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Freedom *of* or Freedom *from* Religion?  
An Overview of Issues Pertinent to the Constitutional  
Protection of Religious Rights and Freedom in  
“the New South Africa”

*Lourens du Plessis\**

I. INTRODUCTION

In a previous issue of this Law Review, Johan D. van der Vyver proffered an insightful, profound, and markedly exhaustive perspective of the evolution of church-state relations in South Africa.<sup>1</sup> He painted an instructive picture of historical developments that shaped church-state relations in South Africa prior to the advent of constitutionalism in 1994. He then assessed developments since 1994 against this historical backdrop. It would be fruitless to duplicate this tour de force—especially its historical (pre-1994) dimension. Consequently, this article will supplement van der Vyver’s post-1994 exposition with an overview of more recent developments. Additionally, the article will revisit issues that van der Vyver raised, putting a thematic spin on them.

The first thematic concern is the extent to which the protection of religious human rights and freedom in South Africa’s Constitution<sup>2</sup> serves to enhance tolerance among a religiously, ethnically, economically, and politically diverse population. Religious pluralism,

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1. Johan D. van der Vyver, *Constitutional Perspective of Church-State Relations in South Africa*, 1999 BYU L. REV. 635. For other overviews of the constitutional protection of religious freedom in South Africa, see Lourens M. du Plessis, *Religion, Law and State in South Africa*, 4 EUR. J. FOR CHURCH AND ST. RES./REVUE EUROPÉENNE DES RELATIONS ÉGLISES-ÉTAT 221 (1997) and E.F.J. Malherbe, *Die Grondwetlike Beskerming van Godsdiensvryheid*, TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 673 (1998).

2. S. AFR. CONST. (Act 108, 1996).

in and of itself, has never been a major source of inter-individual and inter-group intolerance in South Africa. However, racial and ethnic conflict (including tensions between modernism and traditionalism), class tension, and political strife have found expression in the religious life of a nation where the vast majority profess some kind of religious affiliation.<sup>3</sup>

The second concern is whether, in light of South Africa's post-1994 constitutional case law, it is realistic to expect that judicial constructions of religious freedom might proceed beyond the mere allowance of a *passive toleration* of individual religious free exercise. Is it realistic to hope that constitutional warranties may be forthcoming in order to sustain the identity and integrity of dissimilar religious groups and communities, in a country where incongruities intertwined with religious life are rife? This expectation is premised on the cultivation of *active religious tolerance* in a state that abstains from favoring any particular religious communities or sentiments.

## II. THE TRANSITION TO CONSTITUTIONALISM

### A. *The Transitional Constitution*

The product of intense negotiation, South Africa's first justiciable Constitution (the "transitional" or "1993 Constitution"),<sup>4</sup> entered into force on April 27, 1994 (coinciding with the first fully democratic elections in the country's history). This Constitution was a transitional one, "provid[ing] a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."<sup>5</sup>

The transitional Constitution paved the way for the final Constitution. It also made generous provision for the protection of funda-

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3. For statistics, see Amanda Gouws & Lourens M. du Plessis, *The Relationship Between Political Tolerance and Religion: The Case of South Africa*, 14 EMORY INT'L L. REV. 657, 659-61 (2000).

4. S. AFR. CONST. (Act 200, 1993).

5. *Id.* ch. 15, § 251 (National Unity and Reconciliation). These words occurred in a most unusual Postscript or Postamble to the 1993 Constitution.

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mental freedoms, including religious rights<sup>6</sup> and other rights conducive to the realization of the same. These other rights include the right to equality,<sup>7</sup> freedom of expression,<sup>8</sup> freedom of association,<sup>9</sup> and others.<sup>10</sup> Moreover, religious rights were immune from suspension during a state of emergency,<sup>11</sup> and the limitation of these rights was subject to a stricter form of scrutiny than the limitation of most other rights.<sup>12</sup> Thus, in spite of its transitional nature, the 1993 Constitution effectively protected an impressive catalogue of rights, thereby laying a sound foundation for the eventual protection of rights, including religious rights, in the final Constitution. Finally, the transitional Constitution trail-blazed the rise of a South African constitutional jurisprudence.

*B. The Final Constitution*

The final Constitution (or the "1996 Constitution") was agreed on by a Constitutional Assembly and adopted by Parliament. After its adoption, compliance with the transitional Constitution's "Constitutional Principles"<sup>13</sup> had to be certified by the Constitutional Court.<sup>14</sup> The Constitutional Court referred the text back to the Assembly because it was of the opinion that, in certain respects, the text did not comply with the Constitutional Principles.<sup>15</sup> An improved text was then resubmitted, and this text eventually withstood judicial scrutiny.<sup>16</sup> The Constitution of the Republic of South Africa<sup>17</sup> there-

6. *See id.* ch. 3, § 14.

7. *See id.* ch. 3, § 8.

8. *See id.* ch. 3, § 15.

9. *See id.* ch. 3, § 17.

10. *See, e.g., id.* ch. 3, §§ 7–35. For a depiction of the "transitional qualities" of the 1993 Constitution, see generally LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS (1994).

11. *See* S. AFR. CONST. (Act 200, 1993) ch. 3, § 34(5)(c).

12. *See id.* ch. 3, § 33(1)(b)(aa). For an overview of the protection of religious rights under South Africa's 1993 Constitution, see Lourens M. du Plessis, *Religious Human Rights in South Africa*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 441 (Johan D. van der Vyver & John Witte Jr. eds., 1996) [hereinafter LEGAL PERSPECTIVES].

13. *See* S. AFR. CONST. (Act 200, 1993) sched. 4.

14. *See id.* ch. 5, § 71(2).

15. *In re* Certification of the Constitution of the Republic of S. Afr. 1996, 1996 (10) BCLR 1253 (CC).

16. *In re* Certification of the Amended Text of the Constitution of the Republic of S. Afr. 1996, 1997 (1) BCLR 1 (CC).

upon entered into force on February 4, 1997. This final approved 1996 Constitution will serve as the principal point of reference in the overview that follows. However, much of the jurisprudence considered in this article is based on the transitional Constitution.

The 1996 Constitution has, in many respects, been designed to inculcate tolerance among South Africans. Passive tolerance means that people bear or put up with one another; affirmative tolerance means that they understand, accept, and appreciate one another. The latter form is worth striving for, but a minimum, basic (albeit passive) tolerance is preferable to no tolerance at all.<sup>18</sup> Some of the general value statements in the 1996 Constitution make it clear that the reconciliation of individuals, groups, and communities whose interests are potentially in conflict is one of the Constitution's priorities.

For instance, the preamble suggests the significance of national reconciliation—in light of a history of suffering and injustice—thereby connoting the political necessity of positive tolerance.<sup>19</sup> The explicit protection of the right to freedom of religion and the right to religious equality must be understood as part of this project of cultivating tolerance. Specific provision is made for the particular concerns created by a diversity of religious individuals and communities, so much so that it may well be said that the Constitution foresees a celebration of religious plurality in South Africa—in other words, a high degree of affirmative tolerance. Section 31<sup>20</sup> may well be understood as enjoining the “religious majority”—whoever they may be—to honor the “otherness” of the other. As a result, an era of privileging certain understandings of the Christian faith<sup>21</sup> has most certainly come to an end. Furthermore, the constitutional entrenchment of some other rights, including rights that are not so conspicuously religious,<sup>22</sup> will help to sustain typical religious activities such as preaching, witnessing, proselytizing, and assembling or congregating.

The aforementioned dimensions of the Constitution, constituting points of departure for the protection of religious freedoms, will now be considered in light of relevant constitutional jurisprudence,

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17. S. AFR. CONST. (Act 108, 1996).

18. *See generally* Gouws & du Plessis, *supra* note 3, at 657–59.

19. *See infra* Part IV.A.

20. *See infra* Part VI.C.

21. *See infra* Part III.

22. *See infra* Part VII.

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with particular reference to the following principles: first, the traditional Christian bias in South African law; second, "the constitutional context," which includes the potential impact of general constitutional value statements and the interpretation of general limitation and suspension clauses on the adjudication of religious rights; third, explicit constitutional guarantees of religious rights; fourth, constitutional guarantees designed to ensure an evenhanded accommodation of particularistic religious concerns and penetrate the proverbial wall of separation between church and state; and fifth, the entrenchment of rights (other than explicitly religious rights) that can secondarily sustain religious activities.

III. THE TRADITIONAL CHRISTIAN BIAS IN SOUTH AFRICAN LAW<sup>23</sup>

Before April 27, 1994, South African law showed a distinct Christian bias in several ways:

- the existence of a series of Sunday observance laws;<sup>24</sup>
- censorship legislation<sup>25</sup> that introduced blasphemy as a criterion for censorship and stated that "[i]n 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>26</sup>
- allowance for only the Christian form of the oath in criminal proceedings;<sup>27</sup> and
- a constitutional confession of faith in section 2 of the 1983 Constitution<sup>28</sup> as well as statements showing a bias for Christianity, as understood by Afrikaner Calvinists, in its preamble.

The constitutional entrenchment of religious rights since April 27, 1994 has rendered religiously biased provisions both in statutes and in the common law prone to constitutional challenges. Surpris-

23. For a more detailed discussion of instances of this bias and its effects, see van der Vyver, *supra* note 1, at 636–42.

24. See Johan D. van der Vyver, *Religion*, in 23 THE LAW OF SOUTH AFRICA 175, 198–99 (W.A. Joubert & T.J. Scott eds., 1986).

25. See the now-repealed Publications Act 42 of 1974.

26. See *id.* § 1.

27. See section 162(1) of the Criminal Procedure Act, Act 51 of 1977. Witnesses objecting to this could make an affirmation in lieu of the oath. *Id.* § 163.

28. S. AFR. CONST. (Act 110, 1983) section 2 reads: "The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God."

ingly few of these provisions have been legally challenged so far. However, Parliament has in some instances substituted new legislation for religiously biased legislation.<sup>29</sup> The object of the new legislation has not necessarily been the systematic eradication of statutory provisions showing a Christian bias, and the demise of the latter has mainly been a byproduct of broadly conceived legislative reforms.

#### IV. THE CONSTITUTIONAL CONTEXT

##### *A. General Constitutional Value Statements*

The eminently conciliatory preamble to the 1996 Constitution reads as follows:

We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to: Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people. Nkosi Sikelel' i Afrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.<sup>30</sup>

From a religious freedom perspective, the multilingual reference to “God” in the closing sentences of the preamble can be seen to favor monotheistic beliefs. Whether this is an intentional gesture of intol-

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29. Examples of such new legislation are the Films and Publications Act 65 of 1996 which replaced the Publications Act 42 of 1974, and (arguably also) the Choice on the Termination of Pregnancy Act 92 of 1996, which replaced the Abortion and Sterilization Act 2 of 1975.

30. S. AFR. CONST. (Act 108, 1996) preamble.

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erance towards polytheists and atheists is doubtful, but it is inconsiderate nonetheless.<sup>31</sup> In the South African context, preambles to a legislated text traditionally have been held to be only of secondary consequence in the interpretation of such a text.<sup>32</sup> However, the preamble to the constitutional text significantly influences its interpretation.<sup>33</sup>

The constitutional protection of rights is premised on human dignity, equality, and freedom. These foundational values are mentioned in the Constitution’s opening section,<sup>34</sup> the article introducing the Bill of Rights,<sup>35</sup> as well as in the general interpretation<sup>36</sup> and limitation<sup>37</sup> clauses. The centrality of human dignity emphasizes the importance of promoting respect and understanding in human relations. This probably accounts for the explicit limitations on freedom of expression.<sup>38</sup>

### B. *The Interpretation Clause*

Section 39(1) provides guidelines for the interpretation of the Bill of Rights in the Constitution as follows:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum  
 (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.<sup>39</sup>

This provision makes the consideration of international standards for the protection of all rights—including religious rights—obligatory while permitting resort to the law (including the jurisprudence) of other jurisdictions.

The values of interpretive significance written into the body of the constitutional text itself carry as much weight as any other provi-

31. *See also* van der Vyver, *supra* note 1, at 649–52.

32. LOURENS M. DU PLESSIS, *THE INTERPRETATION OF STATUTES* 123–25 (1986).

33. *Kauesa v. Minister of Home Affairs*, 1994 (3) BCLR 1 (NmH) 34F–I. In deciding the constitutionality of capital punishment, the Constitutional Court also generously relied on statements in the unusual Postamble to the transitional Constitution in *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC) paras. 7, 130, 223, 237–38, 244–45.

34. S. AFR. CONST. (Act 108, 1996) ch. 1, § 1(a).

35. *See id.* ch. 2, § 7(1).

36. *See id.* ch. 2, § 39(1)(a).

37. *See id.* ch. 2, § 36(1).

38. *See id.* ch. 2, § 16(2); *cf. infra* Part VII.

39. *See* S. AFR. CONST. (Act 108, 1996) ch. 2, § 39(1).

sion of the Constitution. Legally, they have teeth, although their expansive language renders them susceptible to divergent interpretations.

*C. The General Limitation and Suspension Clauses*

Fundamental rights entrenched in the Bill of Rights of South Africa's Constitution,<sup>40</sup> including religious rights, may be limited pursuant to stipulations of a general limitation clause, which reads as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.<sup>41</sup>

The comparable provision in the transitional Constitution was section 33(1). This section stipulated more strict conditions for the limitation of some specified rights, including religious rights. The limitation of these rights, in addition to being reasonable, also had to be necessary.<sup>42</sup> The notion of a "more strict limitation test" is absent from the 1996 Constitution.

Section 36(2) of the 1996 Constitution precludes the limitation of any right entrenched in the Bill of Rights, except as provided in section 36(1) "*or in any other provision of the Constitution.*"<sup>43</sup> Section 36(1) is therefore not the sole constitutional source of conditions pursuant to which constitutionally entrenched rights can be limited. Rights can, for instance, also be demarcated by internal modifiers,<sup>44</sup> specific limiting provisions,<sup>45</sup> the effect of other rights entrenched in

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40. *See generally id.* ch. 2.

41. *Id.* § 36(1).

42. *See* S. AFR. CONST. (Act 200, 1993) ch. 3, § 33(1)(b)(bb).

43. S. AFR. CONST. (Act 108, 1996) ch. 2, § 36(2) (emphasis added).

44. The rights to assemble, demonstrate, picket, and petition must be exercised "peacefully and unarmed." *See id.* ch. 2, § 17.

45. *See, e.g., id.* ch. 2, § 16(2) (limiting the right to freedom of expression entrenched in section 16(1)).

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the Bill of Rights,<sup>46</sup> and constitutional provisions outside of the Bill of Rights.<sup>47</sup> However, a non-constitutional precept of law arguably cannot limit a fundamental right entrenched in the Bill of Rights other than in conformity with the stipulations of section 36(1).<sup>48</sup>

During the first six years of its existence, the Constitutional Court's jurisprudence on the limitation of rights has sought to give content to the limitation clauses in two successive constitutional texts. Guidelines gleaned from jurisprudence on the construction of the limitation clause in the transitional Constitution<sup>49</sup> have been written into the text of the limitation clause in the final Constitution.<sup>50</sup> Paragraphs (a) through (e) of section 36(1) clearly derive from dicta of the President of the Constitutional Court, Arthur Chaskalson, in *S. v. Makwanyane*.<sup>51</sup> These paragraphs explicate the rudiments of the widely acknowledged test of proportionality, which was designed to inhibit an unbalanced and unrestrained limitation of rights.<sup>52</sup>

It is unnecessary to deal extensively with the guidelines and procedures that have emerged from the South African jurisprudence on the limitation of fundamental rights in general,<sup>53</sup> or religious rights in particular.<sup>54</sup> It will become clear in the course of the further discussion, however, that the adjudication of religious freedom issues has hinged largely on the courts' understanding of the effect of a general limitation clause in matters of this kind. This is not surpris-

46. For example, adjudicating the offence of *crimen iniuria*, a court has to consider the extent to which the victim's right to respect and protection of his dignity (section 10) limits the perpetrator's freedom of speech (section 16(1)). Self-defense raises issues regarding the limitation of the right to security of the person of an attacker (section 12(1)) vis-à-vis that of the "victim" defending himself.

47. A citizen's right to stand for and hold a public office (section 19(3)(b)) is circumscribed by section 47(1), which does not form part of the Bill of Rights but lays down certain requirements for membership in the National Assembly.

48. S. AFR. CONST. (Act 108, 1996) § 36(2).

49. S. AFR. CONST. (Act 200, 1993) ch. 3, § 33(1).

50. S. AFR. CONST. (Act 108, 1996) ch. 2, § 36(1).

51. 1995 (6) BCLR 665 (CC) para. 104.

52. See generally JOHAN DE WAAL ET AL., THE BILL OF RIGHTS HANDBOOK 143–44 (3d ed. 2000).

53. For helpful overviews, see *id.* ch. 7; MATTHEW CHASKALSON ET AL., CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 12 (1996).

54. For a helpful exposition of general principles applicable to the limitation of religious rights, see Makau wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context*, in LEGAL PERSPECTIVES, *supra* note 12, at 417.

ing, given the judicial inclination to reduce religious controversies to issues of the free exercise of religion and to avoid the thornier question of how to treat dissimilar religious institutions and communities evenhandedly. The South African jurisprudence on the constitutional protection of religious rights and freedom can therefore not be understood in isolation from the effect that the general limitation clause in the Bill of Rights can conceivably have on the adjudication of rights issues.<sup>55</sup>

Religious freedom is high on the priority list of basic freedoms singled out for protection in national as well as international human rights instruments. Some regard it as “the most sacred of all freedoms.”<sup>56</sup> It “appeared as the first fundamental human right in political instruments of both national and international character long before the idea of systematic protection of civil and political rights was developed.”<sup>57</sup> Rights that are so eminently fundamental are, in terms of international standards, usually regarded as non-derogable.<sup>58</sup> This means that they cannot be suspended even during a publicly proclaimed emergency when the life of the nation is threatened.<sup>59</sup> Article 4(2) of the International Covenant on Civil and Political Rights explicitly provides for the non-derogability of the religious rights and freedom enshrined in Article 18 of that Covenant. The rule of non-

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55. Denise Meyerson proposes that proof of “neutral harm” on which “all reasonable people” can agree should be used as a test to determine the sustainability of limitations on the right to freedom of expression and religious rights. DENISE MEYERSON, *RIGHTS LIMITED* (1997). She claims that reliance on this test will maximize the free exercise of these rights. *See id.* *But see* Janet Epp Buckingham, *The Limits of Rights Limited*, 11 *STELLENBOSCH L. REV.* 133 (2000) (criticizing Meyerson’s proposals as being too freedom-centered).

56. *HUMAN RIGHTS FOR SOUTH AFRICANS* 124 (Mike Robertson ed., 1991).

57. Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 209 (Louis Henkin ed., 1981); *see also* *HUMAN RIGHTS FOR SOUTH AFRICANS*, *supra* note 56, at 124. *See also*, for example, the first paragraph of the Agreement of the People (of England) of 28 Oct. 1647. The First Amendment to the U.S. Constitution, which deals with religious freedom at a federal level, was proposed in 1789 (the same year in which the Constitution itself came into operation) and was ratified shortly after the commencement of the Constitution. *See* J.D. VAN DER VYVER, *DIE JURIDIESE FUNKSIE VAN STAAT EN KERK* 104 (1972).

58. With reference to the 1993 Constitution, in section 34, “non-derogable” must be read as “non-suspendable.”

59. For a discussion of the general principle with reference to the right to life, *see* B.G. Ramcharan, *The Concept and Dimensions of the Right to Life, in THE RIGHT TO LIFE IN INTERNATIONAL LAW* 1, 14–17 (B.G. Ramcharan ed., 1985); W.P. Gormley, *The Right to Life and the Rule of Non-derogability: Peremptory Norms of Jus Gogens, in THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra*, at 120.

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derogability has probably also become part of customary international law binding on every state irrespective of whether it is a party to any international convention or covenant.<sup>60</sup>

Section 37 of South Africa's 1996 Constitution provides for decidedly strict conditions on which constitutionally entrenched rights can be suspended during a state of emergency. Some rights are non-suspendable or non-derogable,<sup>61</sup> but no section 15 rights<sup>62</sup> have been included in this category. In the transitional Bill of Rights, all of the comparable section 14 rights were non-derogable.<sup>63</sup> The transitional Constitution thus conformed to international standards more strictly than the final Constitution. The suspension of section 15 during an emergency will, for instance, exclude constitutional protection for nonconformist conscientious objection to conscription.

#### V. SPECIFIC CONCERNS REGARDING THE PROTECTION OF RELIGIOUS RIGHTS AND FREEDOM

##### *A. Freedom of Religion*

Section 15(1) of the 1996 Constitution unequivocally entrenches the right to religious freedom: "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion."<sup>64</sup> This provision goes beyond protecting the right to freedom of religion in its narrow connotation and also guarantees freedom of conscience, thought, belief, and opinion. This probably includes the right not to observe any religion at all. One is presumably entitled to believe whatever one wants to, but acting on one's beliefs (that is, exercising them) is not always uncontroversial.

Notably absent from section 15(1) is a provision akin to the establishment clause in the First Amendment of the Constitution of the United States of America: "Congress shall make no law respect-

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60. Louis Henkin, *Human Rights*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 268, 271 (1985).

61. S. AFR. CONST. (Act 108, 1996) ch. 2, § 37(5)(c).

62. Section 15 rights include "the right to freedom of conscience, religion, thought, belief and opinion." *Id.* ch. 2, § 15(1).

63. S. AFR. CONST. (Act 200, 1993) ch. 3, § 34(5)(c).

64. S. AFR. CONST. (Act 108, 1996) ch. 2, § 15(1).

ing an establishment of religion . . . .”<sup>65</sup> There is a difference of opinion on whether section 15(1) of the South African Constitution should be understood to include the establishment proscriptions of the First Amendment as they have been understood and applied in the United States.<sup>66</sup> The constitutional protection of religious rights and freedom is arguably better off without the narrowly conceived version of the establishment clause, which has resulted in a strict separation of state and church as well as of politics and organized religion.<sup>67</sup> This separationism makes for an official *freedom from* religion rather than individuals’ *freedom of* religion in religiously like-minded groups, communities, and institutions. Tolerance of religious diversity goes beyond putting up with the free exercise of divergent religious beliefs and practices. It also entails the even-handed treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting interests. A broadly conceived establishment clause can play a significant role in guaranteeing such treatment. The equality clause in the South African Constitution arguably caters to such expansively understood establishment concerns.

### B. Equality of Religion

Section 9(1) of the South African Constitution guarantees equality before and equal protection of the law. Section 9(3) then proscribes unfair discrimination “against anyone on one or more grounds” and lists a number of grounds explicitly.<sup>68</sup> Included in this list are religion, conscience, and belief.<sup>69</sup> Protection of religious rights and freedom under the equality clause is arguably as significant and indispensable as their protection under section 15(1). However, as will be seen from the survey of South African constitutional jurisprudence on religious rights, the courts have not really had (or have not sufficiently availed themselves of) the opportunity to fully explore the safeguarding potential of the constitutional guarantee of

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65. U.S. CONST. amend. I, cl. 1.

66. See van der Vyver, *supra* note 1, at 652–53; Malherbe, *supra* note 1, at 698. See also the discussion of *S. v. Lawrence*, 1997 (10) BCLR 1348 (CC), *infra* Part V.C.

67. John Witte, Jr. & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in LEGAL PERSPECTIVES, *supra* note 12, at 497, 547–53.

68. S. AFR. CONST. (Act 108, 1996) ch. 2, § 9(3).

69. See *id.*

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religious equality.<sup>70</sup> The tendency thus far has been to put all the eggs of judicial argumentation in support of the protection of religious rights in a freedom basket instead.<sup>71</sup>

An evenhanded treatment of religions as well as of religious groups, communities, and institutions presupposes the absence of the proverbial wall of separation between church and state. Some positive action on the part of the state is called for to officially vouch for evenhandedness without, however, sacrificing impartiality. Evenhanded treatment, after all, is also equal and therefore non-partisan treatment.

*C. Free Exercise Jurisprudence*

In *S. v. Lawrence* ("Seven-Eleven"),<sup>72</sup> three employees of Seven-Eleven chain stores were convicted in separate cases in a magistrate's court of contravening section 90(1) of the Liquor Act,<sup>73</sup> which proscribes wine sales on Sundays. On appeal before the Constitutional Court, Solberg challenged the constitutionality of section 90(1), contending that the prohibition of wine sales on Sunday infringes the right to freedom of religion of those citizens who have no religious objection to such sales. The right to freedom of religion was entrenched in the first part of section 14(1) of the transitional Constitution,<sup>74</sup> the precursor to the similarly phrased section 15(1) of the final Constitution.<sup>75</sup> There were high expectations that the *Seven-Eleven* judgment could serve as a benchmark precedent on the protection of religious rights and freedom, but a number of factors im-

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70. See, e.g., *S. v. Lawrence*, 1997 (10) BCLR at 1348. This was the first case before South Africa's Constitutional Court where the protection of religious rights and freedom under the Constitution was at issue. As will be shown, the court failed to reach unanimity on the applicability of the guarantee of religious equality to establishment concerns.

71. It should be added, however, that there have been too few cases and that it is therefore still too early to draw any definite conclusions.

72. 1997 (10) BCLR 1348 (CC). For a critical assessment of this judgment, see Janet Epp Buckingham, *Religious Freedom and Wine Sales on Sunday*, 10 STELLENBOSCH L. REV. 117 (1999).

73. Act 27 of 1989.

74. S. AFR. CONST. (Act 200, 1993) ch. 3, § 14(1). The second part of section 14(1) states that the right to freedom of conscience, religion, thought, belief and opinion includes "academic freedom in institutions of higher learning."

75. S. AFR. CONST. (Act 108, 1996). The freedom of expression clause in this Constitution now caters to academic freedom. See *id.* ch. 2, § 16(1)(d).

peded this. First, the full record of evidence was not before the Constitutional Court because the appellants did not follow the proper procedure in bringing the case to the latter forum. Second, the *Seven-Eleven* case was not actually perceived as dealing with religious freedom but rather with commercial interests. No religious groups, for instance, presented the court with their understanding of the nature and scope of religious freedom, and the court itself intimated that it was possible to properly dispose of the matter without really turning it into a religious rights dispute.

Six justices of the Constitutional Court agreed that the appeal should be dismissed, but they were divided 4-2 on the reasoning. Three justices thought that the appeal should be allowed, using essentially the same legal arguments that the minority of two judges in the first group used. This latter 5-4 division is of importance for purposes of the present discussion because it involves a difference of opinion on questions of religious freedom vis-à-vis religious equality, in other words, on “free exercise” versus “establishment” concerns.

The President of Court, Arthur Chaskalson, writing on behalf of the four, held that religious equality was not really at issue in the *Seven-Eleven* case. This was because Solberg relied solely on the freedom of religion clause in the transitional Constitution (section 14(1)) to challenge section 90(1) of the Liquor Act and not on the equality clause (section 8) as well. This meant that the court was called upon to deal with issues of religious free exercise only. Had the appellant also explicitly relied on the non-discrimination provision in the equality clause (section 8(2)), the kind of concern to which a broadly conceived establishment clause caters might have entered into the picture.<sup>76</sup>

The five argued on the assumption that equality concerns had to be catered to anyway. This prompted the conclusion that section 90(1) indeed encroached on the right to religious freedom as guaranteed in section 14(1) of the transitional Constitution.<sup>77</sup> Justices Sachs and Mokgoro, however, thought that such apparent encroachment was trivial and constitutionally justified on the strength of the general limitation clause in the transitional Bill of Rights.<sup>78</sup> They accordingly held that section 90(1) had to survive constitu-

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76. *S. v. Lawrence*, 1997 (10) BCLR 1348 (CC).

77. S. AFR. CONST. (Act 200, 1993) § 14(1).

78. *Id.* § 33. The comparable provision in the 1996 Constitution is section 36.

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tional review.<sup>79</sup>

Justice O'Regan (writing on behalf of three of the five) succinctly expressed her disagreement in the following terms:

I . . . cannot agree with Chaskalson P when he concludes that because the provisions do not constrain individuals' "right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs", there is no infringement of section 14 . . . . In my view, the requirements of the Constitution require more from the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favoring one religion over others. Fairness and evenhandedness in relation to diverse religions is a necessary component of freedom of religion.<sup>80</sup>

The approach of the five is more conducive to the promotion of religious tolerance than that of the four. Putting up with (often esoteric) manifestations of religious beliefs is not *the* hallmark of tolerating religious eccentricities. In political terms, a state's evenhanded treatment of divergent religious convictions and the realization of these convictions and their effects in societal life probably does more to evidence (and enhance) positive tolerance. The real freedom of religion issue in the *Seven-Eleven* case was how to accommodate certain Christians' objection to the sale of liquor on their holy day against the acquiescence of Christians and non-Christians who do not really mind.

The four furthermore saw Sunday as a general day of rest and not necessarily a day of religious significance.<sup>81</sup> This fabrication was uncalled for. It is impossible to purge Sunday of its religious significance. At any rate, had Sunday been a general day of rest, then wine and liquor should arguably be more freely available on this day than on normal days of work! It is certainly Sunday's characteristic religious significance, rather than its being a general day of rest, that had given rise to the prohibition of wine sales. All other "closed days" for the sale of wine (in addition to Sunday) are also Christian holidays.<sup>82</sup>

The four's strategy of secularist sanitization designed to mini-

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79. *S. v. Lawrence*, 1997 (10) BCLR at 1348.

80. *Id.* para. 128.

81. *See id.* paras. 95–96.

82. *See id.* para. 125.

mize the constitutionalization of a religious issue is not foreign to the Constitutional Court. For instance, in certifying the Constitution of the Western Cape Province,<sup>83</sup> the Court had to decide whether the opening words of the preamble to that constitution—"In humble submission to Almighty God"—violated the right to religious freedom under section 15(1) of the national Constitution. Similar phrases introduced the preambles to South Africa's three apartheid constitutions between 1910 and 1983. In these constitutions, this phrase undoubtedly verbalized Afrikaner-Calvinist monotheism. The Constitutional Court, however, thought that the phrase in the Constitution of the Western Cape is, its dubious origin notwithstanding, merely of ceremonial significance, and thus religiously neutral.<sup>84</sup> One wonders whether it is coincidence that this phrase has survived in the Constitution of the only South African province in which the National Party—the dominant party in the apartheid era—still held power at the time. A more realistic and credible finding by the court would have been that the contested phrase expresses religious sentiments but that (in a post-apartheid dispensation) these are consistent with guarantees of religious freedom in the national Constitution. Such a finding would still have been open to criticism, but at least it would not have been ridiculous!

In *Christian Education South Africa v. Minister of Education of the Government of RSA*,<sup>85</sup> an organization of concerned Christian parents approached a High Court to strike down section 10 of the South African Schools Act.<sup>86</sup> This provision proscribes corporal punishment in any public or independent/private school. The applicant contended that, according to the religious beliefs of its members, corporal punishment was part and parcel to the upbringing of children. The applicant sought to have corporal punishment reinstated in at least those Christian private schools under its auspices.<sup>87</sup> Justice Liebenberg, in refusing the application, noted that the applicants' reliance on biblical authority allegedly in favor of the physical chastisement of children also indicated that only the parents of the children themselves (and not school officials *in loco parentis*) were

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83. *In re* Certification of the Constitution of the Western Cape 1997, 1997 (9) BCLR 1167 (CC).

84. *See id.* para. 28.

85. 1999 (9) BCLR 951 (SE).

86. Act 84 of 1996.

87. *See Christian Educ. S. Afr.*, 1999 (9) BCLR at 954A–C.

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entitled to administer corporal punishment.<sup>88</sup>

The case was taken on appeal to the Constitutional Court,<sup>89</sup> where Justice Albie Sachs handed down a carefully reasoned judgment dismissing the appeal. The gist of his reasoning was that section 10 of the Schools Act imposes a constitutionally acceptable limitation (that is, one surviving scrutiny in terms of the Constitution's general limitation clause<sup>90</sup>) on parents' free exercise of their religious beliefs. He deliberately refrained from expressing any view on what, in constitutional terms, the implications of parents' own exercise of their religious belief in corporal punishment for their children might be. However, according to Justice Sachs, a statute that precludes parents from authorizing a school to administer such punishment does not, if all relevant considerations are carefully weighed, impose a constitutionally untenable limitation on the parents' free exercise of *their* religious beliefs.<sup>91</sup>

In adopting this line of reasoning, Justice Sachs under-emphasized what schools and teachers should be permitted to do in a country where a modern-day constitution guarantees adherence to the values "that underlie an open and democratic society based on human dignity, equality and freedom."<sup>92</sup> A line of reasoning catering to this kind of concern would have been commendable because it would have proceeded beyond the adjudication of a religious rights issue in a strictly libertarian and individualistic free exercise vein.

In a postscript to his judgment, Justice Sachs lamented the fact that there was no one before the court representing the interests of the children concerned.<sup>93</sup> He thought that the children would have been capable of articulate expression: "[a]lthough both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name."<sup>94</sup> A *curator ad litem* should thus have been appointed to represent the interests of the children whose contribution would have "enriched the dialogue."<sup>95</sup>

88. *See id.* at 958A–959D.

89. *Christian Educ. S. Afr. v. Minister of Educ.*, 2000 (10) BCLR 1051 (CC).

90. S. AFR. CONST. (Act 108, 1996) ch. 2, § 36.

91. *See Christian Educ. S. Afr.*, 2000 (10) BCLR at paras. 29–52.

92. S. AFR. CONST. (Act 108, 1996) ch. 2, § 39(1)(a); *see also id.* ch. 2, §§ 1(a), 36(1)(a). *See also supra* Part IV.A.

93. *Christian Educ. S. Afr.*, 2000 (10) BCLR at para. 53.

94. *Id.*

95. *Id.* at 53.

To date, one of the most difficult and controversial free exercise of religion cases to come before a South African court concerned the professional future of Gareth Prince. A Rastafarian, Prince was a consumer of *cannabis sativa* (or “dagga”) for spiritual, medicinal, culinary, and ceremonial purposes as an integral part of practicing his religion. After having successfully completed his legal studies, Prince became eligible to be registered as a candidate attorney doing community service. Because Prince had been convicted twice of possessing dagga, there were questions as to whether he was fit to be registered as a candidate attorney, especially in light of his declared intention to continue using dagga. The Law Society of the Cape of Good Hope refused his registration, whereupon he challenged the society’s decision in the Cape High Court.<sup>96</sup> The court held that the statutory prohibition on the use of dagga was meant to protect public safety, order, health, and morals and that these considerations outweighed the right of Rastafarians to practice their religion through the use of dagga. Thus, the court refused to overturn the law society’s decision.<sup>97</sup>

Prince appealed to the Supreme Court of Appeal,<sup>98</sup> which is South Africa’s court of final resort in the adjudication of all but constitutional issues. His appeal was dismissed, but he has since appealed to the Constitutional Court, the final court of appeal in constitutional matters. At the time of this article’s printing, the Constitutional Court’s judgment in this matter was still pending.

The Supreme Court of Appeal’s reasoning in Prince’s case is suspect whether or not one agrees with the outcome. Overawed by the prospect of possibly admitting a dangerous dagga smoker to the distinguished ranks of the legal fraternity, the court gave little regard to what the free exercise right of a Rastafarian, or any other religious adherent, *by definition* entails. The court limited the right before making an effort to define it and to determine its scope. This is a rights-unfriendly manner of dealing with fundamental entitlements (including the right to religious freedom). It would have been cold comfort for Prince if the court, taking his religious free exercise rights more seriously, had nonetheless concluded that it could not sanction a prospective attorney’s (or Rastafarian’s) consumption of

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96. Prince v. President of the Law Soc’y, 1998 (8) BCLR 976 (C).

97. *Id.* at 985D–G, 994H.

98. Prince v. President of the Law Soc’y, 2000 (3) SA 845 (SCA).

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dagga for religious purposes. However, a judgment along these lines would have been a more prized contribution to the evolution of a constitutional jurisprudence on religious rights.

South African courts have shown an alertness to broadly conceived establishment concerns (that is, the evenhanded treatment of diverse religious beliefs) in some cases where religion, as such, was not at issue, but the controversies had strong religious overtones. The tendency in such cases has been for courts, ostensibly, to refrain from selectively privileging certain religious beliefs in dealing with those controversies. In *Case v. Minister of Safety and Security*,<sup>99</sup> the constitutionality of measures proscribing the possession of pornographic material was considered not as a religious issue but as a possible infringement of the rights to privacy and freedom of expression.

In *Christian Lawyers Association of South Africa v. Minister of Health*,<sup>100</sup> the applicants approached the Pretoria High Court for an order to strike down South Africa's eminently permissive Choice on the Termination of Pregnancy Act.<sup>101</sup> This Act freely permits abortion on the mother's request during the first trimester of pregnancy. The applicants challenged the Act, relying on the entrenchment of the right to life in section 11 of the Constitution. The court dodged the controversy and upheld an exception to the applicants' summons, alleging that fetal life is not "life" as protected under section 11.<sup>102</sup> An attempt was thus made to keep the controversy over the beginning of human life out of the judicial arena. However, the court's choice can hardly be described as religiously or morally neutral, for it privileged beliefs that deny fetal life the status of human life.<sup>103</sup>

## VI. PENETRATING THE WALL OF SEPARATION

As indicated previously,<sup>104</sup> U.S. jurisprudence on the establishment clause has developed to a point where the evenhanded treat-

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99. 1996 (5) BCLR 609 (CC).

100. 1998 (11) BCLR 1434 (T).

101. Act 92 of 1996.

102. See *Christian Lawyers*, 1998 (11) BCLR at 1441H-1443C, 1444A-1446D.

103. For an insightful discussion of the *Christian Lawyers* case, see Tjatie Naudé, *The Value of Life: A Note on Christian Lawyers Association of South Africa v. Minister of Health*, 15 S.A. PUB. L. 541 (1999).

104. See *infra* Part V.A.

ment of religion has often come to mean the state's "non-treatment" of any religious matters whatsoever.<sup>105</sup> The text of the final South African Constitution does not echo a similar sentiment but creates room for the state to take positive measures to ensure an evenhanded accommodation of religious concerns instead.

*A. Religious Observances at State Institutions*

Section 15(2) of the South African Constitution explicitly authorizes the conduct of religious observances at state or state-aided institutions (e.g., schools, prisons, and state hospitals). However, certain conditions must be met, namely, that the exercise of said observances follow rules made by appropriate public authorities,<sup>106</sup> that observances are conducted on an equitable basis,<sup>107</sup> and that attendance is voluntary.<sup>108</sup> This provision makes it possible for the state—without enjoining it<sup>109</sup>—to actively acknowledge religious sentiments and practices without subscribing to them. The Constitution, in other words, allows the state's "proactive tolerance" of religious practices in public and semi-public institutions, and safeguards action taken to achieve this objective against constitutional challenges alleging religious bias. At the same time, section 15(2) seeks to counter conduct that could further religious intolerance by laying down the very conditions referred to.

In *Wittmann v. Deutscher Schulverein*,<sup>110</sup> the Pretoria High Court held that the conditions in section 14(2) of the transitional Constitution, the similarly worded precursor to section 15(2), do not apply to a private school subsidized by the state to the extent of R1.5 million per year, since such a school is not "a state-aided institution." This judgment raises serious questions as to the precise meaning of "state-aided institutions." Justice Van Dijkhorst used very technical (almost artificial) arguments to conclude that the

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105. For various modes of institutional accommodation of the church-state relationship, see Janet Epp Buckingham, *Realising Religious Freedom: The Application and Limitations of the Canadian Understanding of Religious Freedom to South Africa* ch. 3 (1998) (unpublished LLD thesis) (on file with author).

106. See S. AFR. CONST. (Act 108, 1996) ch. 2, § 15(2)(a).

107. See *id.* ch. 2, § 15(2)(b).

108. See *id.* ch. 2, § 15(2)(c).

109. The introductory sentence to section 15(2) states that the said observances "may be conducted." *Id.* ch. 2, § 15(2).

110. 1999 (1) BCLR 92 (T).

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school in question was not "state aided." He rightly pointed out that section 14(2) evidences the state's disinclination to erect walls of separation between itself and religion, but then overlooked another equally significant concern, namely, that financial aid provided by the state not be invoked to enforce religious beliefs and practices upon people against their will.

The *Wittmann* case was decided under the transitional Constitution, which made but modest provision for the enforcement of constitutionally entrenched rights against non-organs of the state. It is doubtful that the line of reasoning in this case will be sustainable under the 1996 Constitution. Section 8(2) of this Constitution makes the Bill of Rights binding upon "*a natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."<sup>111</sup>

*B. Recognition of Personal and Family Law*

Section 15(3)(a) of the Constitution authorizes legislation recognizing marriages under systems of religious, personal, or family law. However, no *right* is entrenched and the legislation would not automatically be exempt from constitutional challenges, because recognition is required to be consistent with section 15 and with the Constitution. This provision caters to concerns peculiar to some religious minorities, but is also a source of political controversy. Human rights activists (and feminists in particular) complain of the fact that some religious systems of personal and family law discriminate against married women.<sup>112</sup> Section 15(3), so it is feared, will not beget the advancement of the status of women in these communities. Be that as it may, since the commencement of the transitional Constitution, some significant case law on the recognition of religious marriages has called conventional prejudices and chronic intolerance of the majority into question in circumstances where it was to the advantage of married women.

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111. S. AFR. CONST. (Act 108, 1996) ch. 2, § 8(2) (emphasis added).

112. Najma Moosa, An Analysis of the Human Rights and Gender Consequences of the New South African Constitution and Bill of Rights with Regard to the Recognition and Implementation of Muslim Personal Law (MPL) (1997) (unpublished LLD thesis) (on file with author), however, concludes that the recognition of Muslim Personal Law subject to the Constitution is feasible, both theologically and from a human rights point of view, on the strength of the particular understanding of the teachings of Islam that she proposes.

South African courts traditionally held that marriages under Muslim rites are polygamous and that on public policy grounds they should not enjoy legal recognition.<sup>113</sup> It made no difference whether a marriage was in fact polygamous or not: the potential for a *de facto* monogamous union to become polygamous sufficed to attract the aversion of mainstream jurisprudence. Section 15(3) of the Constitution to some extent challenges this prejudice—even though, as was pointed out, the provision does not guarantee *a right* to have religious marriages recognized.

In *Ryland v. Edros*,<sup>114</sup> a case dealing with a divorced Muslim woman's claim for maintenance, the Cape High Court held that the transitional Constitution had the effect of assuaging conventional prejudices about Muslim marriages, especially those that are monogamous in fact. As previously noted, a potentially polygamous Muslim marriage was not officially recognized. Thus, a wife to such a union could claim maintenance *ex contractu* but not *ex lege* from her husband. However, because the contract of marriage between a Muslim husband and wife conceivably violated the *boni mores* ("good morals"), any claim to maintenance (professing to be legally justified) was thought to be unenforceable.<sup>115</sup> However, in *Ryland*, the court held that constitutional values call into question a "public policy" that reflects the preferences and prejudices of only one (albeit predominant) section of a plural society.<sup>116</sup>

*Ryland* potentially represented a step forward for widowed Muslim women. Under the South African law of delict, the claim of the dependant can be brought against a perpetrator who intentionally or negligently killed a dependant's "breadwinner." The plaintiff must prove that the deceased had a legal duty (and not, for instance, merely a contractual obligation) to support him or her.<sup>117</sup> The dependant's claim has always been available to a spouse who was lawfully married under civil law and who had an *ex lege* right to support against the deceased. However, a spouse who was married under

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113. Elsje Bonthuys & Lourens du Plessis, *Whither the Validity of Marriages Concluded Under a System of Religious Law Under the Transitional Constitution: Kalla v. The Master*, 1994 (4) BCLR 79 (T), 10 S.A. PUB. L. 200, 201-02 (1995).

114. 1997 (1) BCLR 77 (C).

115. *Ismail v. Ismail*, 1983 (1) SA 1006 (A).

116. 1997 (1) BCLR 77 (C) 91I, 92B, 92I-93B.

117. van der Vyver, *supra* note 1, at 662; J.R. Midgley, *Delict*, in 8(1) THE LAW OF SOUTH AFRICA para. 38 (W.A. Joubert et al. eds., First Reissue, 1995).

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Muslim law and whose marriage enjoyed no legal recognition only had a contractual right to support against the deceased, and this "lesser entitlement" precluded reliance on the dependant's claim.<sup>118</sup>

A veritable breakthrough for these disadvantaged women was the unanimous judgment of the Supreme Court of Appeal in *Amod v. Multilateral Motor Vehicle Accidents Fund*.<sup>119</sup> Not only did the court find that a former spouse to a Muslim marriage could successfully invoke the dependant's claim, but, in doing so, it explicitly refrained from constitutionalizing the issue.<sup>120</sup> Assessing the *boni mores* in South Africa at the time when the plaintiff's alleged cause of action arose (that is, the date on which the spouse was killed), the court concluded that a "new ethos" had by then "informed the determination of the *boni mores* of the community."<sup>121</sup> This ethos is substantially different from the one that spawned the traditional non-recognition of "potentially polygamous" unions.<sup>122</sup> According to Chief Justice Mahomed, the political and constitutional changes that had taken place up to the spouse's death were all evidence of the "new ethos of tolerance, pluralism and religious freedom"<sup>123</sup> that pointed to the legal recognition of a *de facto* monogamous Muslim marriage for purposes of the defendant's claim.

### C. Minorities

Section 31(1) of the Constitution recognizes, but does not directly guarantee,<sup>124</sup> the right of persons belonging to cultural, *religious*, or linguistic communities to enjoy their culture, practice their religion, and use their language.<sup>125</sup> They also have the right to form, join, and maintain cultural, religious, and linguistic associations and other organs of civil society. This provision can be relied on to vouch

118. This was held in a series of cases of which *Seedat's Executors v. The Master*, 1917 A.D. 302 and *Ismail v. Ismail*, 1983 (1) SA 1006 (A) were the leading ones. Section 31 of the Black Laws Amendment Act 76 of 1963 explicitly avails a (female) spouse to a black customary union, which formerly was not a legally recognized marriage, of the dependant's claim.

119. 1999 (4) SA 1319 (SCA).

120. *See id.* para. 30.

121. *Id.* para. 21.

122. *See id.*

123. *Id.* para. 20.

124. Persons enjoying protection *may not be denied* the rights enumerated in the paragraph.

125. S. AFR. CONST. (Act 108, 1996) ch. 2, § 31(1).

for minority concerns. A Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities has to monitor the realization of section 31 rights.<sup>126</sup>

#### *D. Education*

All have the right to establish and maintain, at their own expense, independent educational institutions on condition that there be no discrimination on the basis of race, that such institutions be registered with the state, and that their standards not be inferior to those of comparable public institutions.<sup>127</sup> “[S]tate subsidies for independent educational institutions” are not precluded.<sup>128</sup> Section 29(3) of the final Constitution, unlike its predecessor, section 32(c) of the transitional Constitution, does not explicitly mention “a common culture, language or religion” as legitimate grounds for the establishment of independent educational institutions. The more inclusive wording of the former, however, certainly authorizes the establishment of such institutions on the said grounds too.

In the case *In re the School Education Bill of 1995 (Gauteng)*,<sup>129</sup> the Constitutional Court held that the right to establish independent schools is a defensive right enjoining the state not to interfere with the establishment of such schools. The state itself cannot be required to provide schools catering to peculiar concerns (such as language, culture, or religion). The state is, in other words, required to tolerate the establishment of private (including religious) educational institutions without actively participating in the process of such establishment.

### VII. OTHER RIGHTS THAT SUSTAIN RELIGIOUS FREEDOM

All constitutionally entrenched rights are, subject to constitutionally authorized limitations, available to religious people and institutions.<sup>130</sup> Some rights are, however, pertinently supportive of typical religious activities, such as preaching, witnessing, proselytizing, assembling, and charitable work. These rights can only briefly be mentioned.

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126. *See id.* ch. 9, § 185.

127. *See id.* § 29(3).

128. *See id.* § 29(4).

129. 1996 (4) BCLR 537 (CC) paras. 7, 9.

130. *See S. AFR. CONST.* (Act 108, 1996) ch. 2, § 8(4).

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Section 16(1) of the final Constitution guarantees a right to freedom of expression, thereby catering to the need of religious individuals and communities to freely "speak out" for their religion and to criticize and challenge social and political structures and policies in terms of the teachings of their religion. Section 16(2), however, explicitly limits the exercise of this right by prohibiting propaganda for war,<sup>131</sup> the incitement of imminent violence,<sup>132</sup> and "hate speech," namely, "advocacy of hatred that is based on race, ethnicity, gender or *religion* . . . that constitutes incitement to cause harm."<sup>133</sup> Arguably, these limitations are aimed at inculcating tolerance. It has as yet not been determined exactly how far they extend. Does criticism and denunciation of a religion or belief, for instance, amount to "advocacy of hatred based on . . . religion"? And what about vigorous proselytizing, which inevitably deprecates "competing religions" to at least some extent?

Other entrenched rights demonstrably supportive of typical religious activities include the rights to freedom of association<sup>134</sup> and movement<sup>135</sup> as well as the rights to assemble, demonstrate, picket, and present petitions.<sup>136</sup> Finally, it is important for religious communities to know that they have a right to just administrative action (where activities of the executive branch of government stand to impact on their day to day activities), including a right to written reasons for administrative action adversely affecting their rights.<sup>137</sup> Religious individuals and groups, furthermore, have a right of access to information required for the exercise or protection of any of their rights.<sup>138</sup>

## VIII. CONCLUDING OBSERVATIONS

It is still too early to draw definite conclusions from patterns in the constitutional treatment of law and religion issues in the "new

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131. *See id.* ch. 2, § 16(2)(a).

132. *See id.* ch. 2, § 16(2)(b).

133. *See id.* ch. 2, § 16(2)(c). The general limitation clause, section 36(1), arguably also caters to such limitations. Specific limitations which are also subject to a general limitation clause raise technical problems of their own (albeit not insurmountable).

134. *See id.* § 18.

135. *See id.* § 21(1).

136. *See id.* § 17.

137. *See id.* § 33(1)-(2).

138. *See id.* § 32(1).

South Africa.” South Africa’s population of roughly 40 million shows a high degree of religious pluralism. Christianity holds a clear majority position, but, within Christianity itself, there is a breathtaking denominational diversity spread over more than thirty-four religious groups and several thousand denominations.<sup>139</sup> Given such diversity and the potent entrenchment of religious rights and freedom in the Constitution, one would have expected much more litigation on religious issues during the past six years. Religious rights litigation so far has largely been an elitist concern: either the parties initiating the litigation were elitist—for example, a select group of Christian professionals (e.g., *Christian Lawyers Association*) or a disgruntled atheist mother who sent her daughter to a prestigious private school (e.g., *Wittmann*)—or the issues were essentially yuppie concerns, for example, wine sales on Sundays (e.g., *Seven-Eleven*) or corporal punishment in prestigious Christian private schools (e.g., *Christian Education*). Of course, the abortion issue raised in *Christian Lawyers Association* concerns millions of poor people in South Africa too, but the fact that the litigation did not really involve grassroots applicants to a large extent resulted in “real people’s issues” not being canvassed. On the other hand, cases such as *Ryland* and *Amod* were significant to a large number of Islamic women disadvantaged by the law.

Religious groups in South Africa must yet learn to organize themselves for the purpose of asserting their rights under the Constitution which so generously protects them. During the final years of apartheid, a National Inter-Faith Conference held in Pretoria in November 1992 raised hopes that such action was forthcoming.<sup>140</sup> At this event, organized by the South African Chapter of the World Conference on Religion and Peace, representatives of various religious communities agreed on a freedom of religion clause to be included in a future South African constitution. The Conference furthermore adopted a Declaration on Religious Rights and Responsibilities.<sup>141</sup> This Conference was a remarkable achievement in tolerance and inter-religious understanding, but it bore no tangible

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139. For statistical information, see Gouws & du Plessis, *supra* note 3, at 659–61.

140. See generally *World Conference on Religion and Peace South African Chapter, Believers in the Future, Proceedings of the National Inter-Faith Conference on Religion-State Relations, Dec. 2–4, 1990* (visited Jan. 21, 2001) <[http://www.uct.ac.za/depts/ricsa/commiss/trc/wcrp\\_sub.htm](http://www.uct.ac.za/depts/ricsa/commiss/trc/wcrp_sub.htm)>.

141. See 82 *JOURNAL OF THEOLOGY FOR SOUTHERN AFRICA* 107–110 (1993).

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fruits after 1994.

It is of particular importance that religious *groups* assert their rights in adjudicative fora. This article has referred to South Africa's courts' (including the Constitutional Court) tendency to dispose of law and religion issues in a mostly libertarian and individualistic, free exercise vein, thereby underplaying issues related to the evenhanded treatment of religious groups. A broadly conceived "establishment" jurisprudence can only develop if religious *groups*, communities, and institutions take their concerns to court.

The South African courts, and the Constitutional Court in particular, are to be criticized for what appears to be their over-emphasis on issues touching the free exercise of religion at the cost of broadly conceived establishment concerns. The courts have, possibly with the exception of the five judges of the Constitutional Court in *Seven-Eleven*,<sup>142</sup> not sufficiently availed themselves of the opportunity to develop a nuanced jurisprudence on the evenhanded treatment of diversity of religions in South Africa. The constitutional text most certainly allows ample room for such an enriching construction of religious rights and freedom. As previously noted, there is the potential of provisions such as sections 15(2) and (3) and section 31(1) of the 1996 Constitution to spearhead a penetration of the wall of separation between church (or organized religion) and state (or "official" politics)<sup>143</sup> erected pursuant to the impoverished and narrow version of American establishment clause jurisprudence.<sup>144</sup> Section 7(2) of the South African Constitution, couched in strikingly affirmative language, can lend further impetus to such a maneuver. This provision requires the state, first, to protect the rights contained in the Bill of Rights, and, second, to promote and fulfill these rights. This certainly strengthens the state's arms to actuate the *freedom of diverse religions* impartially and evenhandedly, instead of ducking *from religion*. It is a prime responsibility of the South African judiciary to explore and recommend dependable and constitutionally feasible ways to do this.

In conclusion, it must be stressed that the actual realization of religious rights and freedom does not and will not solely, or even

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142. *See supra* Part V.C.

143. *See supra* Part VI.A-C.

144. *See supra* Part V.A.

primarily, depend on the courts. The inculcation of a culture of tolerance or, rather, an appreciation of diversity and mutual respect is, and will remain, vital. There are no recent empirical studies that give an indication of tolerance at the grassroots level. Previous studies have revealed high levels of primarily political intolerance but with significant spillovers into religion.<sup>145</sup> Religious individuals, institutions, groups, and communities have a vital role to play in addressing and redressing inter-individual and inter-group intolerance and conflict. It is not inappropriate to involve the state's adjudicative fora in this endeavor from time to time. But it must be understood that litigation on religious rights and the resulting jurisprudence present religious individuals and communities with but a roadmap of how to address religious liberty issues in accordance with the high demands of positive tolerance.

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145. See, e.g., J.L. Gibson & A. Gouws, Political Tolerance in the Emerging South African Democracy (1997) (unpublished paper prepared for The American Political Science Association Conference); A. Gouws, Political Tolerance in the Context of South Africa (1992) (unpublished Ph.D. thesis) (on file with author). Gouws and du Plessis contend that, although attitude surveys have shown that South Africa is a highly intolerant country, it is rarely argued that South Africans are religiously intolerant. See Gouws & du Plessis, *supra* note 3, at 658–59.