections in the certification judgments.<sup>74</sup> The question of a constitutional confession of faith was, however, addressed by the Constitutional Court when it was charged with certifying the legality of the provincial Constitution of the Western Cape, which in terms of its preamble was enacted “in humble submission to Almighty God.”

Following American judicial evaluations of references to “God” as “a time-honored means of adding solemnity” to, for example, a national motto or pledge of allegiance,<sup>75</sup> the Court depicted these words as an instance of “ceremonial deism” that have no effect in the interpretation of the Constitution or in respect of the “rights of believers or nonbelievers.”<sup>76</sup> It therefore sanctioned the reference to “Almighty God” in the Preamble of the Western Cape Constitution. Needless to say, degrading references to “Almighty God” to the “ceremonial” level where it has no meaning is blasphemy in probably all theistic religions of the world.

Degrading “God,” as contemplated in the constitutional preamble, to the level of “ceremonial deism” stands in glaring contrast to the assertion of Judge Van Dijkhorst in the recent case of *Wittmann v. Deutscher Schulverein, Pretoria*,<sup>77</sup> that “religion” is not a neutral concept but denotes a “system of faith and worship [as] the human recognition of superhuman controlling power and especially of a personal God or gods

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73. S. AFR. CONST. of 1983 (Act 110), schedule 4.

74. See *In re Certification of the Amended Text of the Constitution of the RSA*, 1997 (1) BCLR 1 (CC); *In re Certification of the Amended Text of the Constitution of the RSA*, 1996 (10) BCLR 1253 (CC).

75. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (suggesting that phrases such as “God save the United States and this Honorable Court,” “In God We Trust,” “One Nation Under God,” and the like “have lost any true religious significance”); see also *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring).

76. *In re Certification of the Constitution of the Western Cape*, 1997 (9) BCLR 1167 (CC), para. 28 (quoting *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting)).

77. 1998 (4) SA 423 (T).

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entitled to obedience and worship.”<sup>78</sup> Judge Van Dijkhorst went on to say:

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

When therefore . . . s 15(2) of the Constitution permit[s] religious observances, this is a reference to the Jewish, Christian, Moslem, Buddhist and other faiths practising their religion . . . . Religious observances . . . do[] not mean a practice which neither Jew, Christian, Moslem, Buddhist, nor other faiths recognise as such; where the Supreme Being is neither the God of Israel nor the Holy Trinity nor Allah the Merciful etc but a vague nonentity.<sup>79</sup>

*B. Freedom of Religion, Belief, and Opinion*

Section 15(1) of the Constitution of the Republic of South Africa succinctly provides: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”<sup>80</sup> The question whether this provision includes establishment proscription was at issue in the Constitutional Court’s first judgment on the Religion Clause in the 1996 Constitution.<sup>81</sup> The appellant in one of the cases, *S. v. Solberg*, was convicted under the Liquor Act<sup>82</sup> for having sold wine on a Sunday in contravention of contrary terms in her grocer’s wine license. She claimed that the statutory proscription of the sale of wine on Sundays, Good Friday, and Christmas Day afforded

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78. *Id.* at 449.

79. *Id.*

80. S. AFR. CONST. (Act 108).

81. *See S. v. Solberg*, 1997 (10) BCLR 1348 (CC). The case was decided under the Interim Constitution, where religious freedom was dealt with in § 14, which has become § 15 of the current Constitution. For purposes of this article, references are made to the sections of the current Constitution and the references to constitutional provisions in the actual judgment have been adjusted accordingly.

82. Act 27 of 1989.

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preference to the Christian Sabbath and Christian holidays in violation of her right to religious freedom.

President Chaskalson (in whose judgment Deputy President Langa, and Justices Ackermann and Kriegler concurred) differentiated, along the lines of American jurisprudence, between the “establishment” and the “free exercise” of religion:

The primary purpose of the “establishment clause” in the United States constitution is to prevent the advancement or inhibition of religion by the State. The primary purpose of the “free exercise” clause is to permit adherents of different faiths to pursue their religious beliefs without being impeded from doing so by State coercion.<sup>83</sup>

Earlier in the judgment, he endorsed the following definition of freedom of religion given by Chief Justice Dickson in the Canadian case of *R. v. Big M. Drug Mart Ltd.*:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination,<sup>84</sup>

adding that “freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.”<sup>85</sup> Given these directives, Chaskalson decided that Section 15 of the Constitution does not include an establishment clause.<sup>86</sup> Establishment practices could possibly be rendered unconstitutional if they amount to unfair discrimination within the meaning of Section 9 of the Constitution,<sup>87</sup> and he was also open to conceiving circumstances in which endorsement of a religion or religious belief by the state could be held to contravene the free exercise provisions of Section 15, namely if the state should coerce people, directly or indirectly, to observe the practices of a

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83. *Solberg*, 1997 (10) BCLR 1348 (CC), para. 100.

84. *R. v. Big M. Drug Mart Ltd.*, (1985) 13 CRR 64, 97.

85. *Solberg*, 1997 (10) BCLR 1348 (CC), para. 92.

86. *See id.* at para. 101; *see also* *Ryland v. Edros*, 1997 (1) BCLR 77 (C), 86.

87. *See Solberg*, 1997 (10) BCLR 1348 (CC), para. 102. Since § 9 of the Constitution was not invoked by the appellant, the court was not willing to consider further whether selection of the Christian Sabbath and Christian holidays as “closed days” for purposes of the Liquor Act did amount to unfair discrimination.

particular religion, or would place constraints on them that would hinder observance of their own religion.<sup>88</sup> That had not been proven in the present case, and the court consequently decided that the concerned proscription of the Liquor Act does not violate the free exercise provisions of the Constitution.

There are indeed compelling reasons for holding that Section 15 of the Constitution does not entail an establishment clause. The section is couched in free exercise language, and in subsequent subsections actually makes provision for instances of establishment. Instances of establishment are also sanctioned in other sections of the Constitution to be alluded to hereafter.<sup>89</sup> However, the concurring judgment of Justice Sachs (joined by Justice Mokgoro) proceeded on the assumption that Section 15(1) does proscribe establishment.<sup>90</sup> The concurring opinion in essence held that the coupling of Sundays, Good Friday, and Christmas Day as “closed days” for the purpose of a grocer’s wine license amounted to endorsement by the state of the Christian Sabbath (only the sale of wine on a Sunday was at issue here) and that such religious favoritism violates the establishment component of Section 15(1). However, given the facts, first, that the commercial disadvantages suffered by persons whose religious day of rest falls on another day of the week and who, for religious reasons, might feel compelled to close their grocer business on that other day, would be trivial, and, second, constraining the sale of alcoholic beverage on certain days—albeit ones designated for religious reasons by Christianity—serve good secular purposes, the violation of Section 15(1) is justified under the limitations provision of the Constitution. Justice Sachs consequently concurred in the

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88. *See id.* at para. 104.

89. For these reasons, the reasoning of Malherbe that the constitutional guarantee of “freedom of conscience, religion, thought, belief and opinion” should be interpreted as including a free exercise guarantee as well as “establishment” proscriptions in a broad sense, and that the further provisions of § 15 (authorizing religious observances in state and state-aided institutions and legislation that could afford legality to marriages concluded under a system of religion) must be seen as exceptions to the rule against establishment, cannot be accepted. Malherbe, *supra* note 57, at 698.

90. *See Solberg*, 1997 (10) BCLR 1348 (CC), para. 160 (“The objective of section [15(1)] is to keep the State away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must.”).

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decision of the court, holding that the concerned provision of the Liquor Act is not unconstitutional.

The dissenting opinion of Justice O'Regan (joined by Justices Goldstone and Madala) admitted that § 15(1) does not contain an establishment clause,<sup>91</sup> but nevertheless held that "public endorsement of one religion over another is, in itself, a threat to the free exercise of religion."<sup>92</sup> Justice O'Regan disagreed with the proposition mooted by President Chaskalson that Section 15(1) could only be invoked if state coercion was involved; favoritism of one religion over others would in Justice O'Regan's opinion suffice for this variety of establishment to be censured under the general guarantee of freedom of religion.<sup>93</sup>

The minority opinion accordingly laid special stress on religious favoritism in South Africa's repressive past as a guide to constitutional provisions representing "a rejection of our history."<sup>94</sup> Having decided that freedom of religion "require[s] . . . that the legislature refrain from favouring one religion over others" and that "[f]airness and even-handedness in relation to diverse religions is a necessary component of freedom of religion,"<sup>95</sup> Justice O'Regan decided that the proscription under consideration amounted to unconstitutional favoritism of the Christian religion (also noting in particular the coupling of Sundays, Good Friday, and Christmas Day for purposes of that proscription); and furthermore, that the violation of religious freedom in this instance cannot be saved under the limitations clause.

In the latter context it should be noted that the dissenting opinion laid special stress on the fact that religious freedom was singled out in the Interim Constitution as one of a few constitutional rights that could only be subjected to limitations if those limitations were both reasonable and necessary.<sup>96</sup> The necessity requirement has been omitted from the limitations provision of the 1996 Constitution,<sup>97</sup> and one could perhaps argue that Justice O'Regan and the other two Justices who

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91. *See id.* at para. 116.

92. *Id.* at para. 123.

93. *See id.* at para. 128.

94. *Id.* at para. 123; *see also supra* text accompanying notes 34-44.

95. *Id.* at para. 128.

96. *See id.* at para. 130.

97. *See* S. AFR. CONST. (Act 108), § 36.

subscribed to her opinion might in the future conclude that the limitation of freedom of religion in cases like the one under consideration would be constitutionally justified. But that conclusion does not follow. There are good reasons to hold that the necessity requirement was omitted: first, because it was tautological (stricter scrutiny in some cases is already part of reasonable considerations) and second, because the necessity requirement created a misleading assumption as to the hierarchy of constitutionally protected rights and freedoms (as though the ones to which it applied were to be considered more important than those not included in the necessity category). Substantively, therefore, omission of the necessity requirement in the 1996 Constitution is without consequence.

In summary, as far as establishment considerations are concerned, the following opinions emerged:

- The Chaskalson opinion held that Section 15(1) of the Constitution deals with the free exercise of religion only, but that laws sanctioning establishment could possibly be contested under the equal protection and nondiscrimination provisions of Section 9.
- The O'Regan opinion agreed that Section 15(1) does not deal with establishment *per se*, but held that freedom of religion as such requires fairness and even-handedness and could therefore be invoked to strike down religious favoritism.
- The Sachs opinion simply assumed, without analysis or motivation, that Section 15(1) includes proscription of the establishment of religion.

### *C. Religion in State and State-Sponsored Institutions and the Establishment of Parochial Schools*

Constitutionally sanctioned establishment appears from the provisions of Section 15(2), which authorizes religious observances at state or state-aided institutions, subject, though, to three basic conditions:

- religious observances must follow rules made by the appropriate public authorities;
- they must be conducted on an equitable basis; and
- attendance at such observances must be free and voluntary.

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State and state-aided institutions include hospitals, prisons, and public schools.

The Constitution sanctions the right of “[e]veryone . . . to establish and maintain . . . independent educational institutions.”<sup>98</sup> The Interim Constitution expressly provided that such institutions could be based on a common culture, language or religion.<sup>99</sup> These criteria were not repeated in the 1996 Constitution, probably because they were too restrictive. For example, the Interim Constitution did not permit single-sex schools. Omission in the 1996 Constitution of the Equal Access Clause of Section 32(a) of the Interim Constitution is of special significance. Single sex schools in the public educational system are now arguably constitutional. Thus, independent educational institutions based on a common culture, language or religion, as well as (private) single-sex schools, are currently constitutionally tenable.

Independent (private) educational institutions must comply with the conditions mentioned above. Application of the Non-Discrimination Clause could be complicated. Putative egalitarianism may develop under the guise of all kinds of ostensibly race-neutral admission tests and cunning entry requirements. There are, in a word, more ways than one to kill a cat. The principle of “purposive discrimination,” developed in the United States to dispose of discriminatory neutral legislation that in its application amounts to de facto discrimination,<sup>100</sup> may serve as a useful guide for dealing with such matters: if it can be demonstrated that the purpose of an admission test or entry requirement was precisely to conceal a racial preference, then the institution should be judged to have been created in violation of the nondiscrimination imperative.

In the Interim Constitution, nothing was said about the financing of independent educational institutions. A strong argument could be made that state subsidies of such

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98. *Id.* at § 29(3).

99. *See* S. AFR. CONST. of 1993, (Act 200), § 32(c).

100. *See, e.g.,* *Mobile v. Bolden*, 446 U.S. 55 (1980) (finding no discriminatory motivation in an at-large election system which diluted Blacks’ voting power); *Washington v. Davis*, 426 U.S. 229 (1976) (sustaining a language test which kept a disproportionately high number of Blacks out of police jobs); *see also* Johan D. van der Vyver, *Comparative Law in Constitutional Litigation*, 111 S. AFR. L.J. 19, 30-31 (1994).



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institutions was imperative; if one has a constitutional right to a particular facility, amenity, or service, the state is under a complementary duty to provide that facility, amenity or service. *In re The School Education Bill of 1995 (Gauteng)*<sup>101</sup> decided differently. The matter has now, in any event, been clarified: independent educational institutions may be created and maintained at the founder's own expense.<sup>102</sup> Nothing, however, would preclude the state from subsidizing an independent educational institution.<sup>103</sup>

The question of free and voluntary attendance in state and state-aided educational institutions was at issue in the recent case of *Wittmann v. Deutscher Schulverein, Pretoria*.<sup>104</sup> The case involved the German School in Pretoria which is a private institution, financed to a large extent by the German Government. Religious education in the school was initially offered on a parochial basis (mainly Lutheran, but also Catholic), but after 1987, religious instruction was offered in a historical context and no longer from the perspective of any particular denomination. Consequently, attendance of religion classes was mandatory—free only to the extent that no one was obliged to go to that school. The plaintiff in the matter, a student in the German School, took issue with the School Association for being compelled to attend the religion classes. Leaving aside the question of whether the Interim Constitution of 1993—the one that was in force when the dispute arose—was applicable to the school,<sup>105</sup> the court found that the constitutional right not to attend religious observances is one that can validly be waived by its beneficiaries and that the plaintiff had done exactly that by subjecting herself to the school's rules and regulations when she enrolled as a student.<sup>106</sup>

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101. 1996 (4) BCLR 537 (CC), para. 42 (Kriegler, J.), para. 83 (Sachs, J.).

102. *See* S. AFR. CONST. (Act 108), § 29(3).

103. *See id.* § 29(4).

104. 1998 (4) SA 423 (T).

105. Under the Constitution currently in force, the German School is arguably an "organ of state" and is therefore subject to the constitutional Bill of Rights. *See* S. AFR. CONST. (Act 108), § 8(1) (making the Bill of Rights applicable to organs of state), § 239 (defining an "organ of state" as including "any . . . institution . . . performing a public function in terms of any legislation"). The German School is registered in terms of § 6 of Private Schools Act (House of Assembly) 104 of 1986, and providing education may be said to be a "public function."

106. *See Wittmann*, 1998 (4) SA 423 (T), 455.

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The constitutionality of legislation enacted to bring South Africa's education policy and practices in line with constitutional principles, the National Education Act<sup>107</sup> and the South African Schools Act,<sup>108</sup> was unsuccessfully contested.<sup>109</sup> In the case of the South African Schools Act, the plaintiff's constitutional attack focused on provisions that implicated the future of Afrikaans schools and Christian education. In a concurring judgment, Justice Sachs noted that

immense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even although these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past contained in the powerful postscript.<sup>110</sup>

*D. Marriages Concluded Under a System of Religion*

Roman-Dutch law—the common law system of South Africa—denies the status of marriage to all polygamous and potentially polygamous unions, which applies, *inter alia*, to Hindu and Muslim marriages,<sup>111</sup> and marriages concluded under indigenous African systems of law.<sup>112</sup>

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107. Act 27 of 1996.

108. Act 84 of 1996. The Act was initially introduced as a bill of the Gauteng legislature but was subsequently enacted as an Act of Parliament to apply nationally.

109. See *In re* the National Education Policy Bill No. 83 of 1995, 1996 (4) BCLR 518 (CC) (rejecting the submission that the bill would authorize the national authorities to usurp powers reserved for the provinces); *In re* the School Education Bill of 1995 (Gauteng), 1996 (4) BCLR 537 (CC).

110. *In re* the School Education Bill of 1995 (Gauteng), 1996 (4) BCLR 537 (CC), para. 52.

111. See *Ismail v. Ismail*, 1983 (1) SA 1006 (A), 1019-20; *Docrat v. Bhayat*, 1932 T.P.D. 125, 127; see also Firoz Cachalia, *Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry*, 56 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 392, 398-99 (1993).

112. See *Seedat's Executors v. The Master* (Natal), 1917 A.D. 302, 309; *Kaba v. Ntela*, 1910 T.S. 964, 967-69 (De Villiers, J.P.), 970 (Bristowe, J.); see also Johan D. van der Vyver, *Human Rights Aspects of the Dual System Applying to Blacks in South Africa*, in *THE INDIVIDUAL UNDER AFRICAN LAW* 130, 136-37 (Peter Nanyenya Takirambudde ed., 1982).

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While South Africa's transition to a democracy was being negotiated at Kempton Park in 1993, a Muslim delegation raised the problem of nonrecognition of Muslim family law. In consequence of the delegation's representations, a clause was added to the Interim Constitution which authorized legislation that would afford legal recognition to a system of personal and family law adhered to by persons professing a particular religion, specifically the validity of marriages concluded under a system of religious law subject to specified procedures.<sup>113</sup> Since this provision was evidently intended to sanction legislation that would afford legality to polygamous or potentially polygamous Muslim marriages, feminists protested, since polygamy is generally regarded as an affront to the equal treatment of women and as discrimination against women.

Two problems attending the South African provision came to light in the ensuing debate. First, since the legislation envisioned by this section of the Interim Constitution was authorized notwithstanding any other provision in the Chapter on Fundamental Rights,<sup>114</sup> the constitutionality of the legislation would remain unaffected by considerations of equal protection and nondiscrimination. Secondly, because the Constitution only authorized legislation that would legalize personal and family law, and marriages, founded on a particular religion or religious law (such as those obtained in the Muslim community), African polygamous marriages (referred to in South African legal jargon as "customary unions") could not be legalized under auspices of the section in question, because "customary unions" are not founded on any particular religious scruples.

The 1996 Constitution remedied both of these concerns. It now authorizes legislation recognizing marriages concluded under a system of religious, personal or family law, or under *any tradition*. Also, whereas the original provision was preceded by the phrase "Nothing in this Chapter shall preclude legislation . . . ," the 1996 Constitution now provides that recognition of marriages and of systems of personal and family

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113. See S. AFR. CONST. of 1993, (Act 200), § 14(3).

114. See *id.* ("Nothing in this Chapter shall preclude legislation recognising . . . .").

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law in terms of the new provision must be consistent with other provisions of the Constitution.<sup>115</sup>

Legislation contemplated in the Constitution to validate marriages concluded under a system of religion has thus far not been enacted. Given the insurmountable problem of reconciling polygamy with equal protection of, and nondiscrimination against, women, such legislation can perhaps do no more than repeal the legal impediment pertaining to *potentially* polygamous unions and legalizing *de facto* monogamous Muslim, Hindu, and African marriages. The new constitutional dispensation has had an effect, though, with regards to contractual arrangements attending potentially polygamous (in contradistinction to *de facto* polygamous) marriages.

Although until recently “customary unions” were not regarded as a marriage, statutory recognition has been given to many of the matrimonial consequences of such unions.<sup>116</sup> The legislature has been less accommodating in respect to Muslim and Hindu marriages. In *Ismail v. Ismail*, it was decided, on the contrary, that contractual obligations attending the invalid Muslim marriage, as well as other legal consequences intrinsic to the marriage (such as maintenance) are unenforceable.<sup>117</sup> The position taken in *Ismail* was reversed in the recent case of *Ryland v. Edros*.<sup>118</sup>

The court in *Ryland* addressed the effect of constitutional change in South Africa upon concepts such as public policy and the *boni mores* as criteria for the invalidation of certain legal acts or for rendering contractual arrangements unenforceable. The Constitution clearly established a new ethos founded on human rights and fundamental freedoms; and Section 39(2)

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115. S. AFR. CONST. (Act 108), § 15(3).

116. See, e.g., § 54A of Magistrates' Court Act 32 of 1944; see also § 1(1) of Law of Evidence Amendment Act 45 of 1988 (providing that a court of law may not declare the custom of *lobola* or *bogadi*—relating to dowry—to be repugnant to the principles of public policy or natural justice); § 22(7) of Black Administration Act 38 of 1927 (protecting the property rights of the female partner or partners in a customary union in the event of a subsequent civil marriage of the husband with someone other than the customary wife); § 31 of Black Laws Amendment Act 76 of 1963 (affording to wives of a customary union the dependents' claim in the event of the male partner's death through a negligent or intentional act of a third person).

117. See *Ismail v. Ismail*, 1983 (1) SA 1006 (A) 1019-20; *Docrat v. Bhatat*, 1932 T.P.D. 125, 127; see also Cachalia, supra note 111, at 398-99.

118. 1997 (1) BCLR 77 (C), 86; see also *S. v. Solberg*, 1997 (10) BCLR 1348 (CC), para. 101.

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instructs a court, tribunal or forum, when called upon to interpret any legislation, or to develop the common law and customary law, to “promote the spirit, purport and objects of the Bill of Rights.” Since the parties in *Ryland* were indeed married according to Muslim rites (even though not according to South African law), and since their union was indeed monogamous, the court could find nothing morally obnoxious in their conjugal relationship. Consequently, the court held that contractual arrangements attending that union—pertaining to maintenance and a compensatory gift according to Muslim custom—are currently, under the new constitutional dispensation, neither against public policy nor *contra bonis mores*, and are therefore enforceable. The court was not called upon to proclaim the marriage valid,<sup>119</sup> and expressly confined the binding effect of its judgment to a potentially polygamous union that is in fact monogamous.

In *Amod v. Multilateral Motor Vehicle Accident Fund*,<sup>120</sup> the Durban and Coast Local Division of the High Court was not prepared to make the contractual obligations that attended an invalid Muslim marriage effective against third parties. The plaintiff in that case sought to claim damages, pursuant to the third party insurance law of South Africa, from the person responsible for the death, in a car accident, of her “husband.” *Amod* thus related to the liability of a third person to compensate the dependents of the person for whose death the third person was legally responsible for their loss of support. Under South African law, the liability of the third person to pay damages extends only toward those dependants who had a right sanctioned by statutory or the common law (in contradistinction to a right emanating from contract) to be maintained by the deceased. Since the Muslim marriage was considered invalid by South African law, no obligation sanctioned by positive law had vested in the deceased to support the plaintiff, and therefore her action for damages failed. The fact that the deceased was under a contractual duty

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119. At least one commentator saw this judgment as possibly a step toward affording legality to potentially polygamous marriages. See I.P. Maithufi, *Possible Recognition of Polygamous Marriages: Ryland v. Edros 1997 (2) SA 690 (C)*, 60 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 695 (1997).

120. 1997 (12) BCLR 1716 (D).

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to provide support for his "wife" was, in terms of the law as it stands, insufficient ground to substantiate the dependant's claim of the plaintiff. The court distinguished the judgment in *Ryland v. Edros* in that the contractual obligation enforced in that case was a matter between husband and wife only and did not involve the liability of third persons.

The influence of the 1996 Constitution on African customary unions will also be far-reaching. By virtue of Section 54A of the Magistrates' Courts Act, a court may not apply indigenous law found to be "opposed to the principles of public policy or natural justice."<sup>121</sup> Here again, Section 39(2) of the Constitution instructs any court, tribunal, or forum called upon to interpret a statutory provision to do so in a manner that will "promote the spirit, purport and objects of the Bill of Rights."<sup>122</sup> This means, among other things, that the meaning of "public policy" and "natural justice" will henceforth have to be established with that in mind; and it is reasonable to assume that courts, tribunals, and fora will be constrained to find that rules of African customary law that contradict the human rights guarantees enunciated in the Constitution are unenforceable; not because such customary law is thought to be unconstitutional, but by virtue of the criteria of the Magistrates' Courts Act as reinterpreted in accordance with section 39(2) of the Constitution. As far as the obligation to seal a customary marriage by payment of dowry is concerned, the Magistrates' Courts Act expressly provides that this custom of *lobola* or *bogadi* may not be declared repugnant to the principles of public policy or natural justice.<sup>123</sup> If the High Court should find that the practice of *lobola* or *bogadi* violates the equal protection of women as guaranteed in Section 9 of the Constitution, it will be obligated to find this provision null and void.<sup>124</sup> The consequence of such a finding will not be to render unconstitutional the practice of *lobola* or *bogadi* as such, but would simply leave the door open for a magistrates' court to find that this practice violates the principles of public policy or

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121. § 54A of Magistrates' Court Act 32 of 1944; *see also* § 1(1) of Law of Evidence Amendment Act 45 of 1988.

122. S. AFR. CONST. (Act 108), § 39(2).

123. *See* § 54A of Magistrates' Court Act 32 of 1944.

124. *See* S. AFR. CONST. (Act 108), § 172(1)(a).

natural justice; in which event the practice will be considered unenforceable in a court of law.

Recently, the South African Parliament enacted the Recognition of Customary Marriages Act,<sup>125</sup> which afforded recognition as a marriage to all existing (African) customary marriages, as well as future customary marriages that comply with the substantive requirements and formalities of the Act. Polygamy is not an obstacle to the recognition as a marriage of such customary unions.

No such legislation has been enacted to legalize Muslim or Hindu marriages and this can of course raise questions of equal protection and nondiscrimination. However, the Muslim community might elect to follow a different strategy. An insightful law-review article by a Muslim feminist<sup>126</sup> proposes that Muslim personal law be recognized in terms of Section 15(3)(a) of the 1996 Constitution, exactly so that its provisions can be brought into conformity with the constitutional Bill of Rights as required by Section 15(3)(b). Under Islamic law, women are discriminated against, and the new constitutional dispensation in South Africa provides the opportunity to do something about that.

Even though the final Constitution promotes and protects the human rights of women through national machinery, their powers do not extend beyond the Constitution. Gradual social reform within the Muslim community, along with active participation by Muslim women, appear to be more realistic safeguards and long term solutions for effective improvement to the status of Muslim women.<sup>127</sup>

#### *E. Equal Protection and Nondiscrimination*

Section 9 of the 1996 Constitution guarantees equality of everyone before the law and “the right to equal protection and benefit of the law,”<sup>128</sup> subject to remedial action “to protect or

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125. Act 120 of 1998.

126. See Najima Moosa, *The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women*, 9 STELLENBOSCH L. REV. 196 (1998).

127. *Id.* at 205.

128. S. AFR. CONST. (Act 108), § 9(1).

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advance persons, or categories of persons, disadvantaged by unfair discrimination.”<sup>129</sup>

Section 9(3) prohibits unfair discrimination, directly or indirectly, by the State based on, among other things, religion, conscience, or belief. Section 9(4) prohibits unfair discrimination on the same grounds by any person other than the state, but in this instance the proscription must be further sanctioned through national legislation aimed at either preventing or prohibiting the discrimination. Section 9(5) creates a rebuttable presumption that discrimination based on any of the grounds mentioned above is unfair.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965<sup>130</sup> defines discrimination as

any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>131</sup>

Since a court, tribunal or forum interpreting the provisions of the Bill of Rights “must consider international law,”<sup>132</sup> this definition must count for something. It should be noted, however, that the prohibition of discrimination in the South African Constitution is not confined to the denial or impairment of recognition, enjoyment or exercise of human rights and fundamental freedoms only, but embraces all instances of unfair discrimination. Also, this prohibition is not confined to distinctions, exclusions, restrictions or preferences in public life only, but also extends to those obtaining in the private sphere of a person’s day-to-day life . . . unless the distinction, exclusion, restriction or preference is proved to be fair. But even

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129. *Id.* § 9(2).

130. 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966).

131. *Id.* at art. 1; see also *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 180 (XXXIV), art. 1 (1979), reprinted in 19 I.L.M. 33 (1980); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 55 (XXXVI), art. 2.2 (1981), reprinted in 21 I.L.M. 205 (1982); *I.L.O. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*, art. 1(1)(A) and (B) (1958); *UNESCO Convention Against Discrimination in Education*, art. 1(1) (1960).

132. S. AFR. CONST. (Act 108), § 39(1)(b).



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then, if the person wishing to uphold the constitutionality of discrimination based on any of the grounds specified in Section 9(3) fails to rebut the onus created by Section 9(5), he could nevertheless invite a finding of constitutionality on the basis that the discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom as envisaged in the Limitations Clause.<sup>133</sup>

The Constitution thus compels the interpreter to distinguish between the fairness and the reasonableness of discrimination— an exercise fraught with difficulties, contradictions and discrepancies in the history of legal ethics. The chances are that South African courts will relegate the question of fairness to the relics of constitutional rhetoric and throughout apply the directives of reasonableness.

Establishment of a religion—in the sense of the state either coercing someone to abide by the tenets of a religion other than their own or to forsake those of their own religion, or sanctioning or practicing favoritism in respect of a particular religion or some religion—will have equal protection and nondiscrimination implications. Establishment through interference in the sovereign sphere of religious institutions might be rendered constitutionally tenable by imposing on persons other than the state the obligation to refrain from unfair discrimination as envisaged in Section 9(4).

Implications of the proscription of discrimination by persons or institutions<sup>134</sup> other than organs of state may be considered in light of a recent lively debate which erupted in South Africa concerning the refusal of the Roman Catholic Church to ordain women as priests. The question to be considered here is whether this is a matter that may come within the confines of constitutional scrutiny.

The 1993 Interim Constitution was carefully crafted to exclude the decisions taken and acts performed by “private” persons, and the conduct and internal rules of conduct of institutions other than the State, from Bill of Rights control.<sup>135</sup>

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133. *See id.* § 36(1).

134. Note in this regard that the Bill of Rights binds juristic persons (which in South African law includes ecclesiastical institutions) if, and to the extent that, it is applicable, “taking into account the nature of the right and the nature of any duty imposed by the right.” *Id.* § 8(2).

135. *See* Johan D. van der Vyver, *Constitutional Free Speech and the Law of*

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That Constitution did, however, make provision for civil rights legislation “to prohibit unfair discrimination” by persons and institutions whose conduct escaped the application of its provisions.<sup>136</sup>

Section 9(4) of the 1996 Constitution represents one of several provisions that deviate from the 1993 policy arrangement.<sup>137</sup> It expressly makes the nondiscrimination decree applicable to persons other than organs of state—which, in terms of Section 8(2), include natural and juristic persons. It thus imposes on the Roman Catholic Church a constitutional obligation not to discriminate against women<sup>138</sup> and, one should also note, against gays and lesbians.

The wording of Section 9(4) suggests that women wishing to be ordained as priests cannot rely on that Section per se to claim their constitutional right. Differing in this respect from its state-action counterpart,<sup>139</sup> this subsection instructs the legislature to enact legislation to give effect to its decree.

The purpose of leaving it to the legislature to further execute the constitutional proscription of discrimination by persons and institutions other than organs of state was presumably to leave it up to the political representatives of the people to decide which instances of such discrimination may be considered “unfair,” or would provoke such a measure of public outcry that it ought to be prohibited. If that is the case, the wording of the subsection was badly chosen. It does not merely authorize legislation to outlaw discrimination by persons and institutions other than the organs of state, it mandates such legislation.

This, in turn, raises the question how the imperative of section 9(4) could be enforced. For any court, including the Constitutional Court, to instruct the legislature to enact a law would constitute a violation of the separation of powers and of the principle of democracy—both of which have been singled

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*Defamation*, 112 S. AFR. L.J. 572, 586-89 (1995); Johan D. van der Vyver, *The Private Sphere in Constitutional Litigation*, 57 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 378 (1994).

136. S. AFR. CONST. of 1993, (Act 200), § 33(4).

137. See S. AFR. CONST. (Act 108), § 9(4).

138. See Nicholas Smith, Comment, *Freedom of Religion Under the Final Constitution*, 114 S. AFR. L.J. 217, 224-25 (1997).

139. See S. AFR. CONST. (Act 108), § 9(3).

out as salient norms of the new constitutional dispensation.<sup>140</sup> The most the Constitutional Court can do is to proclaim that the legislature, by not enacting the legislation called for in Section 9(4), is in breach of a constitutional duty, and then leave it up to the legislature, and eventually to the electorate, to decide how to respond to the certified neglect of duty.

If legislation is enacted that prohibits unfair discrimination within the structures of religious institutions, the Roman Catholic Church might still claim that disqualification of women as priests is—given the history and dogma of the Church—not unfair, or at least not unreasonable. The Church might also cite the constitutional right to self-determination afforded to cultural, religious and linguistic communities “to enjoy their culture, practise their religion and use their language”,<sup>141</sup> but, then again, “that right may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”<sup>142</sup>

The merits of these claims are, for purposes of the present survey, neither here nor there. The mere fact that the Roman Catholic Church might be constrained to justify its internal ruling before a secular tribunal smells of totalitarianism of the worst kind. It is worth remembering that the exercise of political power in South Africa condemned by the Constitution included many such totalitarian practices. If the new “open and democratic society based on human dignity, equality and freedom”<sup>143</sup> is to be a “never again” society, such practices ought to be avoided as much as any manifestation of discrimination.

#### *F. The Ceremonial Use of Drugs for Religious Purposes*

The judgment of the United State Supreme Court in the case of *Employment Division Department of Human Resources of Oregon v. Smith*,<sup>144</sup> in which it was decided that an Oregon statute that prohibited the use of the hallucinating drug, Peyote, by the North American Church for sacramental

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140. See Constitutional Principles I and VIII (democracy), and VI (separation of powers), S. AFR. CONST. of 1993, (Act 200), schedule 4.

141. S. AFR. CONST. (Act 108), § 31(1)(a).

142. *Id.* § 31(2).

143. *Id.* §§ 36(1), 39(1)(a); see also *id.* § 7(1).

144. 494 U.S. 872 (1990).

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purposes did not violated the free exercise clause of the First Amendment, has also had repercussions in South Africa. *Prince v. President of the Law Society, Cape of Good Hope*,<sup>145</sup> is illustrative of this impact.

The applicant in that case was a law graduate whose application for registration of his contract of community service, as a prelude for admission to the practice of attorney, had been refused by the Cape Law Society. The Law Society judged that he was not “a fit and proper person” for legal practice because of two previous convictions for the illegal possession of a dependence-producing drug, cannabis (better know in South Africa as “dagga”), and his stated resolve to continue using the drug. In his application to the court for the decision of the Law Society to be set aside, the applicant maintained that he was a member of a certain sect, the Rastafari religion, that cannabis was regarded by that sect as a “Holy Herb,” and that its use constituted an integral part of Rastafari rituals.

The Court decided that the statutory prohibition of the possession and use of cannabis was a fair and reasonable limitation of the constitutional right to freedom of religion, following in this regard several American<sup>146</sup> and Canadian<sup>147</sup> judgments pertaining to the use of marijuana (the American equivalent of dagga) for religious purposes.

### G. *The Judiciary and Doctrinal Entanglement*

The semblance of religious neutrality in the United States has precluded American courts from exercising jurisdiction in matters involving “doctrinal entanglement” in the dispute, which is perceived to be the case whenever an interdenominational quarrel or a conflict of interest between a church and any of its members cannot be resolved without an inquiry into doctrinal issues.<sup>148</sup>

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145. 1998 (8) BCLR 976 (C).

146. *See, e.g.*, *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986); *Whyte v. United States*, 471 A.2d 1018 (D.C. 1984); *State v. Blake*, 695 P.2d 336 (Haw. Ct. App. 1985); *Commonwealth v. Nissenbaum*, 536 N.E.2d 592 (Mass. 1989); *State v. Brashear*, 593 P.2d 63 (N.M. Ct. App. 1979); *State v. Rocheleau*, 451 A.2d 1144 (Vt. 1982).

147. *See Regina v. Kerr*, [1986] 75 N.S.J. (2d) 305 (Can.).

148. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church v. Hull Church*, 393 U.S.

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In South Africa, courts of law will not adjudicate upon a purely doctrinal dispute between schisms of a religious sect, but should a conflict arise as to the legal rights and duties of parties to a dispute, a court will not decline to give a judgment in the matter by reason of doctrinal issues that might have a bearing on those rights and duties.<sup>149</sup> South African courts have thus, for example, entertained jurisdiction to decide which one of two religious factions was entitled to the use of a particular name,<sup>150</sup> or could lay claim to church property,<sup>151</sup> following a schism; and they have taken decisions of an internal ecclesiastical tribunal on review.<sup>152</sup>

The question as to the degree to which the new constitutional dispensation may have affected the jurisdiction of state courts where “doctrinal entanglement” prevails was raised, but not decided, in *Ryland v. Edros*.<sup>153</sup> Judge Farlam stated in that case that the American position as to “doctrinal entanglement” might well have become part of South African law in virtue of the new constitutional principles pertaining to freedom of religion.<sup>154</sup> Although the South African Constitution does not have an Establishment Clause, the American rule pertaining to “doctrinal entanglement” can also be based on free exercise considerations.<sup>155</sup>

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440 (1969); *Kedrof v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). In *Jones v. Wolf*, a majority of the Court decided that a property dispute emanating from a church schism could indeed be decided on “neutral principles,” and the Court consequently exercised jurisdiction to resolve the dispute. 443 U.S. 595, 602-03 (1979).

149. See *Allen v. Gibbs*, 1977 (3) SA 212 (SEC), 218.

150. See *Old Apostolic Church of Africa v. Non-White Old Apostolic Church of Africa*, 1975 (2) SA 684 (C).

151. See *The Nederduitsche Hervormde Church v. The Nederduitsche Hervormde of Gereformeerde Church*, 1893 C.L.J. 327.

152. See *Theron en Andere v. Ring Van Wellington Van Die N.G. Sendingkerk in Suid-Afrika en Andere*, 1976 (2) SA 1 (A); *Jamile v. African Congregational Church*, 1971 (3) SA 836 (D).

153. See *Ryland v. Edros*, 1997 (1) BLCR 77 (C), 86-87.

154. See *supra* note 148.

155. Judge Farlam referred in this regard to *United States v. Ballard*, 322 U.S. 78 (1944). However, that case (admittedly on free exercise grounds) simply reiterated that courts of law in America are precluded from establishing the truth or falsehood of religious beliefs. In a dissenting judgment, Justice Stone (in whose judgment Justices Roberts and Frankfurter concurred) was not prepared to hold that the constitutional guarantee of freedom of religion would afford immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one’s religious experiences. See *id.* at 88-89 (Stone, J., dissenting).

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I would submit that South African law regarding the jurisdiction of courts of law in matters where religious belief becomes an issue is sound as it is. It is not for state institutions to judge the substance, or the truth or falsity, of religious belief per se. However, it is a vital function of government to resolve, through its judicial arm, disputes pertaining to the rights and obligations of its subjects. Courts of law ought not to shy away from that function merely because those rights and obligations cannot in a given case be established without considering doctrinal issues.

## V. CONCLUSION

When Nelson Mandela was inaugurated as President of the Republic of South Africa, the official ceremony included a religious service attended by reading from scriptures and prayers—not as incidentals of “solemn deism,” but in a spirit of genuine devotion and humility before the Supreme Being who guided the peoples of South Africa to miraculously settle their differences in a peaceful manner and with the preservation of, and mutual respect for, the ethnic, religious, and linguistic attributes of every section of the community.

A decidedly religious component of momentous occasions has, of course, always been commonplace in South Africa. What was new, however, was that the devotion on that memorable autumn day was not—as in the past—restricted to the Christian faith. It included participation of other major religions with a substantial following in the country, including dignitaries of the Muslim and Hindu communities.

The inauguration of President Mandela clearly illustrates the principle that now governs church-state relations in South Africa. The “new” South Africa is not a secular state but seeks to uphold religiously neutral practices; and it does so in conformity with the egalitarian foundation of its constitutional system.

The *Grundnorm* of any particular political community—the basic norm that irradiates and modifies all its laws and institutions—derives from the history of the people, and is quite often, in a reactionary sense, conditioned by a lamentable past which the current constitutional dispensation seeks to overcome. That is at least true of both the United States and South Africa.

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But there the similarities end; while the anticolonial spirit of the American Constitution afforded preferential status to the First Amendment freedoms and accordingly instilled essentially libertarian values in the fabric of all constitutional arrangements, South Africa, in response to its history of institutionalized discrimination, constructed a new dispensation where considerations of human dignity and equal protection reign supreme. Whereas the libertarian purport of American institutions dictated the “wall of separation” of church and state with all its ramifications, the egalitarian predilections of South Africa set that country on a different course. In South Africa, religion is not perceived as a governmental taboo, but rather the South African Constitution requires evenhandedness in official dealings relating to religion and religious institutions.

Take the following example: the broadcasting of religious services by the state-controlled radio and television corporation is not prohibited in South Africa; it is, on the contrary, encouraged. All the major religions with a substantial following in South Africa are eligible for conducting such services. Time slots are allocated by the appropriate authorities with a view to the norm of equal treatment—which means that the time for religious broadcasting allocated to a particular denomination is calculated to be proportional to the percentage of support enjoyed by that denomination. When a particular Pentecostal denomination, the Rema Church, sought to buy extra time for the broadcasting of its services, its application was turned down by the media authorities; permitting religious groups who could afford to pay for extra time slots on radio and television to do so, would defeat the egalitarian intent of the South African constitutional order.

In education, too, South Africa remains favorably disposed toward promoting spiritual values in the minds of young people, and doing so through the good offices of state institutions. That is why religious observances in state and state-aided institutions is permitted by the Constitution, provided only that, in the context of establishment, all religious groups are treated equally and, in the spirit of free exercise, participation in such observances remains a matter of voluntary choice.

Attempts of the authorities to come to terms with African values is further evidenced by the legislation that afforded full

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legal sanction to African customary marriages, including those that are, or in future will become, polygamous. There was also a judgment in the Transvaal Provincial Division of the High Court not so long ago<sup>156</sup> to the effect that the institution of primogeniture in African customary law of intestate succession (which deemed African women incompetent to inherit under that system) did not amount to *unfair* discrimination within the meaning of the Interim Constitution—that is, said Judge Le Roux, “[i]f one accepts the duty to provide [the widow with] sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture.”<sup>157</sup> Legislation has been introduced in the South African Parliament<sup>158</sup> which, when enacted, will amend the Intestate Succession Act of 1987<sup>159</sup> with a view to making its provisions applicable to all South Africans, and at the same time to repeal the customary-law rules of intestate succession that had attended customary marriages of Africans, including the institution of primogeniture.

Reconciliation of the values imbedded in African culture with the demands of equal protection and nondiscrimination still has to be put to the test of judicial review. Justice Mokgoro of the Constitutional Court noted on one occasion that customary law “remains integral to the domestic culture of millions of South Africans” and must “be accorded due respect.”<sup>160</sup> She referred to the “delicate and complex” task of accommodating customary law to the values embodied in the Constitution. “This harmonisation exercise,” she went on to say, “will demand a great deal of judicious care and sensitivity.”<sup>161</sup>

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156. *See Mthembu v. Letsela*, 1997 (2) SA 936 (T).

157. *Id.* at 945.

158. *See Amendment of Customary Law of Succession Bill*, Bill 109-98 (1998).

159. Act 81 of 1987.

160. *Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC), para. 174.

161. *Id.*