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## Religious Freedom in Southern Africa: The Developing Jurisprudence

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## Religious Freedom in Southern Africa: The Developing Jurisprudence

### I. INTRODUCTION

During the 1990s, many countries in southern Africa became more democratic.<sup>1</sup> Apartheid's<sup>2</sup> demise in South Africa has eclipsed media attention, as well as political, economic and legal scholarship, but other countries in the region have also undergone important changes. South Africa's rule of South-West Africa ended and that nation became democratic Namibia.<sup>3</sup> One-party rule yielded to multiparty elections in Zambia (1991)<sup>4</sup> and Malawi (1993).<sup>5</sup> Military rule and a ban on political activity in Lesotho ended and free elections were held in 1993.<sup>6</sup> Five southern African countries ratified new constitutions (including new bills of rights) since 1991, providing greater freedoms for citizens of these nations.<sup>7</sup>

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1. See Alfred W. Chanda, *Zambia's Fledgling Democracy: Prospects for the Future*, 25-28 ZAMBIA L.J. 125, 125-26 (1993-96).

2. In Afrikaans, apartheid literally means separateness. See TWEETALIGE SKOOL-WOORDEBOEK [TWO LANGUAGE SCHOOL DICTIONARY] 21 (9th ed. 1987).

3. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 295 (1995) [hereinafter FACTBOOK].

4. See *Zambia*, KCWD/Kaleidoscope, available in LEXIS, World Library, Profil File.

5. See *Malawi*, KCWD/Kaleidoscope, available in LEXIS, World Library, Profil File.

6. See *Lesotho*, KCWD/Kaleidoscope, available in LEXIS, World Library, Profil File.

7. Lesotho ratified a new constitution in 1993; Malawi in 1994; Namibia in 1990; South Africa in 1993 and 1996; and Zambia in 1991 (with amendments in 1996). See S. AFR. CONST. (1996); JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 339 (1994); FACTBOOK, *supra* note 3, at 244, 295, 469; *Malawi*, *supra* note 5; Muna B. Ndulo & Robert B. Kent, *Constitutionalism in Zambia: Past, Present and Future*, 40 J. AFR. L. 256, 271-75 (1996). The 1993 South African Constitution was named the "Interim" Constitution, since it was drafted prior to the fully participatory elections in 1994 and since it provided for another, final constitution to be drafted after the elections. See DUGARD, *supra*, at 339. The "Final" Constitution was ratified in 1996. The Final Constitution prescribes that litigation pending before that constitution came into effect would be determined under the Interim Constitution unless the interests of justice require otherwise. See S. AFR. CONST. sched. 6, § 17 (1996). Thus far, no decisions of South Africa's highest court,

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Countries in southern Africa, however, are by no means model examples of freedom. For instance, since 1991, Zambia has held two multiparty elections, yet there are many other areas (such as legal reform, respect for the rule of law, and freedom of the press) in which further democratic change is needed.<sup>8</sup> Zimbabwe has an effectively one-party political system that some say stifles individual liberties.<sup>9</sup> Political parties in Swaziland are illegal.<sup>10</sup> And in terms of religious liberties, Hindus and Muslims are often persecuted in southern Africa by members of other religions.<sup>11</sup> While South Africa's human rights record has historically been the poorest in southern Africa,<sup>12</sup> its abolition of apartheid and its new constitutional dispensation has made it a leader in democracy for other southern African nations.<sup>13</sup> The country has established a number of new institutions to protect democracy.<sup>14</sup> Its celebrated president, Nelson Mandela, is a powerful force for democracy in southern Africa.<sup>15</sup> Currently, South Africa may be

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the Constitutional Court, have been decided under the Final Constitution.

8. See Chanda, *supra* note 1, at 135-36 (discussing a number of challenges facing democracy in Zambia today).

9. See *Zimbabwe: Mugging Dissent*, ECONOMIST, Aug. 19, 1995, at 38; *Zimbabwe: Taking Risks*, ECONOMIST, Oct. 21, 1995, at 46; *Zimbabwe: Walk-over*, ECONOMIST, Mar. 16, 1996, at 46.

10. See FACTBOOK, *supra* note 3, at 403.

11. See Chen Blignaut, *Mosque Bomb: Muslim s Demand Action* (visited Oct. 15, 1997) <<http://164.88.55.123/Archives/Jan97toMay97/9701/15%20Jan/pagad08.html>> (from the South African CAPE ARGUS newspaper); Jan Raath, *Zimbabwe: Zim Christians Attack Muslims*, AFR. NEWS, Feb. 7, 1997, available in LEXIS, World Library, Allwld File; Scott Straus, *In Zambia, Race Hatred Simmers*, BALTIMORE SUN, Jan. 26, 1996, at 2A, available in LEXIS, News Library, Balsun File.

12. See *Molapo v. Director of Public Prosecutions*, 1997 SACL R LEXIS 13, \*18 (Lesotho June 18, 1997) ("Admittedly it is hard to imagine any country with a worse record of violations of human rights than South Africa.").

13. See *infra* Part II.

14. For instance, the new South African Constitutions establish a new Constitutional Court to hear final appeals on all constitutional matters. See S. AFR. CONST. § 167 (1996). Chapter 9 of the Final Constitution discusses a number of other "state institutions supporting constitutional democracy" including, among others, a Public Protector, Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality. See *id.* ch. 9 (outlining the roles of state institutions supporting constitutional democracy).

15. See Barbara Crossette, *Mandela Moving to Center of African Peace Efforts*, N.Y. TIMES, May 4, 1997, at 20 (discussing Mandela's role in African "statesmanship"); *Neighborhood Watch in Southern Africa*, ECONOMIST, Dec. 3, 1994, at 51 (calling Mandela the "natural arbiter for the [southern African] region" in promoting peace and democracy).

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the strongest democracy in the region, especially in light of problems in other southern African countries,<sup>16</sup> and is setting the trend in southern Africa in terms of human rights and freedoms. While some southern African countries are regressing in their commitments to democracy, South Africa is boldly moving ahead.

There is certainly an opportunity for South Africa to set the jurisprudential trend in terms of religious freedom case law in southern Africa. There have not been many recent freedom of religion cases in southern African courts,<sup>17</sup> nor has there been much academic writing about religious freedom in southern Africa as a whole.<sup>18</sup> However, in the last two years, three important cases involving religious freedom have been decided in South Africa.<sup>19</sup> These South African cases are the religious freedom jurisprudence saplings that likely will grow into more established jurisprudential oaks both in South Africa and hopefully the rest of southern Africa. Even though each southern African country is independent and their courts have no obligation to follow the case law of other countries, it is the practice of the highest courts of these countries to examine—and in many cases follow—each others' judicial decisions.<sup>20</sup> This will increas-

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16. See *supra* notes 8-11.

17. One exception is *In re Chikweche*, 1995 (4) SA 284 (Zimb.); see *infra* notes 238-42 and accompanying text.

18. One notable exception is Daniel D. Nsereko, *Religious Liberty and the Law in Botswana*, 34 J. CHURCH & ST. 843 (1992) (discussing the large measure of religious liberty in Botswana). A number of pieces on South Africa have been published, including: Lourens M. du Plessis, *Religious Human Rights in South Africa*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 441 (Johan D. van der Vyver & J. Witte, Jr. eds., 1996) (reviewing the changes made to religious freedom by South Africa's new constitutions); Tracy Kuperus, *Resisting or Embracing Reform? South Africa's Democratic Transition and NGK-State Relations*, 38 J. CHURCH & ST. 841 (1996) (surveying the relationship—especially recently—of an important South African church and the South African state); H.P.P. Lötter, *Religion and Politics in a Transforming South Africa*, 34 J. CHURCH & ST. 475 (1992) (examining religion's role in the South African political arena); Tamara Rice Lave, Note, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT'L L. 483 (1994) (discussing the part religion played in the apartheid system).

19. See *S v. Solberg*, 1997 SACLR LEXIS 30 (CC Oct. 6, 1997); *Fraser v. Children's Court*, Pretoria North, 1997 (2) SA 261 (CC); *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC).

20. See *Molapo v. Director of Public Prosecutions*, 1997 SACLR LEXIS 13, \*15-\*19 (Lesotho June 18, 1997) (Lesotho High Court adopting constitutional law decisions

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ingly be true with respect to following South Africa's decisions,<sup>21</sup> as many southern African countries' legal systems are based on South Africa's mixed Roman-Dutch and English common law system.<sup>22</sup> Additionally, the bills of rights contained in southern African constitutions can be read similarly to South Africa's constitution, especially as it relates to the protection of freedom of religion.<sup>23</sup> Thus, it is very likely that these South African religious freedom cases will be used as "persuasive precedent"<sup>24</sup> in other southern African countries.

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of Namibia and South Africa in case involving a criminal defendant's right to information in the police docket); *S v. Heidenreich*, 1995 SACL R LEXIS 291, \*18-\*23 (Namib. Nov. 13, 1995) (Namibia High Court decision quoting approvingly at length a Zimbabwe constitutional law decision discussing the right to a fair hearing within a reasonable time); *S v. Williams*, 1995 (3) SA 632, 642, 645 (CC) (South African Constitutional Court discussing and relying upon cases from Namibia, Zimbabwe, Botswana, and Lesotho in corporal punishment case); *Patel v. Attorney General*, No. 366 of 1993 (Zambia) (visited Sept. 25, 1997) <<http://zamlit.zamnet.zm/courts/high/full/93hc366.htm>>; *In re Munhume so*, 1995 (1) SA 551, 556 (Zimb.) (Zimbabwe Supreme Court case associating itself with Botswana constitutional case). *But see* *Attorney-General v. Dow*, 1992 SACL R LEXIS 7, \*27 (Bots. July 3, 1992) (Botswana Appeal Court relying on Botswana authorities on point of constitutional law, but mentioning support for same position from, among other jurisdictions, Namibia and Zimbabwe); *Chinamora v. Angwa Furnishers (Pvt) Ltd.*, 1996 SACL R LEXIS 54, \*41-\*46 (Zimb. Nov. 28, 1996) (Zimbabwe Supreme Court examining at length, but not following because of distinguishing facts, two South African Constitutional Court decisions). In fact, the South African Interim and Final Constitutions specifically give courts the power to examine foreign case law to interpret the South African Bill of Rights. *See* S. AFR. CONST. § 35(1) (1993); S. AFR. CONST. § 39(1) (1996); *see also* Richard Cameron Blake, *The World's Law in One Country: The South African Constitutional Court's Use of Public International Law*, 115 S. AFR. L.J. \_\_ (forthcoming 1998).

21. *See Molapo*, 1997 SACL R LEXIS at \*16-\*19 (Lesotho High Court following decision of South African Constitutional Court); *Chinamora*, 1996 SACL R LEXIS at \*21-\*25, \*41-\*46 (Zimbabwe Supreme Court not following because of distinguishing facts, but examining at length because of their precedential strength, two South African Constitutional Court decisions on civil imprisonment, as well as the history of civil imprisonment in South Africa).

22. Botswana, Lesotho, Namibia, South Africa, Swaziland, and Zimbabwe all have aspects of Roman-Dutch law in their systems. *See* FACTBOOK, *supra* note 3, at 56, 244, 295, 389, 403, 471. Lesotho, Malawi, South Africa, Zambia and Zimbabwe all have English common law characteristics. *See id.* at 244, 261, 389, 469, 471. Botswana, Malawi, Swaziland, and Zambia all include customary law, meaning traditional African law, in their systems as well. *See id.* at 56, 261, 403, 469.

23. *See infra* Part III.

24. Courts in the various southern African countries are not bound to follow each others' decisions; however, as shown *supra* notes 12, 20 and accompanying text, these courts often are persuaded by the legal reasoning in a southern African decision and will "adopt" its reasoning and holding. Thus a decision of one southern African court that another southern African court chooses to follow is a type of "persuasive"

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This Comment accomplishes several purposes. First, it reviews South Africa's legal past and present, especially as it relates to religious freedom. Next, it comprehensively analyzes religious freedom clauses found in the constitutions of southern African countries.<sup>25</sup> Finally, this Comment analyzes the three South African religious freedom cases decided thus far, suggests the proper interpretations and potential weaknesses of the cases, and discusses their possible future application to other southern African nations. This Comment concludes that the southern African constitutional provisions relating to religious freedom are similar enough to be interpreted the same—and that they are in fact beginning to be interpreted similarly. Additionally, the South African religious liberty cases that have been decided thus far are sound case law that powerfully protect freedom of religion and should be used as “persuasive precedent” in future religious freedom cases in other southern African countries.

## II. RELIGIOUS FREEDOM AND THE LAW OF SOUTH AFRICA

South Africa's human rights record has historically been the poorest in southern Africa.<sup>26</sup> Other nations in the region actively lobbied against its apartheid regime.<sup>27</sup> However, after the drafting of two new constitutions since 1991, the establishment of a new court for constitutional appeals,<sup>28</sup> and the formation of a number of new institutions to protect

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precedent—not legally binding on the second court, but useful as persuasive reasoning nonetheless.

25. These countries include Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. Angola and Mozambique are also located in southern Africa, but since these countries have different colonial and legal histories they are not examined in this Comment. *See* FACTBOOK, *supra* note 3, at 11, 293 (stating that both Angola and Mozambique's legal systems are derived from Portuguese civil law and customary law).

26. *See generally* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978) (describing the violations of human rights in South African law during apartheid).

27. *See* T.R.H. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY 466, 473 (4th ed. 1991) (describing the efforts of the Front-line States (essentially all of South Africa's southern African neighbors) to establish economic boycotts against, and thus isolate, South Africa through organization of the Southern African Development Coordinating Conference).

28. *See* S. AFR. CONST. § 167 (1996) (discussing the new Constitutional Court).

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democracy,<sup>29</sup> South Africa may be the strongest democracy in the region, especially in light of problems in other southern African countries.<sup>30</sup> While other countries' transitions to full democracy have stagnated,<sup>31</sup> South Africa has been able to maintain its progression toward democracy. This section explores South Africa's apartheid past in terms of religious liberty as well as the changes to protection of religious freedom that have occurred since the beginning of apartheid's demise in 1991. These changes in religious freedom, illustrative of other guarantees of fundamental human rights in the South African Interim and Final Constitutions,<sup>32</sup> together with improvements in judicial<sup>33</sup> and other institutions protecting human rights,<sup>34</sup> make South Africa the leader in democratic reform in southern Africa today.

A. *The Apartheid Era (1948-1993)*

During the apartheid era, the law of South Africa included a "constitution"; however, it was not the supreme law of the land and did not contain a bill of rights.<sup>35</sup> Constitutional issues were governed by the principle of parliamentary sovereignty, and South African courts could only strike down acts of Parliament if they determined the constitution was not procedurally satisfied in passing the act.<sup>36</sup> Parliament therefore had a great deal of latitude to enact legislation without fear of any other body declaring it invalid as a violation of some right.

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29. See *supra* note 14.

30. See *supra* notes 8-11.

31. See Chanda, *supra* note 1, at 134 ("Zambia has not fully completed its transition to democracy."); Thomas Carothers, *The Rule of Law Revival*, FOR. AFR., Mar.-Apr. 1998, at 95, 98.

32. For explanation of the Interim and Final South African Constitutions, see *supra* note 7.

33. See S. AFR. CONST. § 167 (1996) (discussing the new Constitutional Court).

34. See *supra* note 14.

35. See du Plessis, *supra* note 18, at 443.

36. See S. AFR. CONST. §§ 34(2), 34(3) (1983); see also Peter N. Levenberg, *South Africa's Constitution: Will it Last?*, 29 INT'L LAW. 633, 655 (1995) ("South African courts had almost no power to review or reverse acts of Parliament on any constitutional ground . . . . [They] did have a limited power to review delegated or subordinate legislation—that is, the legislation of a provincial assembly or executive body—and were permitted to review the validity of an executive act or order.").

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The law during the apartheid era had a pronounced Christian bias.<sup>37</sup> Additionally, parliament often impinged freedom of religion to promote apartheid policies or to control political insurrection.<sup>38</sup> During the apartheid era, the churches were involved in politics. The Dutch Reformed Church (known in Afrikaans as *Nederduitse Gereformeerde Kerk* (NGK)) provided the moral and philosophical underpinnings for Nationalist apartheid policies.<sup>39</sup> It also gave support to particular laws and made statements supporting the government's actions.<sup>40</sup> In return, the NGK received favored treatment from the government.<sup>41</sup> This political union of church and state produced analogous legal preferences.

According to J.D. van der Vyver, a leading South African legal scholar and expert on religious liberty in that country, many South African laws protected Christian doctrines and practices.<sup>42</sup> For example, censorship under the Publications Act was invoked to protect "a Christian view of life."<sup>43</sup> Religious instruction in state schools had a Christian bias.<sup>44</sup> Sunday observance laws required adherence to the Christian Sabbath, as well as other Christian holy days.<sup>45</sup> Only Christian oaths were adequate in criminal tribunals.<sup>46</sup>

Additionally, the religious liberty of blacks was curtailed by apartheid laws. For example, the "Church Clause" of the Natives (Urban Areas) Consolidation Act<sup>47</sup> allowed a cabinet minister to prohibit Blacks from attending church services outside a Black residential area.<sup>48</sup> Further, churches and their

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37. See du Plessis, *supra* note 18, at 443-45; J.D. van der Vyver, *Religion, in* 23 THE LAW OF SOUTH AFRICA 197-200 (W.A. Joubert & T.J. Scott eds., 1986).

38. For example, see the "Church Clause" in § 9(7) of the Natives (Urban Areas) Consolidation Act 25 of 1945; § 4 of Internal Security Act 74 of 1982 (allowing religious bodies to be banned); § 2 of Affected Organizations Act 31 of 1974. On South African law, politics and religious history, see Lave, *supra* note 18.

39. See Lave, *supra* note 18, at 499-501.

40. See *id.* at 501, 505.

41. See *id.* at 510.

42. See van der Vyver, *supra* note 37, at 197.

43. *Id.* at 197, quoting § 1 of Publications Act 42 of 1974.

44. See *id.* at 197-98.

45. See *id.* at 198-200.

46. See *id.* at 200.

47. § 9(7) of Natives (Urban Areas) Consolidation Act 25 of 1945.

48. See van der Vyver, *supra* note 37, at 191 (claiming that the Church Clause was never invoked).



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leaders were “banned” under the Internal Security Act.<sup>49</sup> Organizations, including churches, engaging in politics in cooperation or consultation with a foreign organization could be, and were, declared “affected organizations,” which forfeited the organization’s foreign financial support.<sup>50</sup> Apartheid rule greatly affected individual freedom of religion.

In State President F.W. de Klerk’s 1990 Parliament-opening speech, he promised a new constitutional dispensation in which all South Africans might participate on a democratic basis.<sup>51</sup> De Klerk’s National Party (NP) repealed apartheid laws, unbanned, unimprisoned, and repatriated individuals and unbanned organizations such as the African National Congress (ANC), the Pan-Africanist Congress (PAC), and the Communist Party.<sup>52</sup> Finally, Nelson Mandela was released from prison in early 1990.<sup>53</sup> Besides receiving freedom of person by being released from prison or exile, for all practical purposes, Black leaders also received freedom of speech, thought and belief.<sup>54</sup>

*B. The Interim Constitution (1993)*

South Africans came to realize that in order to dismantle apartheid completely, they would need to adopt a supreme constitution with a bill of rights.<sup>55</sup> Interested parties were equally represented in writing the transitional constitution beginning in early March, 1993.<sup>56</sup> Throughout the process, the parties acknowledged that a final constitution would need to be

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49. § 4 of Internal Security Act 74 of 1982; *see also* van der Vyver, *supra* note 37, at 192.

50. *See* § 2 of Affected Organizations Act 31 of 1974; *see also* van der Vyver, *supra* note 37, at 191-92.

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

52. *See* Hugh Corder, *Towards a South African Constitution*, 57 MOD. L. REV. 491, 495-96 (1994).

53. *See* van der Vyver, *supra* note 51, at 760.

54. Although there was no legal underpinning guaranteeing these rights, the government indicated its willingness to allow open discussion of politics. *See* NELSON MANDELA, LONG WALK TO FREEDOM 492-98 (1994) (mentioning Mandela’s open discussion of politics in speeches after his release from prison).

55. *See* du Plessis, *supra* note 18, at 449. For comment on other possible forms the government of South Africa could have taken, *see generally* van der Vyver, *supra* note 51.

56. Each party was allowed two representatives, one of which was to be a woman, and two advisors. *See* du Plessis, *supra* note 18, at 449-50.

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negotiated after free and full elections; subsequently, parties were less dogmatic in reaching agreements during this initial process. The parties' result, the Interim Constitution, provided for free democratic national elections and for the drafting of a Final Constitution by the representatives elected in that election. Under the Interim Constitution, freedom of religion is protected through various clauses, including a general freedom of religion clause,<sup>57</sup> a clause forbidding discrimination on the basis of religion,<sup>58</sup> a clause discussing religious education (including religious observances at state institutions or schools),<sup>59</sup> a provision dealing with oaths contrary to religious beliefs,<sup>60</sup> and a freedom of association clause.<sup>61</sup> These rights can be limited by either a general limitations clause,<sup>62</sup> or the declaration of a "state of emergency."<sup>63</sup>

Section 14(1), the general freedom of religion clause, covers freedom for a variety of thoughts.<sup>64</sup> This indicates, among other things, that nonreligiousness is also protected.<sup>65</sup> The negotiators also included protection of "academic freedom" following the example of the Namibian Constitution.<sup>66</sup> However,

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57. See S. AFR. CONST. § 14(1) (1993) ("Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.").

58. See *id.* § 8 ("(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. . . .").

59. See *id.* § 14(2) ("Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.").

60. See *id.* sched. 3 (stating that individuals taking the oath of office can make a solemn affirmation rather than an oath, thus omitting the final words "[s]o help me God").

61. See *id.* § 17 ("Every person shall have the right to freedom of association.").

62. See *id.* § 33 (discussing the circumstances when legislation may violate or limit the application of fundamental rights).

63. See *id.* § 34 (outlining when states of emergency can limit the application of fundamental rights).

64. See *id.* § 14(1).

65. See du Plessis, *supra* note 18, at 459. This is in conformity with the International Convention on Civil and Political Rights. See *id.*

66. See NAMIB. CONST. § 21(b) ("All persons shall have the right to . . . freedom of thought, conscience and belief, which shall include academic freedom in institutions

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this phrase was left out of the Final Constitution. According to a memo issued by the Technical Committee of Theme Committee Four (Bill of Rights), although academic freedom overlaps with freedom of belief and opinion, (“for example freedom of expression, scientific research, associational autonomy, and academic rights”), it is not commonly dealt with as part of this right, the Namibian Constitution being the exception.<sup>67</sup> The Technical Committee proposed that the right should be dealt with elsewhere.<sup>68</sup>

Conspicuously lacking from the constitution is a separation of church and state. Professor Lourens du Plessis of the University of Stellenbosch stated: “It was clear that the multi-party negotiators had no intention whatsoever of using the Constitution or the Bill of Rights to erect a wall of separation between church and state.”<sup>69</sup> Professor Etienne Mureinik of the University of Witwatersrand criticized this lack of separation, especially with reference to section 14(2), the provision allowing for religious ceremonies in state institutions, including schools.<sup>70</sup> He pointed out: “It is coming widely to be recognized that religious observances which carry the endorsement, tacit or otherwise, of a state institution are inherently coercive.”<sup>71</sup> He asserted that religious observances that are state sponsored can rarely be conducted on a fair and equitable basis, and attendance would not be seen as being free and voluntary, thus failing to meet the requirements of section 14(2).<sup>72</sup>

### C. *The Final Constitution*

The Final Constitution was drafted by the Constitutional Assembly (CA), consisting of the National Assembly and the Senate; a total of 490 representatives from seven political

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of higher learning . . . .”).

67. *See id.*

68. *See* Technical Committee of Theme Committee Four, Explanatory Memorandum § 8.5.2.1.

69. Du Plessis, *supra* note 18, at 457.

70. *See* Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 45 (1994) (citing S. AFR. CONST. § 14(2) (1993)) (“[R]eligious observances may be conducted at state or state-aided institutions . . . provided [(a)] such religious observances are conducted on an equitable basis and [(b)] attendance at them is free and voluntary.”).

71. *Id.* at 45.

72. *See id.* at 44-46.

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parties were members of the CA.<sup>73</sup> The CA did a variety of things in order to include the public in the negotiation process and make the Final Constitution a truly democratic instrument. It released a working draft of the constitution to the public in October, 1995, and CA requested and received submissions from the public concerning the working draft. It also published a newsletter, *Constitutional Talk*.<sup>74</sup> Further, the CA committed itself to using plain language in the constitution because citizens have a "right to understand the Constitution under which they live."<sup>75</sup> To further incorporate the public into discussions, the CA set up a useful and simple internet homepage that includes CA minutes and reports, draft texts, a searchable database containing many submissions, issues of *Constitutional Talk*, and media statements released by the CA.<sup>76</sup> The CA also established a Talk-Line to provide information by telephone; the public could leave recorded messages with their ideas regarding the constitution.<sup>77</sup> A survey showed that efforts to involve the public in the negotiations were successful.<sup>78</sup>

The Final Constitution protects freedom of religion through a variety of provisions similar to the Interim Constitution, including a general freedom of religion clause,<sup>79</sup> a clause forbidding discrimination on the basis of religion,<sup>80</sup> a clause

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73. See THE CONSTITUTIONAL ASSEMBLY, CONSTITUTIONS, DEMOCRACY AND A SUMMARY OF THE WORKING DRAFT OF THE NEW CONSTITUTION pt. II para. 11 (1995). Cyril Ramphosa was Chairperson, and Leon Wessels was Deputy Chairperson. See *id.* para. 15.

74. *Constitutional Talk* (visited Jan. 26, 1998) <<http://www.constitution.org.za/talk.html>>.

75. *Some Facts About the Working Draft of the New Constitution* (visited Feb. 9, 1998) <<http://www.constitution.org.za/fct22115.html>>.

76. *South African Constitutional Assembly* (visited Mar. 5, 1998) <<http://www.constitution.org.za>>.

77. See *Some Facts About the Working Draft of the New Constitution*, *supra* note 75.

78. See Debbie Budlender & David Everatt, *Executive Summary, Evaluating the Constitutional Assembly: National Survey Results* (visited Mar. 5, 1998) <<http://www.constitution.org.za/case1546.html>> (discussing a national survey finding that the majority of South Africans were aware of the Constitutional Assembly and its work).

79. See S. AFR. CONST. § 15(1) (1996) ("Everyone has the right to freedom of conscience, religion, thought, belief and opinion.").

80. See *id.* § 9(3) ("The state may not unfairly discriminate directly or indirectly

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discussing religious education (including religious observances at state institutions or schools),<sup>81</sup> a provision dealing with oaths contrary to religious beliefs,<sup>82</sup> and a freedom of association clause.<sup>83</sup> The Final Constitution also includes a clause protecting cultural communities, including religious communities.<sup>84</sup> The rights in these clauses bind the organs of state.<sup>85</sup> They also bind natural and juristic persons “if, and to the extent that, it is applicable, taking to account the nature of the right and of any duty imposed by the right.”<sup>86</sup> Juristic persons, such as churches,<sup>87</sup> “are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the juristic persons.”<sup>88</sup>

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against anyone on one or more grounds, including . . . religion, conscience, belief . . .”).

81. *See id.* § 15(2) (“Religious observances may be conducted at state or state-aided institutions provided that—(a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.”).

82. *See id.* sched. 2 (stating that individuals taking the oath of office can make a solemn affirmation rather than an oath, thus omitting the final words “[s]o help me God”).

83. *See id.* § 18 (“Everyone has the right to freedom of association.”).

84. *See id.* § 31(1) (“Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to—(a) enjoy their culture, practise their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”).

85. *See id.* § 8(1) (“The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.”). “Organs of state” are defined in section 239 of the Final Constitution as

any department of state or administration [other than judicial officers or courts] in the national, provincial or local sphere of government; and (b) any other functionary or institution—(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.

*Id.* § 239.

86. *Id.* § 8(2) (“A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.”).

87. *See De Vos v. Dir Ringskommissie van die Ring van die N.G. Kerk Bloemfontein*, 1952 (2) SA 83, 84, 93 (O). In South Africa, churches have legal personality if their domestic articles of association or constitution so indicate. *See van der Vyver, supra* note 37, at 180-81.

88. S. AFR. CONST. § 8(4) (1996).

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The application of section 15 of the Final Constitution may be limited by the general limitations clause<sup>89</sup> or by the declaration of a state of emergency.<sup>90</sup> The general limitations clause reads in part:

- (1) The rights in the Bill of Rights may be limited only in terms of law of *general application* to the extent that the limitation is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*, taking into account all relevant factors including—
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose;
- and
- (e) less restrictive means to achieve the purpose.<sup>91</sup>

This section also states no law may limit any right entrenched in the bill of rights.

The bill of rights may also be limited under section 37 by the declaration of a state of emergency. A state of emergency can be declared by an act of Parliament when “the life of the nation is threatened . . . and the declaration is necessary to restore peace and order.”<sup>92</sup> A state of emergency can last no more than twenty-one days unless extended by sixty percent of the Assembly.<sup>93</sup> The state of emergency can only derogate from the bill of rights to the extent strictly required by the emergency and the legislation derogating from the bill of rights cannot violate the Republic’s obligations under international law applicable to states of emergency.<sup>94</sup> Additionally, the legislation cannot indemnify the state nor any person, and cannot derogate from a list of rights (which does not include section 15, freedom of religion, thought and belief).<sup>95</sup>

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89. *See id.* § 36 (discussing the circumstances when legislation may violate or limit the application of fundamental rights).

90. *See id.* § 37 (stating when a state of emergency can limit the application of fundamental rights).

91. *Id.* § 36(1) (emphasis added).

92. *Id.* § 37(1).

93. *See id.* § 37(2)(b).

94. *See id.* § 37(4).

95. *See id.* §§ 37(4)-(5) (stating that the rights of equality (but not religious equality), human dignity, life, freedom and security of the person, slavery, servitude and forced labor, children, and arrested, detained and accused persons cannot be

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The equality section in section 9 is both broad and powerful, sharply reflecting South Africa's marred history.<sup>96</sup> Read literally, however, this strong clause can run counter to some rights associated with freedom of religion.<sup>97</sup> The application section says natural and juristic persons are bound by the bill of rights to the extent it is applicable to them.<sup>98</sup> This roundabout language is short circuited by section 9 itself. "No person [including juristic persons] may unfairly discriminate directly or indirectly"<sup>99</sup> on any ground listed in subsection 9(3).<sup>100</sup> Consequently, a church, which is a juristic person, may not discriminate on any of the grounds listed unless the church establishes that such discrimination is fair.<sup>101</sup> This provision may prove onerous to churches with traditions or doctrines that differentiate between people on such grounds. Although such a church has the opportunity to prove its discrimination is fair,

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derogated during a state of emergency, either in their entirety or to a limited extent).

96. Section 9 of the 1996 South African Constitution states:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

97. This may undermine the argument that South Africa has become the strongest democracy in southern Africa and is poised to take the lead in religious freedom issues in the region; however, it undermines the argument only slightly. The strength of South Africa's constitution, the amount of public participation in its drafting, and the institutions established to maintain South Africa's democracy all point to South Africa as the leader in southern African democracy. Further, the three religious freedom cases decided thus far by the Constitutional Court further show the strong protection of religious freedom in South Africa. *See infra* Part IV.

98. *See* S. AFR. CONST. § 8 (1996).

99. *Id.* § 9(4).

100. These grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. *See id.* § 9(3).

101. *See* *De Vos v. Dir Ringskommissie van die Ring van die N.G. Kerk Bloemfontein*, 1952 (2) SA 83, 84, 93 (O).

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read literally, the section says a church is not allowed to discriminate, (for example, in hiring support staff), on the basis of religion. It is counter-intuitive to prevent a church from requiring its agents or functionaries to be members of its congregation because such a requirement would be a violation of some human right.

More controversial would be the application of section 9 to issues surrounding the gender of clergy. Many religions restrict clerical roles by sex.<sup>102</sup> Strictly read, section 9 would declare that practice illegal in South Africa. Some religions may also restrict clerical duties to persons of a particular marital status. Such restrictions may be considered "fair," and therefore legal under sections 9(3) and (4), but section 9(5) burdens the church with proving in court that these restrictions are fair. This kind of legal harassment is not what is envisaged by the freedom of religion provisions in section 15.

According to Du Plessis, during the writing of the Interim Constitution, the greatest number of submissions made by religious communities concerned the guarantee of equality based on sexual orientation.<sup>103</sup> Section 9 seems to imply that a church, as a juristic person, would not be able to remove from its membership a person who is a homosexual, although homosexuality may be a serious sin according to the doctrine of that church, unless the church can show such discrimination is fair. This could be an unacceptable intrusion into the doctrinal affairs of such a church.

Probably the best way to address these problems would be through the operation of the second sentence of section 9(4): "National legislation must be enacted to prevent or prohibit unfair discrimination."<sup>104</sup> By conscientiously defining what "unfair" means in the religious context, the legislative branch can eliminate this problem.

In South African common law, the provisions of a church's constitution legally govern a church's relationship with its

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102. This includes for example, Roman Catholicism, many other Christian religions, Judaism, Islam, African traditional religions, and Sikhism. *See* GENDER AND RELIGION (William H. Swatos, Jr. ed., 1993); RELIGION AND WOMEN (Arvind Sharma ed. 1994); WOMEN IN WORLD RELIGIONS (Arvind Sharma ed., 1987).

103. *See* du Plessis, *supra* note 18, at 458.

104. S. AFR. CONST. § 9(4) (1996).



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members.<sup>105</sup> The relationship between the church and the individual members is contractual;<sup>106</sup> thus, either party may recover for breach. An ecclesiastical tribunal must adhere to its duties under the constitution, as well as to principles of natural justice.<sup>107</sup> These principles have been interpreted to mean the tribunal must actually consider the matter at hand, not act *ultra vires*, act in good faith, and act reasonably.<sup>108</sup> Civil courts may review the decisions of ecclesiastical tribunals to the extent they violate the constitution or the principles of natural justice, particularly where the tribunal has exceeded its jurisdiction or has operated negligently or maliciously.<sup>109</sup>

### III. RELIGIOUS FREEDOM CLAUSES IN SOUTHERN AFRICAN CONSTITUTIONS

South Africa is not the only southern African nation that has ratified a new constitution recently.<sup>110</sup> This Part discusses religious freedom clauses in all southern African constitutions and shows how these other constitutions protect freedom of religion similarly to the South African Constitution. Such similarities suggest the ease with which other southern African countries could follow South African constitutional case law.

Southern African nations' constitutions contain several clauses directly implicating religious liberties, covering: general freedom of religion, discrimination on the basis of religion, religious education (including religious observances at state institutions or schools), and oaths contrary to religious beliefs. A clause that mentions God in a preamble or postamble is a special type of clause that implicates religious liberties and is currently an issue for several southern African nations. Additionally, some southern African constitutions contain additional clauses relating to religion (for example, provisions protecting rights of persons to practice their culture, including religious culture; extending freedom of association; and

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105. See van der Vyver, *supra* note 37, at 183.

106. See *id.* at 184.

107. See *id.*

108. See *id.*, quoting *Theron v. Ring van Wellington van die NG Sendingkerk*, 1976 (2) SA 1, 15, 20-23 (A).

109. See *id.* at 186.

110. See *supra* note 7.

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discussing whether religious rights can be limited or derogated).

*A. General Freedom of Religion Clauses*

Each southern African constitution contains a general freedom of religion clause. Over half of the countries define the right negatively. For example, the Zimbabwean Constitution reads:

Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say, freedom of thought and of religion, freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or in private, to manifest and propagate his religion or belief through worship, teaching, practice and observance.<sup>111</sup>

The other countries' constitutions define the right positively (and more concisely): "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."<sup>112</sup>

The first type of general religious freedom clause specifically defines the scope of religious liberties to include the right to change, practice, and share one's religious beliefs. It also provides for one to consent to a derogation of one's religious rights, as well as for parents to limit their children's religious rights through discipline. These limitation aspects are absent from the second type of clause. The absence of these aspects in the second type of clause, however, does not mean that the scope of religious liberties (or, alternatively, of the limitations to those liberties) is more narrow. In fact, the presence of such language in the constitutions of neighbors could be persuasive to the courts in countries using the second type of general clause, and they may well interpret their constitution to include the specifics mentioned in the first clause.

Another significant difference between the two types of clauses is how the right is phrased: negatively in the first (no one's freedom of religion can be hindered) and positively in the

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111. ZIMB. CONST. § 19(1); *cf.* BOTS. CONST. § 11(1); SWAZ. CONST. § 11(1); ZAMBIA CONST. § 19(1).

112. S. AFR. CONST. § 15(1) (1996); *cf.* MALAWI CONST. § 33; NAMIB. CONST. § 21(1)(c); S. AFR. CONST. § 14(1) (1993). Lesotho's Constitution is a hybrid: it both entitles persons to and forbids hindrance of freedom of religion. *See* LESOTHO CONST. § 13(1).

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second (one has the right to freedom of religion). Textually, the two have different meanings; one affirmatively grants religious freedom, and apparently by implication, forbids hindrance of that freedom,<sup>113</sup> while the other prohibits the hindrance of freedom of religion, which must be a right to which one is entitled in order to be hindered. Practically, however, courts may construe, and indeed have already construed the clauses similarly—indeed the effects, despite the wording, are indistinguishable. For instance, the South African Constitutional Court recently interpreted its general religious freedom clause (the second type) to mean that one cannot be coerced into acting contrary to one's religious beliefs and that evidence of coercion is a per se intrusion on religious freedom.<sup>114</sup> This interpretation was identical to a Zimbabwe Supreme Court case, which after construing the first type of clause, determined that coercion results in a violation of one's religious liberties.<sup>115</sup> This is the same interpretation, despite the different diction in the constitutional provisions.

*B. Discrimination on the Basis of Religion*

In addition to the general protection of freedom of religion, each southern African constitution forbids discrimination on the basis of religion or creed.<sup>116</sup> While the phrasing of these

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113. That these rights cannot be violated is clear from the "application" sections of the bills of rights of those countries using the second type of clause. These clauses state that the rights in the bills of rights are to be upheld (and by implication, not violated) by the government. *See, e.g.*, S. AFR. CONST. § 8 (1996). The religion clause, read with the application clause, establishes that the expressly granted right to religious freedom cannot be hindered; therefore, the second type of religion clause described above is quite like the first.

114. *See S v. Solberg*, 1997 SACLR LEXIS 30, \*99 (CC Oct. 6, 1997); *id.* at \*115 (O'Regan, J., dissenting); *id.* at \*177 (Sachs, J., concurring).

115. *See In re Chikweche*, 1995 (4) 284 (Zimb.).

116. *See* BOTS. CONST. § 15(3) ("In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."); *see also* LESOTHO CONST. § 18(3) (same wording); MALAWI CONST. § 20 (similar wording); NAMIB. CONST. § 10 (similar wording); S. AFR. CONST. § 9 (1996) (same wording); S. AFR. CONST. § 8 (1993) (similar wording); SWAZ. CONST. § 15 (same wording); ZAMBIA CONST. § 23 (same wording); ZIMB. CONST. § 23 (same wording).

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provisions is slightly different, the core concept is clear: one may not be discriminated against based on religion.

One major difference among the clauses is whether protection from discrimination is based on religion or creed. Four countries (Namibia, Lesotho, Malawi, and South Africa) prevent discrimination against *religion*.<sup>117</sup> The other countries protect one from discrimination based on *creed*.<sup>118</sup> No southern African court has defined "creed," although Botswana's highest court, the Appeal Court, has mentioned in dicta that "religion is [arguably] different from creed."<sup>119</sup> However, the point of the dicta was not that creed should be protected under the Botswana discrimination clause while religion was not protected, but that even though religion was not specifically mentioned, it might nevertheless be considered a class protected from discrimination based on the clause.<sup>120</sup>

The absence of "religion" from the classes protected by the discrimination clauses of Botswana, Swaziland, Zambia and

117. Compare S. AFR. CONST. § 8(2) (1993) ("No person shall be unfairly discriminated against, directly or indirectly . . . , on one or more of the following grounds . . . [including] religion . . . ."), with NAMIB. CONST. § 10(2) ("No persons may be discriminated against on the grounds of . . . religion . . . ."), and LESOTHO CONST. § 18(3) ("[D]iscriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by . . . religion . . . ."), and MALAWI CONST. § 20(1) ("Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of . . . religion . . . .").

118. See BOTS. CONST. § 15(3) ("[D]iscriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by [inter alia.] creed . . . ."); SWAZ. CONST. § 15(3) (same wording); ZAMBIA CONST. § 23(3) (same wording); ZIMB. CONST. § 23(3) (similar wording).

119. Attorney-General v. Dow, 1992 SACLR LEXIS 7, \*71 (Bots. July 3, 1992).

120. See *id.* at \*70-\*71 ("I do not think that the framers of the Constitution intended to declare in 1966 that all potentially vulnerable groups or classes who would be affected for all time by discriminatory treatment have been identified and mentioned in the definition in section 15(3) [of the Botswana Constitution]. I do not think that they intended to declare that the categories mentioned in that definition were forever closed. In the nature of things, as far-sighted people trying to look into the future, they would have contemplated that with the passage of time not only the groups or classes which had caused concern at the time of writing the Constitution but other groups or classes needing protection would arise. The categories might grow or change. In that sense, the classes or groups itemised in the definition would be, and in my opinion, are by way of example of what the framers of the Constitution thought worth mentioning as potentially some of the most likely areas of possible discrimination. I am fortified in this view by the fact that other classes or groups with respect to which discrimination would be unjust and inhuman and which, therefore, should have been included in the definition were not . . . . Arguably religion is different from creed, but although creed is mentioned, religion is not.").

Zimbabwe should not mean, however, that one *could* be discriminated against on the basis of religion in these countries. A variety of dictionaries define creed almost exclusively in terms of religious beliefs.<sup>121</sup> Five state courts in the United States,<sup>122</sup> as well as at least one Canadian court,<sup>123</sup> have defined creed strictly in terms of religious belief. The courts of Botswana, Swaziland, Zambia and Zimbabwe might define creed more broadly than these sources (i.e., to include political, social or economic beliefs), but southern African courts would be hard pressed to *exclude* religious belief from any definition of creed. So while the clauses differ in protecting creed versus religion from discrimination,<sup>124</sup> once again, in practice the terms could be interpreted similarly, or at least to include the other.

### C. Religious Education

Southern African constitutions contain two types of clauses relating to religious education: first, the constitutions discuss the right for religious denominations to establish religious schools and to provide religious education at those schools, and second, they address compulsory religious education at state schools.

The southern African constitutions vary in their treatment of the right to establish religious schools. Three countries' constitutions expressly grant religions the right to establish and maintain religious schools at their own expense; these constitutions further declare that such religions will not be

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121. See *Jazairi v. Ontario* [1997] 146 D.L.R. (4th) 297, 307 (Can.) (quoting definitions from *Black's Law Dictionary*, *Houghton Mifflin Canadian Dictionary of the English Language*, *Webster's New International Dictionary*, *Oxford English Dictionary*, *Webster's Ninth New Collegiate Dictionary*, and the *New Shorter Oxford Dictionary on Historical Principles*).

122. See *Shuchter v. Division on Civil Rights*, 285 A.2d 42 (N.J. Super. Ct. App. Div. 1971); *Cummings v. Weinfeld*, 30 N.Y.S.2d 36 (Sup. Ct. 1941); *Rasmussen v. Glass*, 498 N.W.2d 508 (Minn. Ct. App. 1993); *Riste v. Eastern Wash. Bible Camp, Inc.*, 605 P.2d 1294 (Wash. Ct. App. 1980); *Augustine v. Anti-Defamation League of B'Nai B'Rith*, 249 N.W.2d 547 (Wis. 1977). It should be noted that in each of these cases "creed" was being interpreted in the context of a state statute and not a constitution, and in some of the cases state legislative intent was examined in reaching the definition. Still, the courts' definitions of creed are consistent with dictionary definitions.

123. See *Jazairi*, 146 D.L.R. (4th) at 307-08.

124. See *supra* notes 117-118.

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prevented from providing religious instruction to the students of these schools.<sup>125</sup> Two other constitutions state that a “religious community” may provide religious education to students “in the course of any education provided by that community,” but do not grant religions a specific right to establish such schools (perhaps because such a right is implied in the clause) or say whether the religious community is to fund such schools (also, because such an obligation is implied in the clause).<sup>126</sup> Three other constitutions allow “any person” or “everyone” (including, presumably, religious denominations) to establish private schools at their expense if the schools are registered with the state and maintain government education standards.<sup>127</sup> However, these provisions do not discuss whether a religious community providing such education is entitled to provide religious education in the school, and in this way these provisions are facially more narrow than those in other constitutions.

Southern African constitutions also discuss compulsory religious education or observances in state-run schools. While the Namibian and Malawian constitutions contain no reference to religious education or observances in state-run schools, most of the other nations’ constitutions relieve a student from such education, as well as from a religious ceremony or observance,

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125. See BOTS. CONST. § 11(2) (“Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which it wholly maintains or in the course of any education which it otherwise provides.”); LESOTHO CONST. § 13(2) (same); SWAZI. CONST. § 11(2) (same).

126. ZIMB. CONST. § 19(3) (“No religious community shall be prevented from making provision for the giving by persons lawfully in Zimbabwe of religious instruction to persons of that community in the course of any education provided by that community, whether or not that community is in receipt of any subsidy, grant or other form of financial assistance from the State.”); see ZAMBIA CONST. § 19(3) (similar wording). With respect to the expense question, Zimbabwe and Zambia can benefit from a South African Constitutional Court case ruling that the cost of religiously based schools must be paid by the religious organization. See *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC); *infra* Part IV.B.

127. See S. AFR. CONST. § 29(3) (1996) (“Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—(a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.”); see also MALAWI CONST. 25(3); NAMIB. CONST. § 20(4).

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if it relates to a different religion than the student's.<sup>128</sup> The South African Constitution expands that concept to all state-run institutions (including schools) under certain conditions (including that attendance is free and voluntary).<sup>129</sup> Southern African countries controverted United States case law prohibiting religion in school:<sup>130</sup> southern African constitutional founders specifically contemplated the possibility of religious education in their nations' schools if such education was not forced on students of other faiths.<sup>131</sup>

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128. See BOTS. CONST. § 11(3) ("Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own."); LESOTHO CONST. § 13(3) (same wording); SWAZI. CONST. § 11(3) (similar wording); ZAMBIA CONST. § 19(2) (same wording); ZIMB. CONST. § 19(2) (same wording).

129. See S. AFR. CONST. § 15(2) (1996) ("Religious observances may be conducted at state or state-aided institutions provided that—(a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary."). For criticism of this provision, see *supra* text accompanying notes 70-72.

130. See, e.g., *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (vocal prayer).

131. One ambiguity exists in the Botswana and Zambia constitutions regarding religious education and observances. These constitutions excuse students from attendance if the education or observance relates to a different religion than their own. However, does "religion" in this case mean a family of religion (i.e. Islam as opposed to Christianity) or religious denominations (i.e. Roman Catholic as opposed to Methodist)? The Lesotho, Swaziland and Zimbabwe constitutions make clear that references to religion in their religion clause include references to a religious denomination. See LESOTHO CONST. § 13(7) ("References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly."); SWAZI. CONST. § 11(6) (same wording); ZIMB. CONST. § 19(6) (same wording). Therefore, a Lesotho, Swazi or Zimbabwean court might construe "religion" in this circumstance to be religious denomination and excuse Catholic students if a Methodist pastor conducted a prayer meeting at a school. This result should also occur in Botswana and Zambia, despite the absence of the language found in the Lesotho, Zimbabwe and Swaziland constitutions. Forcing one to attend a religious service at school led by a religious denomination different than one's own would at least be a violation of the general freedom of religion clauses in the Botswanan and Zambian constitutions, see BOTS. CONST. § 11(1); ZAMBIA CONST. § 19(1), in that such coercion "hinder[s] . . . the enjoyment of his freedom of . . . religion." Coercing one to act contrary to one's own religious beliefs has been found to be an intrusion on religious freedom in both South Africa and Zimbabwe, see *S v. Solberg*, 1997 SACLX LEXIS 30, \*99 (CC Oct. 6, 1997); *id.* at \*115 (O'Regan, J., dissenting); *id.* at \*177 (Sachs, J., concurring); *In re Chikweche*, 1995 (4) SALR 284 (Zimb.), and should similarly result in unconstitutionality in Botswana and Zambia if one is forced to attend a religious service in school conducted by a denomination other than one's own.

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*D. Oaths Contrary to Religious Beliefs*

Most southern African constitutions protect one from taking any oath contrary (or in a manner contrary) to one's religious beliefs.<sup>132</sup> The South African Constitution does not have such an all-inclusive provision, although it does allow one being sworn into a political office to take an affirmation rather than an oath, which would require one to include the words "[s]o help me God."<sup>133</sup> While the taking of other oaths is not expressly prohibited, taking an oath contrary to one's religious beliefs would most likely qualify as state coercion in violation of one's religious liberties, guaranteed by the general religious liberties clauses mentioned above. All of the judges of the South African Constitutional Court agree that such outright coercion is sufficient to violate the general religious liberty provision of the South African Constitution.<sup>134</sup>

*E. Clauses Mentioning God*

Only two southern African countries discuss religious themes in prefatory language: South Africa and Zambia. The South African Interim Constitution<sup>135</sup> mentions God in both the preamble and "postamble" section (which is titled "National Unity and Reconciliation").<sup>136</sup> The Final Constitution, ratified in 1996, mentions God only in the preamble.<sup>137</sup> Even this inclusion led to much debate during constitutional drafting about the separation of church and state. Noble Peace Prize recipient

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132. See BOTS. CONST. § 11(4) ("No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief."); LESOTHO CONST. § 13(4) (same wording); SWAZI. CONST. § 11(4) (same wording); ZAMBIA CONST. § 19(4) (same wording); ZIMB. CONST. 19(4) (same wording).

133. See S. AFR. CONST. sched. 2 (1996) (giving public officials the choice of taking an oath, in which case "[s]o help me God" concludes the oath, or making a solemn affirmation, in which case "[s]o help me God" is not spoken).

134. See *Solberg*, 1997 SACLX LEXIS at \*99 (stating that direct or indirect coercion was necessary (and thus at least sufficient) to establish a violation of religious liberty); *id.* at \*115 (O'Regan, J., dissenting) (arguing that coercion was sufficient); *id.* at \*177 (Sachs, J., concurring) (submitting that coercion was sufficient); see also *infra* Part IV.A.3.

135. See *supra* note 7.

136. See S. AFR. CONST. preamble (1993) ("In humble submission to Almighty God . . ."); *id.* "postamble" (stating "May God bless our country" in six prominent South African languages).

137. See S. AFR. CONST. preamble (1996) (stating "May God protect our people" and "God bless South Africa" in six prominent South African languages).



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Archbishop Desmond Tutu, for example, called for a secular state.<sup>138</sup> However, over 3,000 Christians marched on parliament to protest a proposal to separate church and state.<sup>139</sup> This group included denominations from charismatic churches to the conservative Dutch Reformed Church.<sup>140</sup> In the end, reference to God in the preamble was maintained.<sup>141</sup> Even though these statements could be considered “religious,” they are inconsequential, as statements in a previous South African constitution<sup>142</sup> referring to God have been interpreted as “a confession of faith and as such . . . not . . . law . . . [,] consequently altogether lack[ing] juridical relevance.”<sup>143</sup>

However, in Zambia the situation is slightly different and much more controversial. Zambia ratified a new constitution in 1991 that provided for multiparty democracy with full and free elections.<sup>144</sup> In the 1991 election, Zambia’s only president since independence in 1964, Kenneth Kaunda, was replaced by Fredrick Chiluba.<sup>145</sup> Five years later, Chiluba polemically amended the constitution to include language in the preamble making Zambia a “Christian nation” but “upholding the right of every person to enjoy that person’s freedom of conscience or religion.”<sup>146</sup> Amending the preamble breached the suggestion of

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138. See Brendan Boyle, *Tutu Calls for Separation of Church and State*, REUTERS N. AM. WIRE, June 6, 1995, available in LEXIS, World Library, Reuna File.

139. See Marius Bosch, *South African Christians Oppose Secular Constitution*, REUTERS N. AM. WIRE, June 14, 1995, available in LEXIS, World Library, Reuna File.

140. See *id.*

141. S. AFR. CONST. preamble (1996) (stating “May God protect our people,” followed by “God bless South Africa” in six different languages).

142. See S. AFR. CONST. preamble (1983) (“IN HUMBLE SUBMISSION to Almighty God . . . WE DECLARE that we . . . [must] uphold Christian values . . . .”); *id.* § 2 (“The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God.”).

143. Van der Vyver, *supra* note 37, at 193.

144. See FACTBOOK, *supra* note 3, at 469.

145. See *id.*

146. ZAMBIA CONST. preamble. The controversial “Christian nation” language in the preamble was not the most problematic amendment: Chiluba amended the constitutional section regarding electing the Zambian president to include a requirement that a Presidential candidate’s parents, as well as the candidate, are Zambian by birth or descent. See *id.* § 34(3)(a)-(b) (“A person shall be qualified to be a candidate for election as President [only] if—(a) he is a citizen of Zambia; (b) both his parents are Zambians by birth or descent . . . .”). This requirement disqualified former president Kaunda from running against Chiluba in the 1996 election because Kaunda’s parents were born in Malawi, not Zambia as required by the constitution. See Ndulo & Kent, *supra* note 7, at 256, 273, 276.

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a government constitutional recommendation commission, and it was contrary to the lobbying efforts of many churches.<sup>147</sup> Commentators call the proclamation in the preamble “antithetical to the equality of the people regarding their religious beliefs.”<sup>148</sup> It is also dangerous: Hindus in Zambia have recently been targets of property damage and hate acts;<sup>149</sup> state-recognized Christianity further ostracizes Hindu Zambians and could encourage Christians to further antagonize Hindus and other religious groups. In order to protect religious liberty in Zambia, the “Christian nation” language should be deleted in a future constitutional amendment. Alternatively, Zambian courts should either ignore the prefatory “Christian nation” language, as has been argued in the South African context,<sup>150</sup> or ensure special consideration of religious liberty in light of the added determination in the preamble to “uphold[] the right of every person to enjoy . . . freedom of conscience or religion,”<sup>151</sup> or both. Further, Chiluba’s government, including the Zambian Parliament (most of whom belong to Chiluba’s political party), should not use the prefatory language to justify passing pro-Christian legislation that violates the religious liberties of any Zambians—non-Christian or otherwise.

*F. Other Clauses Implicating Religion*

Some southern African constitutions describe other rights related to religion. For instance, in Namibia and South Africa, religious communities specifically have the right to practice their religion.<sup>152</sup> This right was probably included to appease

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147. See Ndulo & Kent, *supra* note 7, at 277; Joe Chilaizya, *Zambia-Religion: Knocking the Halo Off a “Christian Nation,”* INTER PRESS SERVICE, Oct. 23, 1995, available in LEXIS, World Library, Allwld File; *Zambia: Zambian Church and State on Collision Course*, ALL AFR. PRESS SERVICE, June 24, 1996, available in LEXIS, World Library, Allwld File.

148. Ndulo & Kent, *supra* note 7, at 277.

149. See Straus, *supra* note 11.

150. See *supra* notes 142-143.

151. ZAMBIA CONST. preamble.

152. See NAMIB. CONST. § 19 (“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.”); S. AFR. CONST. § 31(1) (1996) (“Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to—(a) enjoy their culture, practise their religion and use their language;

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the Afrikaner communities in both of these countries after their minority governments changed to majority black rule.<sup>153</sup> Additionally, the South African constitutional provision on language policy requires a Pan South African Language Board to be established. The Board must, among other tasks, “promote and ensure respect for languages . . . used for religious purposes,” such as Arabic, Hebrew and Sanskrit.<sup>154</sup>

Additionally, all southern African constitutions protect freedom of association—a right sometimes relied upon by religious groups. The way the right is protected is similar to the general religious freedom clauses described above. Some protect the right negatively: “Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association . . . .”<sup>155</sup> Others define it positively: “Every person shall have the right to freedom of association . . . .”<sup>156</sup> In most southern African countries, this right includes the right to form an association.<sup>157</sup>

Another important type of clause that affects the protection of religious freedom is the limitations clause found in southern African constitutions. Limitations clauses contemplate the

and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”).

153. Afrikaners make up a small percentage of South Africans and Namibians. They are white descendants of the Dutch settlers who came to South Africa in 1652, and are usually characterized by their language, Afrikaans (a derivative of Dutch), and their religion (usually Calvinistic). See DAVENPORT, *supra* note 27, at 19, 20, 30. It was the mostly Afrikaner National Party that instituted apartheid in South Africa in the late 1940s. See *id.* at 320-45. As minority communities and the designers of apartheid, Afrikaners were especially sensitive to protect their culture and religion constitutionally when the current Namibian and South African constitutions were drafted: thus, Namibia Constitution § 19 and South African Constitution § 31 were included.

154. S. AFR. CONST. § 6(5)(b) (“The Pan South African Language Board must . . . promote and ensure respect for languages, including . . . Arabic, Hebrew, Sanskrit and others used for religious purposes.”).

155. BOTS. CONST. § 13(1) (“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to . . . associations for the protection of his interests.”); see also SWAZI. CONST. § 13(1) (same wording); ZAMBIA CONST. § 21(1) (same wording); ZIMB. CONST. § 21 (same wording).

156. MALAWI CONST. § 32(1) (“Every person shall have the right to freedom of association, which shall include the freedom to form associations.”); see LESOTHO CONST. § 16(1) (similar wording); NAMIB. CONST. § 21(1)(e) (similar wording); S. AFR. CONST. § 18 (1996) (“Everyone has the right to freedom of association.”).

157. See, e.g., BOTS. CONST. § 13(1).

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possibility that legislation may, in certain circumstances, limit the extent of religious freedoms. In other words, some legislation or other state action could on its face violate one's freedom of religion, but such violation would not be unconstitutional because its effects were minor or were felt important. In two southern African countries, religious freedoms are among those liberties that may *not* be limited or derogated.<sup>158</sup> Other countries allow for reasonable derogations of religious freedom for purposes of national defense, public safety, public order, public morality, public health, or for the purpose of protecting others' religious rights.<sup>159</sup> The South African Constitution states that limitations are allowed if they are reasonable and justifiable in a democratic society, and all relevant factors (a presumably inexhaustible list of which is included in the constitution) must be considered before the limitation is allowed.<sup>160</sup>

## IV. RELIGIOUS FREEDOM CASE LAW IN SOUTHERN AFRICA

In 1995, one year after a fully participatory election in South Africa, the new South African Constitutional Court heard its first case.<sup>161</sup> Since then, the Constitutional Court has

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158. See MALAWI CONST. § 44(1)(h); NAMIB. CONST. § 24(3).

159. See BOTS. CONST. § 11(5); SWAZI. CONST. § 11(5); ZAMBIA CONST. § 19(5); ZIMB. CONST. § 19(5).

160. See S. AFR. CONST. § 36 (1996). The Interim South African Constitution's limitations clause contained a different, two-tier approach. First, all limitations had to be reasonable, justifiable in a democratic society, and nondestructive of the essential content of the right. See S. AFR. CONST. § 33(1) (1993). Second, limitations on certain rights, including religious rights, had to be shown to be necessary, thus raising the difficulty of these rights being limited. See *id.* However, the different approach in the Final Constitution does not mean religious rights (and those other rights protected with the tougher "necessary" standard under the Interim Constitution) can be more easily limited under the Final Constitution. One factor the Final Constitution mentions is "the nature of the right." S. AFR. CONST. § 36(1)(a) (1996). Religious rights are arguably the first of the human rights, see W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE, *supra* note 18, at 1, 1, and during apartheid in South Africa religious rights were often violated. See *S v. Solberg*, 1997 SACLR LEXIS 30, \*139-\*48 (CC Oct. 6, 1997) (Sachs, J., concurring); see also *infra* Part IV.A.3. Subsequently, they deserve special protection from limitation under the Final Constitution as they did under the Interim Constitution.

161. See *S v. Zuma*, 1995 (2) SA 642 (CC) (first Constitutional Court case). The Constitutional Court has ultimate jurisdiction "over all matters relating to the interpretation, protection and enforcement of the provisions of [the South African] Constitution." S. AFR. CONST. § 98(2) (1993). It is composed of a President and 10 other judges. See *id.* § 98(1). Each must meet certain qualifications, see *id.* § 99(2)

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decided three important cases involving religious freedom under the Interim Constitution.<sup>162</sup> In these cases one sees the beginnings of a South African religious freedom jurisprudence upon which all southern African countries may rely. Subsequent judicial opinions in all of southern Africa will, in all likelihood, examine these cases and apply their reasoning; therefore, these initial decisions are crucial starting points for the developing southern African religious freedom jurisprudence. In one Constitutional Court decision, the Court made it clear that legislation that discriminates on the basis of religion is unconstitutional;<sup>163</sup> however, the Court has also determined that South Africans will receive no special treatment because of their religion.<sup>164</sup> Additionally, a Constitutional Court decision determined that proof of either direct or indirect coercion to act contrary to one's religious belief is sufficient to show a violation of freedom of religion.<sup>165</sup>

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(stating a judge must be a South African citizen, be fit and proper to serve as judge, and be either a past judge, advocate, professor or expert in constitutional law of South Africa), and each serves for a non-renewable term, *see id.* § 99(1). The President of South Africa has authority to choose the President of the Constitutional Court and four of its judges with minimal consultations with the Cabinet and the Chief Judge of the Supreme Court. *See S. AFR. CONST.* §§ 97(2)(a), 99(3) (1993). The four judges the President chooses must come from among the judges of the Supreme Court. *See id.* § 99(3). The President must choose the final six judges from a shortlist of names provided by the Judicial Service Commission, a group of judges, attorneys, advocates, Members of Parliament, the Minister of Justice, and one professor of law. *See id.* §§ 99(4)-(5), 105(1). Similar provisions exist in the Final Constitution. *See S. AFR. CONST.* §§ 167, 172, 174, 176, 178 (1996).

162. *See S v. Solberg*, 1997 SACLR LEXIS 30 (CC Oct. 6, 1997); *Fraser v. Children's Court*, Pretoria North, 1997 (2) SA 261 (CC); *In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC). The Final Constitution contemplates that cases arising during the time before the Final Constitution was ratified in 1996 will be decided under the Interim Constitution, unless justice otherwise requires. *See S. AFR. CONST.* sched. 6, § 17 (1996) ("All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."). Thus, the majority of cases currently heard by the Constitutional Court are still governed by the Interim Constitution, and all the religious liberties cases have been decided under the Interim Constitution.

163. *See Fraser*, 1997 (2) SA at 272-73; *see also infra* Part IV.A.

164. *See Gauteng School Bill*, 1996 (3) SA at 171-75, 185 n.\*\*; *see also infra* Part IV.B.

165. *See Solberg*, 1997 SACLR LEXIS at \*99 (stating that direct or indirect coercion was necessary (and thus at least sufficient) to establish a violation of religious liberty); *id.* at \*115 (O'Regan, J., dissenting) (arguing that coercion was sufficient); *id.* at \*177 (Sachs, J., concurring) (submitting that coercion was sufficient);

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*A. South African Religious Freedom Case Law**I. Discrimination on the Basis of Religion: Fraser v. Children's Court, Pretoria North*

Section 8 of the South African Interim Constitution forbids discrimination on the basis of a number of grounds, including religion.<sup>166</sup> In *Fraser*,<sup>167</sup> the petitioner used section 8 to challenge the child adoption provisions of the South African Child Care Act (the "Act").<sup>168</sup> In most instances, the Act requires a court to obtain the father's *and* mother's permission before it will allow an adoption of their child.<sup>169</sup> However, section 18(4)(d) provides an exception in the case of an illegitimate child: the mother's permission alone is sufficient for an adoption to transpire.<sup>170</sup> The petitioner, Lawrie John Fraser, lived unmarried with Adriana Petronella Naude. Naude became pregnant and decided to put their child up for adoption.<sup>171</sup> Fraser, wanting to either adopt his child or prevent adoption by someone else from occurring, challenged the constitutionality of section 18(4)(d).<sup>172</sup>

The Court determined that section 18 of the Act violated section 8 of the Interim Constitution because it discriminated against fathers of certain "marital unions."<sup>173</sup> In so doing, the Court examined how the Act discriminated based upon one's

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*see also infra* Part IV.A.3. But the Court was divided on whether anything less than coercion is also sufficient (for example, state endorsement of religion). *See, e.g., id.* at \*177 (Sachs, J., concurring). The coercion holding in *Solberg* complements a similar holding in a Zimbabwean case, *In re Chikweche*, 1995 (4) SA 284 (Zimb.), which held that coercion is sufficient to establish a claim for violation of religious freedom under the Zimbabwe Constitution. This Zimbabwe decision also held that Rastafarianism is a religion. *See id.* at 290.

166. *See* S. AFR. CONST. § 8 (1993).

167. 1997 (2) SA 261 (CC).

168. 74 of 1983, *cited in Fraser*, 1997 (2) SA at 267.

169. *See id.* § 18(4)(d), *quoted in Fraser*, 1997 (2) SA at 267.

170. *See id.* ("A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied . . . (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be . . ."), *quoted in Fraser*, 1997 (2) SA at 267.

171. *See Fraser*, 1997 (2) SA at 266.

172. *See id.* at 267.

173. *See id.* at 272.

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religion and marriage performed under that religion. It observed that in South Africa, Islamic marriages are not legal because of the potential for polygamy that exists in these unions.<sup>174</sup> Children born into unions solemnized under Islamic law are considered illegitimate, and their fathers, whether or not they actually practice polygamy, do not have the same rights as their mothers under the Child Care Act.<sup>175</sup> An Islamic mothers' permission is prerequisite to her child's adoption—the fathers' permission is not.<sup>176</sup> Because of the inequality between a father and mother in an Islamic union, the Court declared section 18 of the Act unconstitutional.<sup>177</sup>

The Court also emphasized that the section discriminated against fathers of Islamic unions as well as against fathers of customary African unions.<sup>178</sup> The Act specifically accepts African customary unions as legal marriages for purposes of certain provisions of the Act, including the adoption provisions. This means a father in a customary African union must give permission before his child is adopted, but in the same circumstance permission of a Muslim father is not required. Because of this additional discriminatory effect on the basis of religion, the Court found section 18 of the Act unconstitutional.<sup>179</sup>

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174. *See id.*

175. *See* § 18(4)(d) of Child Care Act 74 of 1983, *quoted in Fraser*, 1997 (2) SA at 267.

176. *See Fraser*, 1997 (2) SA at 272.

177. *See id.*

178. A customary African union is a traditional marriage that occurs after the payment of *labola* (a gift of cattle from the husband to the wife's father). It is not recognized as a legal marriage except for certain purposes specified by law. *See* § 27 of Child Care Act 74 of 1983, *discussed in Fraser*, 1997 (2) SA at 273.

179. *See Fraser*, 1997 (2) SA at 273. It had also been argued that § 18(4)(d) discriminated against "fathers of certain children on the basis of their gender or their marital status," *id.*, and "between married fathers and unmarried fathers," *id.* at 274. These arguments were not accepted by the Court as additional reasons to declare § 18(4)(d) unconstitutional. *See id.* at 273-75.

If the Constitutional Court determines that "any law or any provision thereof is inconsistent with th[e] Constitution," it may "declare such law or provision invalid to the extent of its inconsistency." S. AFR. CONST. § 98(5) (1993). However, the Constitutional Court also has the authority to "require Parliament . . . to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified." *Id.* The Constitutional Court, pursuant to its authority to do so, requested Parliament to rewrite section 18(4)(d) within two years. In order to assist Parliament in drafting a constitutional provision, the Court reviewed the statutory law and case law of other countries and outlined some issues

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*Fraser* was correctly decided and is persuasive precedent upon which other southern African countries could rely. Section 18(4)(d) of the Act clearly did not provide fathers in Islamic marriages the same rights as fathers in other types of marriages and was thus discriminatory on the basis of religion. Each southern African constitution forbids discrimination on the basis of religion,<sup>180</sup> and as the Constitutional Court has observed, a number of other nations' constitutions and human rights instruments also forbid discrimination.<sup>181</sup> The South African Constitutional Court was correct in striking down the offending portion of the Act as it did—discrimination on the basis of religion should not be tolerated and discriminating legislation should be struck down.

As previously mentioned, Namibia and Malawi both have constitutional provisions similar to South Africa's that prevent discrimination specifically on the basis of religion.<sup>182</sup> Accordingly, *Fraser* should be applicable and helpful to courts in these two countries in cases involving the religion aspect of their equality provisions. When a law in those countries discriminates against members of certain religions by granting them more rights (or taking away their rights), the law should be struck down as the provision of the Child Care Act was in *Fraser*.

However, other southern African countries' equality provisions protect citizens from discrimination based on one's "creed" without specifically mentioning religion.<sup>183</sup> As

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of which Parliament should be aware. See *Fraser*, 1997 (2) SA at 275-82. Parliament has since drafted legislation to replace section 18(4)(d) of the Act. See Lindsay Barnes, *A Ray of Hope for Unmarried Fathers*, AFR. NEWS, Aug. 25, 1997, available in LEXIS, News Library, Curnws File.

180. See *supra* Part III.B.

181. See *Brink v. Kitshoff* NO, 1996 (4) SA 197, 215-16 (CC) (discussing the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the constitutions of the United States of America, India, and Canada).

182. Compare S. AFR. CONST. § 8(2) (1993) ("No person shall be unfairly discriminated against, directly or indirectly . . . , on one or more of the following grounds . . . [including] religion . . . ."), with MALAWI CONST. § 20(1) ("Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of . . . religion . . . ."), and NAMIB. CONST. § 10(2) ("No persons may be discriminated against on the grounds of . . . religion . . . .").

183. See BOTS. CONST. § 15; SWAZ. CONST. § 15; ZAMBIA CONST. § 23; ZIMB. CONST. § 23.



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previously mentioned, creed should be interpreted to at least include religious beliefs.<sup>184</sup> The fact that some clauses protect “religion” and others “creed” should not minimize *Fraser’s* effect as persuasive precedence in interpreting and applying a country’s discrimination clause with respect to religion. Thus, the South African Constitutional Court judgment in *Fraser* arguably could apply to cases in Botswana, Swaziland, Zambia, or Zimbabwe dealing with discrimination on the basis of creed, in addition to cases involving religious discrimination in Namibia and Malawi. *Fraser* could—and should—assist the courts in these countries by standing for the proposition that legislation having a discriminating effect or putting individuals on an unequal level because of religion is unconstitutional.

2. *Religious Schools: In re Gauteng School Education Bill of 1995*

The Constitutional Court dealt with an emotionally charged cultural, linguistic, and religious issue in the *In re Gauteng School Education Bill of 1995*<sup>185</sup> case. The Court has original jurisdiction to issue advisory opinions regarding “the constitutionality of any Bill before . . . a provincial legislature”<sup>186</sup> if one-third of the members request the speaker of the legislature to submit the bill before the Court.<sup>187</sup> The speaker of the Gauteng<sup>188</sup> provincial legislature petitioned the Court to determine the constitutionality of provisions of the 1995 Gauteng School Education Bill.<sup>189</sup> The Bill established certain requirements for public schools relating to, inter alia, language, religious policy, and freedom of conscience.<sup>190</sup>

Petitioners and their supporting amicus group were Afrikaners<sup>191</sup> who wanted their children to be educated at

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184. See *supra* Part III.B.

185. 1996 (3) SA 165 (CC) [hereinafter *Gauteng School*].

186. S. AFR. CONST. § 98(2)(d) (1993). South Africa contains nine provinces that each have provincial legislatures and power over certain aspects of South Africans’ lives. See *id.* ch. 9 (1993).

187. See *id.* § 98(9).

188. Gauteng is a province in north-central South Africa that includes two important cities: Pretoria and Johannesburg.

189. See School Education Bill of 1995, *quoted in part in Gauteng School*, (3) SA at 170-71.

190. See *id.*

191. See *supra* note 153.

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exclusively Afrikaans-language schools with Christian value systems that required religious classes as part of the curriculum.<sup>192</sup> They argued that sections of the Act violated their constitutional rights by abolishing language competency tests in school admissions procedures, limiting a school's ability to establish its own religious policy, and cutting off government funding of schools that required religious education.<sup>193</sup> Petitioners also contended that section 32(c) of the Interim Constitution created a positive obligation on the State to establish, where practicable, educational institutions based on a common culture, language, or religion so long as the school did not discriminate on the basis of race.<sup>194</sup> This argument, if endorsed by the Constitutional Court, would require the state to establish and pay the costs of schools to which the applicants could send their children—schools that admitted students based upon competency in Afrikaans, that developed religious policy without state interference, and that required religious instruction despite the beliefs of its students.<sup>195</sup> The argument based on section 32(c) of the Constitution was the petitioner's main contention, and they argued that international human rights documents dealing with the rights of minority groups supported their claims.<sup>196</sup>

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192. See *Gauteng School*, (3) SA at 171.

193. See *Gauteng School*, (3) SA at 170-71 (containing the text and discussing the constitutionality of §§ 19(1), 21(2)-(3), and 22(3) of the School Education Bill of 1995).

194. See *id.* at 172.

195. See *id.*

196. See *id.* at 186 (Sachs, J., concurring). While petitioners were well within their legal rights to do so, it is ironic that Afrikaners would make arguments supported by human rights documents, since Afrikaner politicians denounced human rights instruments, see John Dugard, *Human Rights and the Rule of Law in Postapartheid South Africa*, in SOUTH AFRICA'S CRISIS OF CONSTITUTIONAL DEMOCRACY: CAN THE U.S. CONSTITUTION HELP? 122, 123 (Robert A. Licht & Bertus de Villiers eds., 1994) (stating one president during apartheid characterized human rights as an instrument of international communism), and South African courts (many of which were presided over by Afrikaner judges) refused to observe human rights norms and specifically rejected arguments that human rights instruments had the status of customary international law. See John Dugard, *The Role of International Law in Interpreting the Bill of Rights*, 10 S. AFR. J. HUM. RTS. 208, 209 (1994) (discussing how two South African decisions, *S v. Petane* and *S v. Rudman*, rejected the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and both the European and American Conventions as customary international law). Anti-apartheid activists' cases that appealed to international legal norms to show the injustice of apartheid usually failed. See DUGARD, *supra* note 7, at 21 (describing a number of cases in which international law was unsuccessfully used,

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The Court dismissed petitioners' reading of section 32(c) based upon the plain meaning of the section and the context in which the section is found in the Interim Constitution.<sup>197</sup> Section 32(c) reads: "Every person shall have the right . . . to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."<sup>198</sup> The Court read this section as not affirmatively "conferring on the State an obligation to establish such educational institutions," but only providing that citizens have the right to establish such institutions without interference from the government.<sup>199</sup> This reading is supported by the linguistic and grammatical context in which section 32(c) is found. Section 32(a) and (b) both confer rights to citizens: the right to education and the right, if practical, to education in one's own language.<sup>200</sup> A right is also conferred in section 32(c)—the right "to *establish*"<sup>201</sup> a school, not to have a school *established for* the petitioners. Read in the context of section 32 as a whole, subsection (c) did not support petitioner's reading that they are entitled to have a certain type of school established for them.<sup>202</sup>

The effect of the majority's opinion is spelled out even more clearly in Judge Kriegler's concurring opinion: the Afrikaners must pay the costs of schools they establish.<sup>203</sup> In the first Constitutional Court opinion (be it majority, concurrence, or

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inter alia, to challenge restrictions on the freedom of movement, to oppose racially-based zoning laws, to dispute the legality of cross-border arrests involving kidnapping, and to challenge jurisdiction).

197. See *Gauteng School*, (3) SA at 172-73.

198. *Id.* at 172 (quoting S. AFR. CONST. § 32(c) (1993)).

199. *Id.* at 173.

200. See S. AFR. CONST. §§ 32(a), (b) (1993) ("Every person shall have the right—(a) to basic education and to equal access to educational institutions; (b) to instruction in the language of his or her choice where this is reasonably practicable . . .").

201. *Id.* § 32(c) (emphasis added).

202. A counterargument might be that section 32(c) must be read in another context of section 32(a), which grants to every person the right to an education. See *id.* § 32(a). If every person is entitled to an education, it is presumed that the government must provide the expenses for that education. If under section 32(c) individuals have the right to establish educational facilities, that right should be subject to the state obligation in section 32(a) to pay for educational expenses. *Gauteng School*, however, did not read section 32 and its subparts as saying this. See *Gauteng School*, (3) SA at 172-73.

203. See *Gauteng School*, (3) SA at 184 n.38 (Kriegler, J., concurring).

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dissent) to be written in Afrikaans,<sup>204</sup> Kriegler elucidated the result of the decision:

[Petitioners] are at liberty harmoniously to preserve the heritage of their fathers for their children [by establishing schools based on common culture, language or religion]. But there is a price, namely that [they] will have to dig into [their] own pocket[s] therefor. In a sense, the present dispute is not about a people's heritage but about money.<sup>205</sup>

Judge Sachs, in another separate concurrence, agreed with the Court's interpretation of section 32(c) and emphasized the decision's conformance to international law.<sup>206</sup>

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204. Judge Kriegler's writing in Afrikaans is, most likely, an attempt to show understanding and sensitivity to the Afrikaans parties to the case and the Afrikaans community generally. During apartheid, Afrikaans and English were the only two official languages of South Africa, *see* S. AFR. CONST. § 89(1) (1983), and judicial opinions were often written in Afrikaans. While Afrikaans is still an official language under the Interim Constitution, *see* S. AFR. CONST. § 3(1) (1993), and the Final Constitution, *see* S. AFR. CONST. § 6(1) (1996), no Constitutional Court judge had written an opinion in Afrikaans until Kriegler did in the instant case.

205. *Gauteng School*, (3) SA at 185 n.42 (Kriegler, J., concurring) (translation by editors of South African Law Reports).

206. *See id.* at 185-208 (Sachs, J., concurring). Judge Sachs' concurrence stems from his dissatisfaction with the majority's "straightforward reading" of section 32(c) and desire to follow through with petitioners' international law argument. *Id.* at 185-86. Sachs examined a vast array of human rights documents to determine if international law elucidates section 32(c). *See id.* at 190-207 (Sachs, J., concurring) (examining a decision of the Permanent Court of International Justice, the U. N. Charter, the Universal Declaration, the International Covenant, the writings of international legal scholars, two International Labor Organization conventions, a statement of the U. N. Human Rights Committee, the U. N. Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the European Convention, the International Convention on the Elimination of all Forms of Racial Discrimination of 1950, the Convention on the Elimination of Discrimination Against Women of 1953, decisions of the European Court on Human Rights, the Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, the UNESCO Convention against Discrimination in Education of 1960, and the Convention for the Protection of National Minorities).

In Sachs' view, human rights treaties note the presence of six minority rights: existence, non-discrimination, equality, autonomous development within civil society, affirmative action, and positive support from the state. *See id.* at 196. However, none of these rights requires a state to provide special benefits to minorities, such as unique schools for minority groups, even if it is a religious minority. Sachs' conclusion, as well as his interpretation of section 32(c), is identical to the majority's: "I would accordingly say that s[ection] 32(c) of the Constitution should be interpreted in the way that [the majority opinion] has done, and that international law on the subject reinforces the conclusions to which [it] comes." *Id.* at 208.

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*Gauteng School* could stand for several propositions. At the least, the case holds that where a southern African constitution does not explicitly express that the state will pay the expenses of a religiously formed school, the religion must bear the costs.<sup>207</sup> In a broader sense, the case could represent the position that religions are not entitled to any affirmative benefits or aid from the state. This broader holding is consistent with the case law of the United States<sup>208</sup> and may be adopted by South Africa in the future, but *Gauteng School* should not be used for such a broad proposition at this time. There is a definite advantage to allowing the jurisprudence of a state to evolve slowly and surely, rather than using cases for the broadest reading possible.<sup>209</sup> The limited holding—that when a southern African constitution does not specifically so state, the government should not pay the costs of a religious school—is both correct and sufficient a holding for the time being.

Because of the first, more limited reading, *Gauteng School* may be useful in future decisions in Malawi and Zambia, whose constitutions are ambiguous about (or do not mention) the issue of expense in schools formed by religious organizations.<sup>210</sup> The constitutions of these countries do not explicitly give a religious

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207. See *Gauteng School*, (3) SA at 185 n.42 (Kriegler, J., concurring) (“[Petitioners] will have to dig into [their] own pocket [for the costs of their school]. In a sense, the present dispute is . . . about money.”).

208. See, e.g., *Everson v. Board of Education of Ewing*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment [to the United States Constitution] means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

209. The South African Constitutional has already seen the wisdom of this argument. See *Prinsloo v. Van der Linde*, 1997 (3) SA 1012, 1023 (CC) (“[T]his Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely.”); *S v. Solberg*, 1997 SACLR LEXIS 30, \*129 (CC Oct. 6, 1997) (Sachs, J., concurring) (“We [have] emphasised that we should be astute not to lay down sweeping interpretations at this stage but should allow doctrine to develop slowly and, hopefully, surely, on a case by case basis with special emphasis on the actual context in which each problem arose.”).

210. See MALAWI CONST. § 25(3) (mentioning possibility of “private” schooling (including, presumably, religiously based schools), provided such education meets certain standards, but does not specifically mention a religion’s right to establish school); ZAMBIA CONST. § 19(3) (mentioning religions’ right to provide education for its members but not discussing who will pay); ZIMB. CONST. § 19(3) (contemplating possibility for state subsidy but in doing so implying that religion may bear primary expense for education).

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community the right to establish schools but do specifically contemplate such a possibility.<sup>211</sup> However, like the South African Interim Constitution, under which *Gauteng Schools* was decided, the Malawian and Zambian constitutions fail to mention whether the state or the religious denomination would bear the expense. Section 32(c) of the Interim Constitution, section 25(3) of the Malawi constitution and section 19(3) of the Zambian constitution are not exactly the same,<sup>212</sup> but *Gauteng School* could still be useful in interpreting the Malawian and Zambian constitutions by standing for the proposition that where a constitution does not explicitly state that the country will pay the expenses of a religiously formed school, the religion must bear the costs.<sup>213</sup> As important a decision as *Gauteng School* was for the parties involved, it will probably have little effect on case law in southern African countries other than Malawi and Zambia: most southern African constitutions (including the Final South African Constitution) explicitly state that religions may establish schools, but at the religion's expense.<sup>214</sup>

### 3. *Sunday Liquor Laws and Religious Freedom: S v. Solberg*

The Constitutional Court's most recent case implicating religious freedom (and the first to address the religion clause, section 14) is *Solberg*,<sup>215</sup> which involved a provision of the

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211. See MALAWI CONST. § 25(3); ZAMBIA CONST. § 19(3).

212. Compare S. AFR. CONST. § 32(c) (1993) ("[T]o establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.") with MALAWI CONST. § 25(3) ("Private schools and other private institutions of higher learning shall be permissible, provided that—(a) such schools or institutions are registered with a State department in accordance with the law; (b) the standards maintained by such schools or institutions are not inferior to official standards in State schools.") and ZAMBIA CONST. § 19(3) ("No religious community or denomination shall be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by the community or denomination or from establishing and maintaining institutions to provide social services for such persons.").

213. See *Gauteng School*, (3) SA at 185 n.42 (Krieger, J., concurring).

214. See BOTS. CONST. § 11(2); NAMIB. CONST. § 20(4); S. AFR. CONST. § 29(3) (1996); SWAZ. CONST. § 11(2). Sachs' concurrence in the *Gauteng School* case may also be useful in future cases (be they religious freedom cases or otherwise) for the erudite presentation of the rights of minorities as gleaned from international human rights instruments.

215. *S v. Solberg*, 1997 SACLX 30 (CC Oct. 6, 1997).

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Liquor Act.<sup>216</sup> The Act is quite detailed and provides for a variety of liquor licenses, each allowing the licensee to sell certain types of liquor at certain places at certain times.<sup>217</sup> Licensees selling liquor in violation of the conditions of their respective licenses can be convicted for the offense.<sup>218</sup> The three appellants had each been convicted under the Act of selling alcohol in violation of their liquor licenses: one, Ms. Solberg had sold on Sunday, a “closed day” to alcohol sales under the Act for her particular license.<sup>219</sup> Each of the appellants argued the provisions of the Act in question violated the right to economic activity guaranteed in section 26 of the Interim Constitution.<sup>220</sup> Additionally, Ms. Solberg contended the Act violated section 14, the right to freedom of religion, belief and opinion.<sup>221</sup> The Court unanimously agreed that appellants’ section 26 arguments failed.<sup>222</sup> Additionally, the Court held that the Act did *not* violate Ms. Solberg’s freedom of religion.<sup>223</sup>

Solberg had argued that it was a violation of section 14 for her not to be able to sell liquor on a “closed day,” defined under the Act as Sunday, Good Friday, and Christmas Day.<sup>224</sup> Her belief was that this prohibition “induce[d] submission to [or alternatively, compelled the observance of] a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays”<sup>225</sup> in violation of her rights under section 14, which guarantees “[e]very person[’s] . . . right to freedom of conscience, religion, thought, belief and opinion.”<sup>226</sup> However, this argument appeared to the judges to

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216. 27 of 1989, cited in *Solberg*, 1997 SACL R LEXIS at \*22-\*23.

217. See *Solberg*, 1997 SACL R LEXIS at \*26. The *Solberg* defendants each possessed a grocer’s wine license, under which they could sell no alcohol other than table wine and could sell table wine only weekdays from 8:00 AM to 8:00 PM, Saturdays 8:00 AM to 5:00 PM, but in no cases on Sundays, Good Friday and Christmas Day. See *id.* at \*27.

218. See *id.*

219. See *id.* at \*23.

220. See *id.* at \*42-\*75.

221. See *id.* at \*81-\*82.

222. See *id.* at \*75.

223. See *id.* at \*100.

224. See *id.* at \*81-\*82.

225. *Id.* at \*83.

226. S. AFR. CONST. § 14(1) (1993).

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be “artificial”—more focused on her loss of profit on Sunday rather than a threat to her religious beliefs.<sup>227</sup>

Three judges wrote opinions on the section 14 issue. President Chaskalson’s, which three other judges joined, held that the Act in no way violated section 14 because it did not *coerce or constrain* Ms. Solberg’s religious belief;<sup>228</sup> any connection between the Christian Sabbath and the restriction from selling liquor under Solberg’s license on Sunday was “too tenuous” to be an infringement on religious freedom.<sup>229</sup> Chaskalson would find a violation of religious liberty only if the petitioner proved she was coerced to act contrary to her religious beliefs.<sup>230</sup> Judge Sachs disagreed with Chaskalson’s

227. *See Solberg*, 1997 SACLR LEXIS at \*127-\*28 (Sachs, J., concurring) (“[This] challenge . . . came not from believers whose faith was being threatened, but from grocers whose profits were being limited. . . . [T]he result was an air of artificiality in relation to this aspect of the case, and a lack of evidence . . . on the question of the purpose and impact of closed days.” (footnote omitted)).

228. *See id.* at \*93.

229. *See id.* at \*100.

230. Chaskalson’s opinion reasons that freedom of religion “implies an absence of coercion or constraint and 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.” *Id.* at \*91. He continued: “The coercion may be direct or indirect, but it must be established to give rise to an infringement of the freedom of religion.” *Id.* at \*99. Further, the person claiming a violation of section 14 must establish that a coercion or constraint has occurred. *See id.* Using this “coercion” test, Chaskalson concludes:

It is difficult to discern any coercion or constraint imposed by section 90 of the Liquor Act on the religious beliefs of holders of grocers’ wine licences or any other person, or any religious purpose served by such prohibition. The section does not compel licencees or any other persons, directly or indirectly, to observe the Christian Sabbath. It does not in any way constrain their right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs. It does not compel them to open or close their businesses on a Sunday.

*Id.* at \*93.

Chaskalson’s opinion rejects the United States jurisprudence under the First Amendment, stating: “Our Constitution deals with issues of religion differently to the United States Constitution.” *Id.* at \*95. This is an attack on the two other opinions’ use of the endorsement theory suggested by First Amendment jurisprudence, which is explained below. Rather, he follows Canadian interpretation of freedom of religion, *see id.* at \*90, found in the Canadian Supreme Court’s decision in *Regina v. Big M Drug Mart Ltd.* [1985] 13 CRR 64. However, Chaskalson rejects the holding in *Big M* (that the Canadian Lord’s Day Act was unconstitutional) because of factual differences. *See Solberg*, 1997 SACLR LEXIS at \*87-\*88.

Summarizing, Chaskalson would find a violation of freedom of religion if one could prove they had been coerced, either directly or indirectly, to act contrary to their religious beliefs. For him, coercion is not only sufficient, it is necessary. In



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“coercion-only” test, stating that state endorsement of religion could also violate one’s religious liberties.<sup>231</sup> Subsequently, Sachs believed that the Act *did* violate Solberg’s freedom of religion because it endorsed the Christian sabbath; however, the violation was so minor that it could be “justified,” or permitted, under section 33 of the Interim Constitution.<sup>232</sup> Accordingly, Sachs (and Judge Mokgoro, who concurred in Sachs’ opinion) agreed with Chaskalson that the Act was constitutional.<sup>233</sup> Judge O’Regan and two others agreed with

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Chaskalson’s opinion. Ms. Solberg simply could not (and did not) establish such coercion. *See id.* at \*99.

231. *See Solberg*, 1997 SACLR LEXIS at \*177.

232. *See id.* (Sachs, J., concurring) (stating that the violation of section 14 is “sanctioned by section 33,” the limitations section of the Interim Constitution).

233. Sachs expressly rejects Chaskalson’s “coercion” test: “I cannot agree . . . that coercion, whether direct or indirect, must be established before section 14 can be said to have been breached.” *Id.* at \*177 (Sachs, J., concurring). Sachs contemplates situations in which the state has not coerced one to violate their religious beliefs but nonetheless has “endors[ed] a particular faith as a direct and sectarian source of values for legislation binding on the whole nation.” *Id.* To Sachs, such situations also violate section 14. Thus Sachs’ interpretation of section 14 would include two non-exclusive prongs: in order for legislation to violate the freedom of religion, it must *either* coerce one to abandon (or act contrary to) their religious beliefs *or* involve an endorsement of a particular faith or religion. Sachs then sees two ways in which the Liquor Act might violate religious freedom: (1) if it forced (or in Chaskalson’s words, *coerced*) non-Christian sellers to forego their own non-Sunday day of rest to sell because they could not economically afford to avoid sales on *two* days, or (2) if the symbolic effect of the Act was a state endorsement of the Christian sabbath. *See id.* at \*123-\*25.

Like Chaskalson, Sachs does not find the provision of the Act in question to be coercive: he determined it did not give a competitive commercial advantage to Christian liquor sellers at the expense of non-Christian sellers or force state-imposed conformance to the Christian sabbath. *See id.* at \*155-\*56. However, Sachs concluded the Act symbolically endorsed Christian holidays and the Christian sabbath. “Closed days” under the Act include Sundays, Christmas, and Good Friday: none of the other South African holidays or other days of the weekend are specified closed days. Sachs sees this as a subtle but “inescapable” sectarian ramification of the Act. *See id.* at \*156-57. If only symbolically, the Act endorses Christianity by forbidding the sale of liquor by certain licensees on Christian holy days.

Even though Sachs finds a violation of section 14, he concludes with Chaskalson that the Act is constitutional. *See id.* at \*177. He reaches this determination under the limitations clause, section 33 of the Interim Constitution, which states that even if a law violates the bill of rights, it may still be found constitutional if its effect is limited. If the violation of a right guaranteed under the bill of rights is reasonable, justifiable in a democratic society, does not negate the essential content of the right in question, and for certain rights (including religion), is necessary in addition to being reasonable, the violation will not result in a finding of unconstitutionality. *See S. AFR. CONST.* § 33(1) (1993). The Constitutional Court thus must make a two-pronged inquiry when investigating an alleged violation of a fundamental right: “First,

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Sachs that Chaskalson's "coercion-only" test was not the only way religious freedom could be violated and that state endorsement of religion also qualified as a violation of freedom of religion; however, she felt the Act not only violated religious freedom but that it could *not* be justified.<sup>234</sup> O'Regan would have declared the Act unconstitutional.<sup>235</sup>

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has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?" *S v. Zuma*, 1995 (2) SA 642, 654 (CC). Sachs believed the violation of section 14 in Solberg's case was justified: "[The Act], while indeed offending against section 14, does so in an indirect and marginal way, imposing relatively little obligatory observance, in respect of a matter of slight sectarian import, in relation to days that have become highly secularised." *Solberg*, 1997 SACLR LEXIS 30, at \*174. Sachs lists a number of reasons why the violation is insignificant in this case. *See id.* \*171-\*77. Sachs' analysis, therefore, is that the Act violates the freedom of religion by endorsing a particular religious belief (Christianity) but that the violation is not serious enough to declare the section of the Act in question unconstitutional.

Sachs' opinion is valuable in several other ways. Paragraphs 142-48 contain a lucid and cogent description of the provisions of the Interim Constitution implicating religion. While the Final Constitution makes some changes to these provisions, Sachs' examination nonetheless provides a framework for understanding how the Constitution approaches religious issues. Further, paragraphs 149-53 contain invaluable information on freedom of religion (or rather, violations thereof) during the apartheid period. This history will doubtlessly be used in further cases, since the Court often considers South Africa's historical context important in its decisions. *See, e.g.,* *Brink v. Kitshoff* NO, 1996 (4) SA 197, 216-17 (CC) ("Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. . . . The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause [of the Interim Constitution] needs to be interpreted.").

234. *See Solberg*, 1997 SACLR LEXIS at \*120.

235. *See id.* at \*115-\*16 (O'Regan, J., dissenting). Judge O'Regan's interpretation of the religion clause is similar to Sachs': "[We must] be satisfied . . . that there is no direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference [or endorsement] of one religion over others." *Id.* at \*112-\*13; *see also id.* at \*115 ("In my view, the requirements of the Constitution require more of the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring [endorsing] one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion."). She, like Sachs, determines the Act does in fact "give a legislative endorsement to Christianity, but not to other religions." *Id.* at \*114. However, unlike Sachs, O'Regan concludes that the violation of the religion clause cannot be justified. She asks, if the purpose of the closed days is to restrict consumption of alcohol, why are not other traditionally heavy-drinking days not included as closed days? She notes a variety of non-religious holidays that are not closed days but on which drinking is great. Further, alcohol may be sold under other licenses on closed days: only grocers' licenses (which is the license Solberg held) are restricted. Determining that the purpose of the law (restricting drinking) does not meet the effect of the law (only restricting drinking on traditionally Christian holy days), she concludes that the violation of the religion clause, while "not severe or

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The case's result is clear: the Act is constitutional, and Mrs. Solberg goes to jail.<sup>236</sup> Another aspect of the case is also lucid: all Constitutional Court judges believe that coercing one to act contrary to one's religious beliefs is sufficient to show a violation of one's freedom of religion.<sup>237</sup> This holding is correct and is consistent with *In Re Chikweche*,<sup>238</sup> a Zimbabwean religious liberty case that precedes *Solberg*. This case involved the bar admission of a dreadlock-donning Rastafarian. A Zimbabwean judge refused to administer the bar admission oath to Mr. Chikweche, considering him unkept and improperly dressed because of his dreadlocks.<sup>239</sup> Chikweche challenged the judge's decision before the Zimbabwe Supreme Court, which determined that the judge's actions violated the Zimbabwean Constitution.<sup>240</sup> The Court observed that the judge's ruling essentially forced (or coerced) Chikweche to choose between his religious beliefs and being able to take the bar admission oath.<sup>241</sup> This coercion, the Court determined, violated Chikweche's religious freedom.<sup>242</sup> *Solberg* rules consistently

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egregious," is serious enough not to be justified under section 33. *See id.* at \*119-\*20. Accordingly, she would strike down as unconstitutional the portion of the Act making it illegal to sell alcohol under certain licenses on closed days.

236. Some might argue that *Solberg* is a poor religious freedom case because it results in the rejection of Ms. Solberg's religious freedom argument. She had challenged the Liquor Act because, in her mind, it forced her to refrain from selling on someone else's holy day. However, the Constitutional Court judges are absolutely correct when they assert that Ms. Solberg's case is ultimately economic in nature and that her religious freedom issue is "artificial" at best. *See id.* at \*127 (Sachs, J., concurring). As Judge Sachs stated: "[This] challenge . . . came not from believers whose faith was being threatened, but from grocers whose profits were being limited." *Id.* Religious liberty is not strengthened when used to enhance economic gains as argued by Ms. Solberg. With a different set of facts—with more evidence that a "believer[']s . . . faith was being threatened"—the result perhaps would and should be different. But under these facts, religious freedom should not be the impetus behind Ms. Solberg's further economic well being.

237. *See id.* at \*99; *id.* at \*115 (O'Regan, J., dissenting); *id.* at \*177 (Sachs, J., concurring).

238. 1995 (4) SA 284 (Zimb.).

239. *See id.*

240. *See id.*

241. *See id.* at 291.

242. *See id.* The case is noteworthy for two additional reasons. First, *Chikweche* is the only southern African case to attempt to constitutionally define "religion." *See id.* at 289-90. In defining "religion," the Court examined case law from the United States and Canada, as well as a treatise on Indian constitutional law. *See id.* (citing *United States v. Ballard*, 322 U.S. 78 (1944), *Regina v. Big M Drug Mart Ltd.*, [1985] D.L.R. (4th) 321, and *Constitutional Law of India* by J.N. Pandey). These citations

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with *Chikweche*, and both should be relied upon by other southern African judges.

However, the question *Solberg* does not answer is whether something less than outright coercion (i.e. endorsement as discussed by Sachs and O'Regan) also violates freedom of religion. Chaskalson's "coercion-only" test secured only four votes. Sachs' "either coercion or endorsement" theory seems to have gathered five votes, including the three O'Regan dissenters; however, its application in relation to the limitations clause was inconsistent between the two camps. One could predict that in a future case the Sachs and O'Regan camps may again join at least in theory, but in practice the groups might again diverge, as they did in this case. Alternatively, Chaskalson could gain swing votes and the coercion-only test could win the day. Perhaps after another case the Court's interpretation of the religion clause will become more apparent. On the other hand, it may remain unsettled for some time.<sup>243</sup>

While some argue that the endorsement test should be applied in South Africa to determine a violation of religious liberty, the coercion test provides a better, bright-line test. A majority of the judges on the Constitutional Court—the ones

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suggest the Court will give a great amount of deference to individuals and their conscience in determining what "religion" they are, so long as one's "religious" beliefs do not injure their neighbors or infringe on their neighbor's religious beliefs. *See id.* at 290. One need not show one's religion has a belief in Deity or is even organized, but one must show sincerity of belief. *See id.* This results in what the Court called a "wide and non-technical" definition of "religion." *See id.*

Second, after examining the tenets of Rastafarianism, the Court determined that it was a religion. *See id.* at 287-89. This is in accordance with United States case law cited by the court. *See id.* at 288-89 (citing *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988) (upholding a district court's finding that Rastafarianism is a religion for purposes of the First Amendment)).

243. For instance, religious freedom jurisprudence under the First Amendment to the United States Constitution did not begin until the late 1800s—over a hundred years after the Constitution was ratified. *See Bradfield v. Roberts*, 175 U.S. 291 (1899) (Establishment Clause); *Reynolds v. United States*, 98 U.S. 145 (1878) (Free Exercise Clause); STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 616, 695 (2d ed. 1996) (citing these two cases). Jurisprudence under the First Amendment is still evolving to a great extent. The Constitutional Court may be wise to "not . . . lay down sweeping interpretations at this stage but . . . allow doctrine to develop slowly and, hopefully, surely, on a case by case basis with special emphasis on the actual context in which each problem arose." *Solberg*, 1997 SACLX LEXIS at \*129 (Sachs, J., concurring). This is especially true on an issue such as the religion clause where the Court appears so heavily divided.

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joining the O'Regan dissent and the Sachs' concurrence—have suggested that they would support an endorsement test. However, the two opinions' use of the test resulted in different outcomes in *Solberg*.<sup>244</sup> Additionally, the late South African law Professor Etienne Mureinik touched on how endorsement is “inherently coercive”:

State endorsement of a religious perspective—be it only the perspective that religion is to be preferred to irreligion—turns those who adhere to that perspective into insiders, and those who do not into outsiders. That alone puts pressure—governmental pressure, since it comes from the state—on non-adherents which may be considered coercion.<sup>245</sup>

However, the difference in result in the O'Regan and Sachs' opinions shows one problem with the endorsement test—two different groups of people applying the test end up with a different result. At least one U.S. Supreme Court case evaluates a state statute based on endorsement.<sup>246</sup> However, the endorsement test as a whole has not been adopted as the determining factor for whether the Free Exercise Clause of the U.S. Constitution has been violated,<sup>247</sup> and other courts have not used the endorsement test to determine violations of their constitutions protecting religious liberty.<sup>248</sup> Coercion—be it direct or indirect—provides a bright line and avoids problems

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244. See *Solberg*, 1997 SACL R LEXIS at \*115 (O'Regan, J., dissenting); *id.* at \*177 (Sachs, J., concurring).

245. Mureinik, *supra* note 70, at 45 (citations omitted).

246. See *Wallace v. Jaffree*, 472 U.S. 38, 57 n.45 (1985) (“What was missing in the appellants' eyes at the time of the enactment of [an Alabama statute authorizing a 1-minute period of silence in all public schools for meditation or voluntary prayer]—and therefore what is precisely the aspect that makes the statute unconstitutional—was the State's endorsement and promotion of religion and a particular religious practice.”).

247. See *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995); see also SHIFFRIN & CHOPER, *supra* note 243, at 690 (discussing the Supreme Court's division on the scope of the endorsement test in *Capital Square*).

248. See, e.g., *Solberg*, 1997 SACL R LEXIS 30, at \*91 (discussing *Regina v. Big M Drug Mart, Ltd.*, (1985) 18 DLR (4th) 321, and stressing its emphasis on coercion, constraint, and force as determinative of violations of religious liberties); *In re Chikweche*, 1995 (4) 284 (Zimb.) (using a coercion test to find a violation of religious liberties). That Canada has not adopted the endorsement test is especially important for South Africa because the South African Bill of Rights was drafted based on the Canadian Charter. See also Corder, *supra* note 52, at 514.

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evident in the endorsement regime.<sup>249</sup> Further, it is a safer initial position, and its use allows the South African case law to develop slowly and deliberatively—a judicially conservative result the Constitutional Court has approved.<sup>250</sup> While using the endorsement test may be enticing for the Constitutional Court, a better position for now would be to follow Chaskalson's coercion-only test.

In any case, the only clear holding from *Solberg*, and a point of law that other southern African nations can take therefrom, is that manifest coercion suffices to violate freedom of religion.<sup>251</sup> Whether coercion is necessary or whether a showing of state endorsement of religion is also sufficient to show encroachment on freedom of religion remains undecided.<sup>252</sup>

One sees, then, three initial cases implicating religious freedom in South Africa. The first, *Fraser*, holds that one cannot be discriminated against based on one's religion and that legislation that differentiates between individuals on the basis of religion—even indirectly—is unconstitutional.<sup>253</sup> *Gauteng School* further finds, however, that religions will not be given special privileges: in the context of religiously founded schools, the Constitutional Court held that the religions would

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249. See *Solberg*, 1997 SACL R LEXIS at \*159 (Sachs, J., concurring) (“The strength of the O’Connor J’s approach, namely its all-encompassing character which lifts it out of formulaic reasoning and combines the relationship between purpose and effect, also appears to be its weakness. *It indicates the broad question to be asked, but not the specific criteria to be used for the answer. More especially, it does little to establish from whose standpoint the message by the State should be considered.* What comes through as an innocuous part of daily living to one person who happens to inhabit a particular intellectual and spiritual universe, might be communicated as oppressive and exclusionary to another who lives in a different realm of belief. What may be so trifling in the eyes of members of the majority or dominant section of the population as to be invisible, may assume quite large proportions and be eminently real, hurtful and oppressive to those upon whom it impacts. This will especially be the case when what is apparently harmless is experienced by members of the affected group as symptomatic of a wide and pervasive pattern of marginalisation and disadvantage.” (emphasis added) (footnote omitted)).

250. See *supra* note 209 and accompanying text.

251. See *Solberg*, 1997 SACL R LEXIS at \*99; *id.* at \*115 (O’Regan, J., dissenting); *id.* at \*177 (Sachs, J., concurring).

252. In the absence of more clear doctrine from South Africa on its religion clause, other southern African nations may want to read *Solberg* carefully, limiting its holding to the sufficiency of coercion to establish violation of religious freedom, and otherwise only using that which definitely applies to the specific constitutional and historical context of those nations.

253. 1997 (2) SA 261 (CC).

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have to pay for the schools rather than have the government pick up the tab.<sup>254</sup> Finally, *Solberg* shows that either direct or indirect coercion to act contrary to one's religious beliefs is a violation of one's freedom of religion.<sup>255</sup>

*B. Why Southern Africa Should Follow South African  
Religious Freedom Case Law*

Courts in southern Africa often review similar constitutional issues: in recent years, a number of southern African courts have heard the same types of constitutional cases on issues ranging from the death penalty<sup>256</sup> and corporal punishment<sup>257</sup> to reverse onus provisions in criminal statutes.<sup>258</sup> Southern African courts often use each others' case law as persuasive precedent if the previous case is applicable to the case at hand.<sup>259</sup> Even though there have not been many recent religious freedom cases in southern African countries other than South Africa, it is inevitable that such cases will be heard in the future. The South African Constitutional Court decisions in *Fraser*, *Gauteng School*, and *Solberg* have set an example for the protection of religious liberty in southern Africa and should be followed. Further, one aspect of *Solberg* corresponds with a previous Zimbabwean case. When religious freedom cases do arise in other southern African countries, and to the extent that the holdings in *Fraser*, *Gauteng School*, and *Solberg* are applicable, courts in other southern African countries should look to these South African decisions as persuasive precedent.

Application of these South African decisions will not be constitutionally challenging: as mentioned previously, the

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254. 1996 (3) SA 165 (CC).

255. 1997 SACLR LEXIS 30 (CC, Oct. 6, 1997).

256. *See* S v. Ntesang, 1995 SACLR LEXIS 220 (Bots. Jan. 30, 1995); S v. Makwanyane, 1995 (3) SA 391 (CC).

257. *See* S v. Williams, 1995 (3) SA 632, 642, 645 (CC) (discussing cases deciding upon the constitutionality of corporal punishment in Botswana, Lesotho, Namibia, and Zimbabwe).

258. Reverse onus provisions presume the defendant guilty and put the "onus" (responsibility) of proving otherwise on the defendant. Several southern African courts have discussed the constitutionality of these provisions. *See, e.g.*, S v. Mhlungu, 1995 SACLR LEXIS 247 (CC June 8, 1995); S v. Zuma, 1995 (2) SA 642, 654 (CC); *Freiremar SA v. Prosecutor-General of Namibia*, 1994 SACLR LEXIS 242 (Namib. Apr. 8, 1994); S v. Chogugudza, 1 SACLR LEXIS 873 (Zimb. Jan. 8, 1996).

259. *See* cases cited *supra* notes 12, 20.

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southern African constitutional clauses implicating freedom of religion are all fairly similar.<sup>260</sup> On their faces, these constitutions strongly compel the protection of religious liberty. While it is true that some southern African countries have had trouble of late fully making the transition to democracy,<sup>261</sup> that transition can be more easily made, at least in terms of religious liberty, by the application of South Africa's religious freedom decisions.

By so doing, southern African countries will be following the lead that South Africa has made during the years since its recent elections and transition to full democracy in 1994. While other southern African nations may have led out in democracy and human rights during apartheid, it appears that South Africa has quickly surpassed them and is the democratic nation to follow in southern Africa. The words of one judge from Lesotho's highest court, ruling in conformance with a South African Constitutional Court judgment granting an accused defendant the right to have access to the prosecutor's file on his case, are particularly relevant:

It is important to note that of all [Lesotho's] neighbouring countries [South Africa] is where the winds of change [on granting a defendant the right to his criminal file] all started.

. . . .  
Admittedly it is hard to imagine any country with a worse record of violations of human rights than South Africa. That however is of no consequence as far as the exercise before me is concerned. This is so because in my judgment any violations of human rights regardless of the degree thereof deserve to be stamped out in a just democratic society that prides itself with a Bill of Rights entrenched in the Constitution such as Lesotho is. Accordingly I am prepared to adopt the approach of the Constitutional Court . . . . After all Lesotho has had its own fair share of repression, autocracy and or dictatorship of some sort as well as power struggles in which fundamental human rights inevitably took the back seat. The experiences of South Africa are therefore not without relevance to this country.<sup>262</sup>

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260. *See supra* Part III.

261. *See supra* Part I.

262. *Molapo v. Director of Public Prosecutions*, 1997 SACL R LEXIS 13, \*16, \*18 (Lesotho June 18, 1997).



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Other southern African nations are sure to find this judge's words applicable to the South African decisions in *Fraser*, *Gauteng School*, and *Solberg*.<sup>263</sup> The winds of constitutional protection of religious liberty in southern Africa are blowing north from South Africa, and other southern African nations should follow suit.

## V. CONCLUSION

This Comment has examined the various southern African constitutional clauses relating to religious liberty, showing how many of them are similar and could be interpreted (and indeed are being interpreted) alike. It has also analyzed three recent South African cases concerning religious liberty and discussed the usefulness of each case in future religious liberty cases in southern Africa. These cases, *Fraser*,<sup>264</sup> the *Gauteng School* case,<sup>265</sup> and *Solberg*,<sup>266</sup> are sound decisions and are persuasive precedent that should be relied upon in other southern African courts. They begin to define the scope of religious liberty in southern Africa. When southern African courts decide future cases, it is hoped that they will continue to respect the religious liberty so strongly enumerated in these countries' constitutions and in the current South African case law.

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263. Even if other southern African courts do not expressly follow these decisions, they will certainly find the cases relevant and important to examine in light of the sparse southern African religious freedom case law. *See, e.g.*, *Chinamora v. Angwa Furnishers (Pvt) Ltd.*, 1996 SACL R LEXIS 54, \*21-\*25, \*41-\*46 (Zimb. Nov. 28, 1996) (Zimbabwe Supreme Court examining at length, but not following because of distinguishing facts, two South African Constitutional Court decisions).

264. 1997 (2) SA 261 (CC) (holding that discrimination based on religion violates religious freedom).

265. 1996 (3) SA 165 (CC) (finding that religious groups must pay the cost of religious-run schooling).

266. 1997 SACL R LEXIS 30 (CC Oct. 6, 1997).