

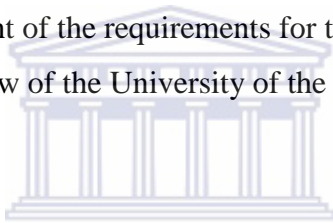
**The right to freedom of religion in the public domain in South Africa**

By

**Patricia Michelle Lenaghan**

BLC LLB (University of Pretoria) LL M (University of the Western Cape)

A thesis submitted in fulfilment of the requirements for the degree Doctor of Law in the  
Faculty of Law of the University of the Western Cape



Promoter:  
*UNIVERSITY of the*

**Honorary Professor Albie Sachs**

Co-promoter:

**Associate Professor Jacqueline Gallinetti**

University of the Western Cape

December 2010

## Abstract

Within the context of South Africa's diverging religious, cultural and social backgrounds, new questions on the nature of a multicultural society are raised from the perspective of human rights. The universality and indivisibility of human rights are challenged by this diversity and consequently implies that standards, concepts and structures for implementation have to be reconsidered. International and national standards are being (re)interpreted and attention is not only focused on the contents of the norms but on the limitations imposed thereupon.

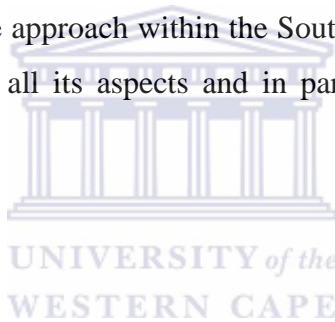
The debate on whether limits should be set in permitting or accommodating cultural or religious pluralism is becoming extremely relevant. The manner in which these questions are responded to is even more prominent in the light of our history of *apartheid* which has disregarded respect for religious and cultural diversity. In the scope of this research emphasis will be placed on the right to freedom of religion and in particular the limitation of the right to religion in an attempt to balance conflicting rights and accommodates religious diversity.

The right to freedom of religion albeit constitutionally entrenched is subject to reasonable and justifiable limitations. However, no clear guidelines have been formulated on the criteria for limiting the right to freedom of religion. The main aim of this research is to find guiding criteria to facilitate the imposition of limitations on the right to freedom of religion. The limitations of the right to freedom of religion are interrelated with the following research questions: Firstly, the definition afforded to the right to freedom of religion in accordance with national and international standards; secondly, the relationship between culture and religion and any interconnection that exists between these rights. This is followed by the influence of the particular value framework or normative commitments of the judiciary on the interpretation of the right to religion, as

well as the relationship between the state and religion. The above issues will be researched both on a national and an international level.

The aim is to conduct research that will build on an appreciation of the guidelines that should be employed in ensuring the protection of the right to freedom of religion. To this end comparisons will be drawn with other legal systems, which on the one hand acknowledge the protection of the right to freedom of religion and on the other hand have to find ways in which the right can be balanced in the event of conflict.

It is envisaged that the research of the criteria imposed on the limitation of the right to religion both on a national and an international level will assist in suggesting criteria that will influence scholarly debate on the topic. In addition that this debate will allow for the formulation of a transformative approach within the South African context that sanctions the celebration of diversity in all its aspects and in particular the right to freedom of religion.



## Keywords and phrases

Freedom of Religion

Manifestation

Limitation

Equality

Dignity

Secularism

Civil Religion

Multiculturalism

Constitutionalism

Public Education



## Acknowledgements

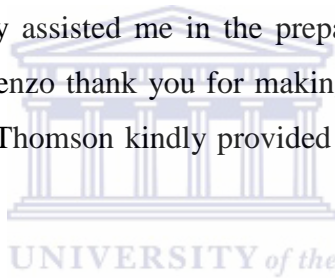
The African Proverb ‘[i]t takes a village to raise a child’ from the Igbo and Yoruba regions of Nigeria is applicable to the writing of this thesis. It has taken a community to write this thesis. My community has been supportive, patient and at time critical and without their support this task would not have come to fruition.

First and foremost I wish to thank my supervisors Albie Sachs and Jacqui Gallinetti. As a scholar I have been inspired by the jurisprudence of Justice Sachs and the manner in which he has included the marginalised other. This exemplary approach has formed the lens for many of my thoughts on how to optimally ensure the right to manifest religious belief in a diverse society. I am indebted to Albie for numerous thought provoking discussions and for constant referrals to authoritative sources. His guidance and generous spirit has been an inspiration in this endeavour. Jacqui, as a colleague and supervisor I am indebted to you, for prompting when chapters took too long in the writing and then for reading and re-reading when they came without delay. Your reasoned guidance and excellent structuring skills have greatly attributed to this work.

My mentor, Louis van Huyssteen, thank you for the time spent reading and editing my work. The time and space you made available for my concerns has been most valuable in the completion of this work. It has indeed been fun to work with you and I will miss our weekly meetings. My colleagues in the department of Public Law have also shaped my ideas and thoughts, discussions with Pierre de Vos, Yonatan Fessha and Jacques de Ville have in various ways influenced my reasoning. The thoughtful and detailed reports provided by my external examiners: Professors Eva Brems, Lourens du Plessis and Christa Rautenbach are appreciated; your constructive criticism, helpful suggestions and recommendations have greatly enhanced the final presentation of this thesis. The dean, Julia Sloth-Nielsen, who graciously, at times, acted as a supervisor and created an enabling environment which provided the space and means for me to undertake this doctoral study. Julia, not only did you create an enabling environment at work but you

undertook the same at home. A thankful ghost has returned her sheet. I am also grateful to my colleagues who undertook academic and administrative functions on my behalf while I was busy concluding my research, Haneen McCreath, Lea Mwambene, Lilian Chenwi and Yonatan Fessha, thank you for doing more than your fair share over the last six months.

I also extend my appreciation to the staff of Law Faculty who is always supportive and caring. A special thank you to in particular Lynne Thomas, Maggie Nelson and Hazel Jeftha for all those reminding phone calls and for preempting what needed to be done. The National Research Fund's continued financial support has enabled me to have the benefit of research assistants. Rubeth Nonies, Raphael Masesa, Hakim Salum and Lorenzo Wakefield, your assistance in finding various sources has been most helpful. Hakim, in particular, gratefully assisted me in the preparation of the bibliography and referencing of this thesis. Lorenzo thank you for making sure the 't's' were all crossed. Aimée Lottering and Michael Thomson kindly provided the graphics of the relationship between the state and religion.



My friends have been patient and understanding throughout the process of writing this thesis. Some have even placed me in a witness protection programme. In particular, I must thank Karla, Kitty and Riekie for the support and encouragement.

I wish to thank my children, Aimée and Bernice, Micaela, Hayden and Zara, Emma, Stef, Daniel and Sven. Thank you for endless hugs, cups of tea, BBM messages and smiles. I wish to thank my mom Joan, as always you have encouraged and motivated me to do and be my best. I would not have achieved all that I have without your love and support.

Finally, and above all I wish to thank my husband to be, Nigel. Your love, as always has carried me.

## Declaration

I, Patricia Michelle Lenaghan, declare that this Thesis, titled: **The right to freedom of religion in the public domain in South Africa**, is the original work of my research and therefore has not been subkitted for any examination, published in any local or international journal, or book and that all sources used or quoted have been duly acknowledged by complete referencing.

Patricia Michelle Lenaghan

.....

December 2010



## Table of Contents

Abstract .....	i
Keywords and phrases .....	iii
Acknowledgements .....	iv

<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction .....</b>	<b>1</b>

1.1	Background to the study .....	1
1.2	Title of the study.....	4
1.3	Terminology and normative approaches .....	8
1.4	Statement of the problem.....	18
1.5	Aims of the study.....	21
1.6	Research methodology .....	22
1.7	Limitations of the study.....	23
1.8	Chapter outline .....	27

<b>Chapter 2.....</b>	<b>31</b>
-----------------------	-----------

<b>A brief overview of the development of a regulatory framework for the protection of the right to freedom of religion in response to religious conflict .....</b>	<b>31</b>
---	-----------

2.1	Introduction .....	31
2.2	The origin of the protection of the right to freedom of religion: The Edict of Milan (313) .. .....	33
2.3	The first phase of reluctant recognition: the Protestant Reformation (1517 – 1648) .....	35
2.3.1	The Protestant Reformation in German territories: The Peace of Augsburg (1555) .... .....	36
2.3.2	The Protestant Reformation in the French territories: The Edict of Toleration (1562) and the Edict of Nantes (1598).....	38



2.3.3	The Thirty Years' War (1618 – 1648) and the resulting Peace of Westphalia (1648) ..	39
2.4	The second phase: Protection of the rights of religious minorities in terms of the Minority Treaties of the Treaty of Berlin (1878) and the Paris Peace Conference (1919).....	41
2.5	The third phase: The International protection of individual human rights .....	45
2.6	Recent religious abuses .....	47
2.7	Conclusion.....	52
<b>Chapter 3.....</b>		<b>56</b>
<b>The relationship between the state and religion .....</b>		<b>56</b>
3.1	Introduction .....	56
3.2	Process of separation (secularisation).....	58
3.3	Institutional separation .....	60
3.3.1	Carriers of separation .....	60
3.3.2	Influence of the dominant religion on separation .....	62
3.3.3	The influence of ideology on separation .....	64
3.4	Variations of the relationship between state and religion.....	68
3.4.1	Durham's dimensional approach.....	69
3.5	Principal categories of the arrangement between state and religion.....	73
3.5.1	No separation between the state and religion: confessional states .....	73
3.5.2	Some degree of identification or separation between the state and religion: predominantly confessional states .....	77
3.5.3	Separation between state and religion: secular states .....	79
3.6	An assessment of the possible variations in secular states .....	81
3.6.1	Passive and assertive approaches towards secularism.....	81
3.6.2	Accommodationist, separationist and neutral interpretations of secularism .....	84
3.6.3	Evaluation of the nature of the approach towards and the method of interpreting secularism.....	86
3.7	Critique of secularism: freedom of religion or freedom from religion? .....	87
3.8	Conclusion.....	89
<b>Chapter 4.....</b>		<b>91</b>

<b>Legal context of the right to freedom of religion:</b> .....	<b>91</b>
<b>International and regional level</b> .....	<b>91</b>
4.1 Introduction .....	91
4.2 The United Nations.....	92
4.2.1 The Universal Declaration of Human Rights .....	94
4.3 International Covenant on Civil and Political Rights .....	99
4.3.1 The right to manifest religious belief .....	102
4.3.2 The right to non-discrimination.....	105
4.3.3 The rights of religious minorities .....	107
4.4 Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration).....	111
4.5 Other international instruments .....	115
4.6 Other UN resolutions and related activities.....	120
4.7 Monitoring mechanisms .....	123
4.7.1 The ICCPR Human Rights Committee .....	123
4.7.2 The Special Rapporteur on Freedom of Religion or Belief.....	125
4.8 Regional level.....	128
4.8.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms .....	129
4.8.2 The European Union.....	132
4.8.2.1 The role of religion in EU law ( <i>acquis communautaire</i> ).....	133
4.8.2.2 The EU Charter of Fundamental Rights 2000 .....	135
4.8.2.3 The Lisbon Treaty .....	136
4.8.2.4 Interrelation between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) .....	138
4.8.3 Organisation for Security and Cooperation in Europe (OSCE).....	141
4.9 The Inter-American System .....	148
4.9.1 American Convention on Human Rights (Pact of San José).....	148
4.9.2 Supervisory bodies: The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) .....	150
4.10 The African System: African Charter on Human and Peoples' Rights .....	151
4.10.1 Supervisory bodies: The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.....	154

4.11	Conclusion.....	155
------	-----------------	-----

**Chapter 5..... 157**

**A postmodern (post secular) framework to enhance protection of the right to manifest religious belief in a diverse society ..... 157**

5.1	Introduction .....	157
5.1.1	Postmodern approach .....	160
5.2	The inherent difficulty with the concept of secularism .....	162
5.2.1	Critique of secularism.....	162
5.2.1.1	The collective nature of religion.....	164
5.2.1.2	Impact on marginalised religions .....	165
5.2.2	Postmodern response to secularism: The return of religion to the public sphere .....	168
5.2.2.1	Democratic citizenship .....	174
5.2.2.2	Deliberative democracy through value pluralism.....	177
5.3	The flawed theoretical foundation of human rights as individual negative rights.....	182
5.3.1	Postmodern response: positive obligation to promote the collective right.....	185
5.4	The inequitable notion of toleration .....	187
5.4.1	The development of the notion of toleration .....	190
5.4.2	Postmodern response to toleration: Celebration – one step further .....	195
5.5	Traditional approach towards discrimination: formal equality versus the postmodern response: substantive equality .....	198
5.5.1	Substantive equality and indirect discrimination.....	201
5.5.2	Substantive equality and affirmative action .....	203
5.6	The concept of <i>ubuntu</i> in South African jurisprudence.....	205
5.7	Conclusion.....	208

**Chapter 6..... 213**

**Application of the right to manifest religious belief in the international legal context ..... 213**

6.1	Introduction .....	213
6.1.1	Further limits to the study.....	219

6.2	Criteria for justifying a limitation on the right to manifest religious belief in the international legal context .....	222
6.2.1	Prescribed by law of general application.....	226
6.2.2	Necessary to protect a public interest or the fundamental rights of others .....	227
6.2.2.1	Level of scrutiny – doctrine of the margin of appreciation .....	230
6.2.3	Public interest protected .....	232
6.2.3.1	Restriction on the grounds of public health and public morality.....	233
6.2.3.2	Restrictions for the protection of public safety .....	235
6.2.3.3	Restrictions for the protection of the rights and freedoms of others .....	239
6.2.3.4	Restrictions for the protection of public order.....	244
6.3	Evaluation of the principle of secularism / public neutrality as an analogous ground of justification.....	248
6.3.1	Public employees - teachers at public schools wearing the Islamic headscarf- <i>hijab</i> : the matter of <i>Dahlab v Switzerland</i> .....	249
6.3.2	Private individuals and the display of the Islamic headscarf- <i>hijab</i> or other religious motivated dress.....	254
6.3.2.1	Students at public universities: <i>Sahin v Turkey</i> .....	254
6.3.2.2	Scholars in public schools: <i>Atkas v France</i> .....	261
6.3.2.3	Private individuals in the public domain: the matter of <i>Ahmet Arslan and Others v Turkey</i> .....	262
6.3.4	Critique of the application of the principle of secularism .....	263
6.3.4.1	Different interpretations of the dictates of secularism.....	264
6.3.4.2	Secularism is not a listed public interest ground .....	265
6.3.4.3	Secularism aimed at equal treatment of all religions.....	265
6.3.4.4	Limitations need to be necessary.....	266
6.3.4.5	The requirement of state neutrality.....	267
6.3.4.6	Expression of bias.....	269
6.4	Some further relevant developments in other legal instruments .....	271
6.5	Conclusion.....	273
<b>Chapter 7.....</b>		<b>278</b>
<b>Application of the right to manifest religious belief in selected national legal contexts.....</b>		<b>278</b>
7.1	Introduction .....	278

7.1.1	Religious diversity.....	280
7.1.2	Investigative overview.....	282
7.1.2.1	Respect for the protection of fundamental rights .....	283
7.1.2.2	Historical culture .....	283
7.1.2.3	Separation between the state and religion .....	284
7.1.2.4	Legal systems regulating fundamental rights .....	286
7.1.3	Extent of the investigative analysis .....	287
7.1.4	Limitation .....	287
7.2	France .....	288
7.2.1	Relationship between the state and religion .....	288
7.2.1.1	Historical development of the principle of <i>laïcité</i> .....	290
7.2.2	The French Law of 2004 .....	292
7.2.2.1	The Islamic headscarf and gender inequality .....	296
7.2.2.2	The assignment of religion to the private sphere.....	297
7.2.2.3	The concept of French citizenship.....	298
7.2.3	International concerns .....	300
7.2.3.1	Possible international challenge to the Law of 2004 .....	301
7.3	United Kingdom - England .....	303
7.3.1	Relationship between state and religion .....	304
7.3.2	Legal framework for the protection of fundamental rights .....	307
7.3.2.1	Race Relations Act of 1976.....	309
7.3.2.2	Human Rights Act 1998.....	311
7.3.3	Application of the HRA and the RRA.....	313
7.3.3.1	Human Rights Act .....	315
7.3.3.2	Race Relations Act .....	320
7.3.3.3	Appraisal of the reasoning of the Court of Appeal in <i>Begum</i> .....	320
7.3.4	The European Union Employment Equality (Religion or Belief) Regulations .....	322
7.4	Germany .....	324
7.4.1	Relationship between state and religion .....	325
7.4.2	Application of the right to manifest religious belief – <i>Ludin</i> case .....	325
7.5	United States of America.....	330
7.5.1	The relationship between the state and religion .....	331

7.5.2	Free exercise of religion .....	335
7.6	Canada .....	342
7.6.1	Relationship between state and religion .....	343
7.6.2	Constitutional protection of the right to freedom of religion .....	344
7.6.3	Definition of religion as a personal and private autonomous choice.....	345
7.6.4	Application of the right .....	347
7.7	Conclusion.....	351
7.7.1	Critical assessment .....	351
7.7.2	Appraisal.....	356
<b>Chapter 8.....</b>		<b>358</b>
<b>Legal context and application of the right to freedom of religion: .....</b>		<b>358</b>
South Africa .....		358
8.1	Introduction .....	358
8.2	History of religious domination and conflict.....	362
8.3	Historical relationship between the state and religion .....	366
8.4	Current relationship between the state and religion: <i>Lawrence v The State</i> .....	369
8.4.1	Even-handed and constructive coexistence .....	374
8.4.2	Free from coercion and constraint coupled with equity .....	377
8.4.3	Positive duty to promote.....	381
8.4.3.1	Interpretation of fundamental human rights .....	382
8.5	The scope of the right to freedom of conscience, religion, thought, belief and opinion .	384
8.6	Limitation of the right to freedom of religion .....	389
8.6.1	General limitations test.....	391
8.6.2	Reasonable accommodation .....	398
8.7.	Collective nature of religion and culture .....	403
8.7.1.	<i>MEC for Education: KwaZulu-Natal v Pillay</i> .....	408
8.7.2	<i>Prince v President of the Law Society of the Cape of Good Hope</i> .....	417
8.7.3	Religion and substantive equality.....	421
8.7.4	Religion and dignity .....	426
8.8	Protection of the fundamental rights of others .....	427
8.8.1	The right to dignity: <i>Christian Education of South Africa v Minister of Education</i>	428

8.8.2	The right to property: <i>Bührmann v Nkosi and others</i> .....	429
8.8.3	The right to a fair trial: <i>Crossley v National Commissioner of South African Police Service</i> .....	431
8.8.4	The right to freedom of religion: <i>Woodways v Vallie</i> .....	433
8.9	Conclusion.....	435
<b>Chapter 9.....</b>		<b>440</b>
<b>Conclusion.....</b>		<b>440</b>
9.1	Introduction .....	440
9.2	Approach in general followed in international and other jurisdictions .....	444
9.3	The approach of the South African courts.....	447
9.4	Conformity of the South African approach with international instruments .....	451
9.5	A postmodern approach.....	452
9.6	Overall conclusion.....	454



# Chapter 1

## Introduction

### 1.1 Background to the study

The freedom of individuals to hold their own religious beliefs is one of the basic characteristics of a democratic society. It is a fundamental right that is enshrined in a number of international agreements, such as the Universal Declaration of Human Rights (UDHR),<sup>1</sup> regional instruments, such as the European Convention for Human Rights (ECHR),<sup>2</sup> and national legislation.<sup>3</sup> Notwithstanding the protection afforded to the right

---

<sup>1</sup> In this regard see article 18 of the UDHR which was adopted by the General Assembly of the United Nations, resolution 217 (III) of 10 December 1948. UN Doc. A/3/810 (1949) as discussed in section 4.2.1, and article 18 of the International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXII) of 16 December 1966 as discussed in section 4.3, and article 1 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration), proclaimed by the General Assembly of the United Nations, resolution 36/55 of 25 November 1981 as discussed in section 4.4. See also Human Rights Committee General Comment 22: The Right to Freedom of Thought, Conscience and Religion (article 18), paragraph 4, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) (hereinafter General Comment 22). The body of independent experts monitoring the implementation of the provisions of the ICCPR is known as the Human Rights Committee (HRC). For purposes of clarity and to avoid confusion with the Human Rights Council (HRC) this committee is referred to as the ICCPR Human Rights Committee. For a further discussion on the role of the ICCPR Human Rights Committee see section 4.7.1.

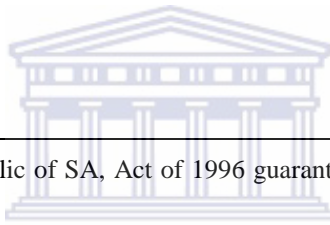
<sup>2</sup> See also article 9 of the ECHR which was adopted by the Council of Europe on 4 November 1950 in Rome (entered into force 3 September 1953) as discussed in section 4.8.1; also article 12 of the American Convention on Human Rights (Pact of San José) adopted by the Organization of American States on 22 November 1969, San José, Costa Rica (entered into force on 18 July 1978) as discussed in section 4.9 and article 8 of the African Charter on Human and Peoples Rights (African Charter) adopted by the Organization of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981 in Nairobi, Kenya (entered into force on 21 October 1986) as discussed in section 4.10.

<sup>3</sup> In the United States of America the most important protection of the right to freedom of religion is contained in the First Amendment to the United States Constitution. The Canadian Charter of Rights and Freedoms guarantees in Article 2(a) that: Everyone has ... freedom of thought, conscience and belief,



to freedom of religion, there are many places in the world where followers of a particular religion may not lawfully practice their religion in their daily lives, and many individuals face restrictions on their right to freely manifest their religion or belief.<sup>4</sup>

Throughout history there are numerous incidents in which adherents of different religions have failed to tolerate each other. The use of religion for repression and even terror is well recorded. For example, the bloody religious wars of the 16th and 17th centuries,<sup>5</sup> the atrocities committed during the Second World War and the persecution of the Jewish people are testimony to human rights abuses of the past.<sup>6</sup> Even today inter-religious conflict still forms the basis of major disputes worldwide as seen, for example, in the Balkan States,<sup>7</sup> Israel-Palestine,<sup>8</sup> Sudan<sup>9</sup> and Nigeria.<sup>10</sup> Furthermore, intra-religious conflicts, for example between Catholics and Protestants in Northern Ireland,<sup>11</sup> have also tainted our history.



---

whilst The Constitution of the Republic of SA, Act of 1996 guarantees the right to freedom of religion in section 15.

<sup>4</sup> See generally PM Taylor *Freedom of Religion - UN and European Human Rights Law and Practice* (2005). For example in Burma, the Government arrests and imprisons Buddhist monks who promote human and political rights. For a detailed overview of countries in which religious freedom is restricted see the United States of America Department of State: The International Religious Freedom Report for 2010, available at <http://www.state.gov/g/drl/rls/irf/2010/index.htm> last accessed on 6 December 2011.

<sup>5</sup> See generally S Carroll *Noble Power During the French Wars of Religion: The Guise Affinity and the Catholic Cause in Normandy* (2005); MP Holt *The French Wars of Religion, 1562–1629* (1995); G Parker *The Thirty years' War* (1997).

<sup>6</sup> See generally G Franz-Willing 'The Origins of the Second World War' (1986) 7(1) *Journal of Historical Review* 95.

<sup>7</sup>In this regard see generally V Perica *Balkan Idols: Religion and Nationalism in Yugoslav States* (2004).

<sup>8</sup> See generally BM Edwards *The Israeli-Palestinian Conflict: a People's War* (2009).

<sup>9</sup> See generally CU Orji *Ethnic and Religious Conflict in Africa: an Analysis of Bias, Decline, and Conversion based on the Works of Bernard Lonergan* (2008).

<sup>10</sup> See generally T Falola *Violence in Nigeria: The Crisis of Religious Politics and Secular Ideologies* (1998).

<sup>11</sup> See generally J McGarry and B O'Leary *The Northern Ireland Conflict: Consociational Engagements* (2004).

The term inter-religious conflict is used to indicate relations across religious difference, for example between Muslims and Christians. While the term intra-religious conflict is used to illustrate competing interpretations within the same religion, for example between Sunnis Muslims and Shi'is Muslims.

Religious intolerance continues to incite conflict, and as a consequence, human rights abuses often follow. The September 11 attack on the World Trade Centre in 2001 played a role in the increase in religious intolerance. This is confirmed by the director of Organization for Security and Co-operation in Europe (OSCE), Ambassador Janez Lenarčič who states that:

Some of these challenges are very present at the beginning of the 21st century: certain tensions and difficulties linked to religions and beliefs have come to the fore.<sup>12</sup>

Intolerance and discrimination towards Muslims has caused the Commission for Human Rights to react with calls for appropriate control of the mass media to prevent incitement to violence and intolerance towards Islam.<sup>13</sup> Simultaneously traditional Islamic practices are increasingly considered as indications of extremism. It is argued that this point of view is biased and has influenced certain European States, notably France, to react against traditional Muslim observances such as the wearing the Islamic headscarf in State schools.<sup>14</sup> In this and other regards the relationship between the state and religion remains a controversial issue in some societies. A more recent development has been the emergence of political parties campaigning for the introduction of government based on religious law.<sup>15</sup>

---

<sup>12</sup> Address by Ambassador Janez Lenarčič, the Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) Supplementary Human Dimension Meeting on 'Freedom of Religion or Belief' Neuer Saal, Hofburg, Vienna 9 July 2009, available at [http://www.osce.org/documents/odihhr/2009/07/38726\\_en.pdf](http://www.osce.org/documents/odihhr/2009/07/38726_en.pdf) last accessed on 13 July 2009.

<sup>13</sup> Resolution 2002/9 15 April 2002 Commission on Human Rights.

<sup>14</sup> France Country report filed by the OSCE, available at [http://www.osce.org/documents/odihhr/2008/10/34058\\_en.pdf](http://www.osce.org/documents/odihhr/2008/10/34058_en.pdf) last accessed on 13 July 2009.

<sup>15</sup> *Refah Partisi (The Welfare Party) and others v Turkey* (2003) 37 ECHR 1 229, 314,335. The Turkish courts had dissolved one of the largest Turkish political parties because of its alleged support for Islamic

These events referred to briefly above were not anticipated by the founders of UDHR and the ICCPR, which both protect the right to freedom of religion. This has caused speculation as to whether existing international instruments are capable of meeting the challenges posed by modern events. It has been claimed that '[t]he twentieth century is pre-eminently the century of religious persecution'<sup>16</sup> and that the right of religious freedom is one of the weakest rights, both as regards its recognition and enforcement, of all the rights contained in the UDHR.<sup>17</sup> The right to manifest one's religious belief can in this regard be said to be nothing more than an 'empty vessel'.<sup>18</sup>

## 1.2 Title of the study

The title of this study is 'The right to freedom of religion in the public domain in South Africa'. This study encapsulates the following question: 'Does a secular argument for the return of religion to the public domain ensure the optimal protection of the application and limitation of the right to manifest religious belief? This question is approached from an international and comparative perspective with specific reference to South Africa as a case study.

---

fundamentalism, including advocating the introduction of *Shariah* law in Turkey. The European Court held that it could be appropriate for a State to dissolve a political party if it appears that the party may be on the verge of obtaining political power (*Refah Partisi* para 108) and if some of its proposals are against the State's constitutional order (*Refah Partisi* paras 59-60, 67, 93) or fundamental democratic principles (*Refah Partisi* paragraph 98).

<sup>16</sup> See G Wiegel 'Religion as a Human Right' (1984) 3 *Freedom at Issue* 77.

<sup>17</sup> RB Lillich 'Civil Rights' in T Meron (ed) *Human Rights in International Law, Legal and Policy Issues* (1984) 160.

<sup>18</sup>As the right to freedom of religion is often disregarded, it is my premise that the right to freedom of religion is an empty right, just as Westen argues that the notion of equality is an empty vessel. See generally P Westen 'The Empty Idea of Equality' (1982) 95 (3) *Harvard Law Review* 537. It is possible to argue this point of view with regards to the application of other fundamental rights as well. However, this thesis will focus on the right to freedom of religion in particular as well as the right to non-discrimination on the ground of religious belief.

### *Why 'a secular argument'?*

The relationship between the state and religion can be structured in various ways. This relationship may range from states in which there is no separation between the state and religion and a state church or state religion exists, to states in which there is separation between the state and religion, so called secular states.<sup>19</sup> The premise of this study is that the right to freedom of religion of all faiths is generally better protected in a state in which there is no relationship between the state and a particular religion, as all religions are more likely to be treated equally.<sup>20</sup>

### *Why 'the return of religion to the public domain'?*

Secular states in general defend the principle that secularism demands a neutral public domain in which religion is relegated to the private sphere. The premise of this study is that a strict division between the public and private sphere is problematic, as the very nature of religion does not generally allow for a distinction between public and private.

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe.<sup>21</sup>

The division between the public and private is employed here similarly to the theory underlying much liberal political thought, in that the public sphere is used to indicate the world of paid employment and public affairs, while the term private sphere is used to indicate the private world of the household or family. This division is even more challenging for those religions in which the manifestation of religion in the public sphere is obligated as, for example, the requirement of the wearing of the Islamic headscarf-*hijab* does. It is the premise of the study that the principle of secularism ought to be

---

<sup>19</sup> See section 3.4.

<sup>20</sup> See section 3.6.3.

<sup>21</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) paragraph 37.

interpreted to mean religious impartiality. Secularism should not to be interpreted that the public sphere should be void from religious influence.

*Why 'the application and limitation of the right to freedom of religion'?*

The scope of a right is determined by the restrictions imposed upon the right.<sup>22</sup> The right to have religion of one's choice (*forum internum*) is unconditional and may not be limited. The right to manifest one's religion (*forum externum*), through worship, observance, practice and teaching may however be limited.<sup>23</sup> The actual scope of the right to freedom of religion is therefore determined by the manner in which the right to manifest religious belief is limited. If the right to manifestation is extensively limited, then the right to freedom of religion may therefore effectively be rendered without meaning. It is the premise of this study, that in light of the importance of the right to freedom of religion for the individual's sense of self-worth and dignity, it is in the interest of society as a whole that any limitation on the right is subject to strict scrutiny.

*Why 'the right to manifest religious beliefs'?*

From an analysis of international jurisprudence it is apparent that the manifestation of religion through worship and teaching has been less fraught with interpretational difficulties, while the manifestation of religion through practice and observance has been more controversial.<sup>24</sup> Observances may include, for example, the right to observe religious personal and family law, the right to undertake religious pilgrimages, the right

---

<sup>22</sup> M Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* (1993) 311.

<sup>23</sup> In this regard see generally A Krishnaswami 'Study of Discrimination in the Matter of Religious Rights and Practices' in JD van der Vyver & J Witte (eds) *Religious Human Rights in a Global Perspective* (1996) 1, 17; see generally D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997).

<sup>24</sup> For a general discussion on the differences between belief and practice see G Moens 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

to observe religious days<sup>25</sup> and the right to display religious symbols. Observances may also include the right to observe religious rites,<sup>26</sup> dietary practices or the right to cultivate a religious appearance as prescribed by a particular religion, for example adhering to a dress code,<sup>27</sup> such as wearing the Islamic headscarf or by growing a beard or fashioning hair in a particular manner, for example Rastafarians wearing dreadlocks.<sup>28</sup> Other examples of religiously motivated dress include Jews wearing yarmulkes, Christians wearing crucifixes, Hindus displaying a *bindi* or nose-ring<sup>29</sup> and Sikhs wearing a turban or *kirpan*.<sup>30</sup>

The focus of this study is on the manifestation of religion through practice and observance. In particular the right to observe religious rites as well as the right to cultivate a religious appearance, which has recently been the subject of much debate and controversy,<sup>31</sup> is emphasised.

---

<sup>25</sup> This study will not provide a comprehensive overview of these components of the right to freedom of religion. In this regards see G van der Schyf *The Right to Freedom of Religion in South Africa* LLM Thesis Randse Afrikaanse Universiteit (2001) 133 onwards.

<sup>26</sup> Moreover, the 1981 Declaration further specifies the freedom to: ‘make, acquire and use to an adequate extent the necessary articles and materials related to rites or customs of a religion or belief.’ See Article 6 (c) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

<sup>27</sup> General Comment 22 on Article 18 of the ICCPR elaborates that ‘The observance or practice may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings.’ See General Comment 22 paragraph 4.

<sup>28</sup> Rastafarians are obligated not to cut their hair which results in dreadlocks, as according to the King James version Numbers ch 6 1:6. In terms of the Nazarene vow, only foods in their natural state may be eaten, alcohol may not be consumed and Rastafarians may not cut their hair.

<sup>29</sup> The wearing of a nose-ring is a time-honoured family tradition. In this regard see generally BN Banerjee *Hindu Culture, Custom, and Ceremony* (1978).

<sup>30</sup> The *kirpan* is among the five religious obligations of orthodox Sikh males and serves as a reminder of the constant struggle between good and evil. In this regard see generally HS Dilagira *Who are the Sikhs?* (2000).

<sup>31</sup> A comparative analysis shows regulation or prohibitions on wearing religious symbols in more than 25 countries in the world. See the comparative table on prohibitions of wearing religious symbols. Available at <<http://www.uni-trier.de/~ievr/kopftuch/ReligiousSymbols.pdf>> last accessed on 9 September 2010.

*Why ‘an international and comparative perspective’?*

The international and regional instruments in terms of which the right to freedom of religion and in particular the right to manifest religious belief is entrenched have globally influenced the formulation of national human rights instruments. Similarly the jurisprudence of these international bodies have impacted on the manner in which the right to manifest religious belief is protected. National jurisdictions have also been required to investigate the application and limitation of the right to manifest religious belief. The manner in which the right has been protected in these jurisdictions has been dependant on various factors, such as the relationship between the state and religion. The purpose of this survey is to determine the constitutional, juridical and philosophical framework that ensures the optimal protection of the right to manifest religious belief.

*Why ‘with specific reference to South Africa as a case study’?*

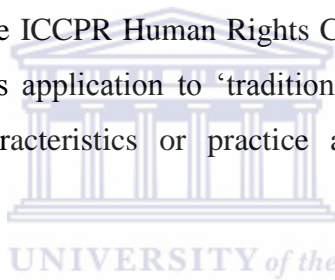
South Africa is the country in which this study takes place. South Africa further has a diverse population and is home to adherents of various religions. Within the relative short span of the constitutional democracy the South African courts have had the opportunity to address the question of the right to manifest religious and cultural practices on more than one occasion. From an analysis of these cases it is clear that that the jurisprudence of the South African Constitutional Court in particular has truly recognised the right to manifest religious belief and cultural practices. In following this approach the court has ensured that the right to freedom of religion is acknowledged, protected and furthered.

### **1.3 Terminology and normative approaches**

A number of terminological choices have been made throughout this study. In order to simplify the text, unless the context requires otherwise, this study shall try to use consistent terms throughout. Some of these terms are explained below.

### *Definition of the concept 'religion'*

The right to freedom of religion has not been defined in any of the international instruments. There is no generally accepted definition for religion in international law. Neither the ICCPR nor the ECHR have developed a detailed definition.<sup>32</sup> None of the instruments describe the expression 'religion or belief'. The bodies implementing the ICCPR as well as the ECHR have however given some guidance. The ICCPR Human Rights Committee states that 'freedom of religion or belief' denotes freedom of theistic, non-theistic, and atheistic beliefs, as well as the freedom not to profess any of these beliefs.<sup>33</sup> The European Court of Human Rights also acknowledged that the religious dimensions of article 9 had meaning for 'believers, atheists, agnostics, sceptics and the unconcerned'.<sup>34</sup> In addition the ICCPR Human Rights Committee has indicated that the expression is not limited in its application to 'traditional religions or to religions and beliefs with institutional characteristics or practice analogous to those traditional religions'.<sup>35</sup>



Edge and Harvey provide the following definition of religion:

Religions are diverse ways of being human and there are many various ways of being religious. All are concerned with ways of seeing and being in the world (some considering that this influences existence in post-mortem destinations). Perhaps religion

---

<sup>32</sup> See generally MW Janis & C Evans *Religion and International Law* (1999); P Cumper 'Freedom of Thought, Conscience and Belief' in D Harris & S Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995).

<sup>33</sup> See General Comment 22 on Article 18 ICCPR paragraph 2, as well as the Krishnaswami Study of Discrimination in the Matter of Religious Rights and Practices (UN Doc e/cn.4/Sub.2/200/Rev.1(1960)). For a general overview of the European definition of freedom of religion see BG Tahzib-Lie 'The European Definition of Freedom of Religion or Belief' (1998) 17 *Helsinki Monitor* 17.

<sup>34</sup> See *Kokkinakis v Greece* (1993) 260 A Eur Ct H R, 31.

<sup>35</sup> The ICCPR Committee determined that a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug cannot be brought within the scope of Article 18 of the ICCPR - see *M.A.B. , W.A.T. and J.-A.Y.T v Canada* (Communication no 570/1993), inadmissibility decision of 8 April 1994 UN Doc CCPR/C/51/D/570/1993, 4.2.



is concerned with the transcendent, but not all religions are necessarily concerned with that which some claim transcends time and space.<sup>36</sup>

This study will not provide a fixed definition for the concept of religion. A comprehensive definition will be used and the term will be used in a broad sense, inclusive of non-religious or secular life stances, as suggested by Edge and Harvey.

In addition the term right to freedom of religion is used with essentially the same meaning as freedom of thought and conscience in that reference to thought and conscience does not intend to indicate different rights, but is merely to recognise the diverse profiles of the same right.<sup>37</sup> Accordingly, the term right to freedom of religion includes religious thoughts and conduct as well as deeply held conscientious beliefs and conduct, and will be used as such throughout this study. Furthermore, as the scope of the right to freedom of religion is determined by the manner in which the right to manifest religious belief is limited, the term ‘right to manifest religious belief’ is used with appreciation that this term incorporates the right to freedom of religion.

*Alternative approach to defining religion – religion as a way of life*

An alternative approach to defining the concept of religion is to recognise the value of the role of religion in the lives of adherents, through emphasising the various ‘facets’ of religion.<sup>38</sup> Three ‘facets’ can be identified: firstly, religion as a belief; secondly, religion as a way of life; and finally, religion as an identity. Religion as a belief accentuates, for example, the existence of a deity or the adherence to doctrines, as discussed above.

---

<sup>36</sup> PW Edge & G Harvey *Law and Religion in Contemporary Society: Communities, Individualism and the State* (2000) 8-9.

<sup>37</sup> J Martínez-Torrón & R Navarro-Valls ‘Protection of Religious Freedom in the System of the Council of Europe’ in T Lindholm, WC Durham & BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 210.

<sup>38</sup> JT Gunn ‘Definition of “Religion” in International Law’ (2003) 16 *Harvard Human Rights Law Journal* 189, 200.

The second ‘facet’ of religion accentuates religion as a way of life. In this facet religion is associated with actions and rituals that may distinguish the believer from adherents of other religions. The traditional Christian view of religion focuses primarily on religion as belief and, moreover, religion as a private belief.<sup>39</sup> For adherents of other religions the belief component may be of less importance. Religion as a way of life may perhaps be the most salient aspect of their lives. For example, adherence to their religion may demand prayers five times a day may impose certain dietary requirements and may demand that certain religious dress and grooming requirements be complied with. The concept of religion as a way of life may further be linked to the interconnectedness that exists between religion and culture as more fully discussed in section 5.2.1.1.

Traditional western states often are reluctant to make accommodations for this religious way of life and in doing so often reveal the dominant facet of the religion of the majority of the state as a religion of belief.<sup>40</sup> These states may claim that by enforcing so called ‘neutral laws’ that are applicable to all religious and ethnic groups, the state is treating all religions as equal. However, adherents to religion as a way of life may suffer disproportionately. This may have a devastating impact on the individual’s ability practice her religion.<sup>41</sup>

*Alternative approach to defining religion – religion as identity*

None of the international, regional or national instruments mentioned previously provide for a specific right to identity. Consequently, no definition for the right to identity exists. The South African Constitutional Court in the matter of *Pillay*,<sup>42</sup> however, convincingly reasons for the importance of identity in the following manner:

---

<sup>39</sup> *Ibid* 204.

<sup>40</sup> *Ibid* 205.

<sup>41</sup> *Ibid* 214.

<sup>42</sup> See section 8.7.1.1.

Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity.<sup>43</sup>

Identity is therefore linked to the self-worth of an individual. The importance of self-worth is appreciated by Rawls who speaks of a 'sense of belonging'.<sup>44</sup> A sense of belonging is made possible through the individuals' location in for example, a religious or cultural community. The role of religious and cultural practices in relation to human dignity and identity is also confirmed in that:

[R]eligious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.<sup>45</sup>

Religion as identity accentuates affiliation with a group, such as ethnicity, race or nationality. Religion as identity is accepted by Benito,<sup>46</sup> who holds that 'religion usually encompasses more than faith. Often it is the focal point of the cultural tradition of a group'.<sup>47</sup> Religion as identity is most vividly reflected in the case of Jews, in that 'they are primarily a religious group, they are likewise viewed as a race, a nation, a people, a culture'.<sup>48</sup> Here too, the concept of religion as identity may be linked to the interconnectedness that exists between religion and culture as more fully discussed in section 5.2.1.1.

---

<sup>43</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC) (*Pillay*) paragraph 53.

<sup>44</sup> J Rawls *A Theory of Justice* (1971) 62. See also and I Berlin 'Concepts of Liberty' in I Berlin (ed) *Four Essays on Liberty* (1969) 118,154-60.

<sup>45</sup> *Pillay* (note 43 above) paragraph 62.

<sup>46</sup> EO Benito, Special Rapporteur on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief for the period 1983 – 1986.

<sup>47</sup> Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Sub-Commission on the Prevention and Protection of Minorities, Commission on Human Rights, Economic and Social Council, 39<sup>th</sup> Session at paragraph 183 U N Doc E/CN.4/Sub 2/1987/26/(1986).

<sup>48</sup> GW Allport *The Nature of Prejudice* (1979) 446.

In addition, it is sometimes impossible to separate defining characteristics of a group's cultural composition as religious belief is often an integral part of ethnicity.<sup>49</sup> Both religion and ethnicity play an important role in people's self identity. Religion may further form the foundation of the existence of a specific ethnic group as supported by the following definition of ethnic group as a group of people who are seen as:

[S]haring a distinctive and enduring collective identity based on a belief in a common origin, a common history and a common destiny [as well as] culturally specific practices and beliefs. Physical appearance, language, a shared territory and religious beliefs may further contribute in varying degrees to ethnic identity.<sup>50</sup>

Identity consequently relates to various distinctive characteristics such as language, culture and religion; these aspects are all relative. However, the very nature of universal human rights prefers to deal with universalities and generalities.<sup>51</sup> Consequently the importance of these relative attributes is often insufficiently considered. It is this interrelation between religion and ethnicity that will be explored next.

It is the premise of this study that this alternative approach to defining religion as a way of life and religion as an identity is of particular importance in attempting to ensure the optimal protection of the right to manifest religious belief in a diverse society. Regarding the definition of religion as identity it is further important to acknowledge the cultural and ethnic interconnection.

### *Cultural, ethnic and racial interconnection*

---

<sup>49</sup> J Haynes 'Religion, Secularisation and Politics: A Postmodern Conspectus' (1997), 18 (4) *Third World Quarterly* 709, 721.

<sup>50</sup> A Odendaal 'Ethnic Conflict and its Management: A Position Paper' Centre for Conflict Resolution (1998), available at [http://ccrweb.ccr.uct.ac.za/archive/staff\\_papers/odendaal\\_ethnic.htm](http://ccrweb.ccr.uct.ac.za/archive/staff_papers/odendaal_ethnic.htm) last accessed on 10 March 2009.

<sup>51</sup> C Douzinas 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights (2002) 29 (3) *Journal of Law and Society* 379, 402.

The interconnection between race and religion is suitably portrayed among the people in the Cape during the seventeenth and eighteenth centuries. Religion rather than race provided the categories for defining differences. In light of this categorisation, black people were grouped with Islam.<sup>52</sup> Religion was also often interlaced with ethnicity or nationality. For example Muslims in the Cape were referred to as ‘Malays’; this was not a racial or ethnic designation in that the term ‘Malays’ signified the Muslims of the Cape who ‘embrace every shade, from the blackest to the most blooming Englishwoman.’<sup>53</sup> In Natal too, ethnicity or nationality was attached in a similar manner. Muslim merchants from India settling in Natal set themselves apart from Indian labourers, who were mostly Hindu, through calling themselves ‘Arabs’.<sup>54</sup> Likewise the Jewish population that settled in Johannesburg was also divided by social class; the poorer underclass known for their illegal liquor trading and prostitution acquired the ‘ethnic’ designation of Peruvians.<sup>55</sup>

Religion, race,<sup>56</sup> and ethnicity<sup>57</sup> are all types of cultural groupings. The concept ‘cultural group’ refers to a group of people who to a large extent share similar customs, lifestyles, values, religious beliefs, historical continuity, physical characteristics and/or language.<sup>58</sup> The overlap between ethnicity and religion has also been recognised by the Abdelfattah Amor, United Nations Special Rapporteur on Freedom of Religion or Belief who states that:

---

<sup>52</sup> D Chidester *Religions of South Africa* (1992) 89.

<sup>53</sup> In this regards see Chidester (note 52 above) 162 where he refers to a comment in the 1860s by an aristocratic English visitor to the Cape, Lucy Duff Gordon.

<sup>54</sup> F Ginwala *Class, Consciousness and Control: Indian South Africans, 1860-1946* (1947) PhD Thesis Oxford University, 136.

<sup>55</sup> Chidester (note 52 above) 177.

<sup>56</sup> The term race or racial group usually refers to the categorisation of humans into populations or ancestral groups on the basis of various sets of heritable characteristics. The physical features commonly seen as indicating race are salient visual traits such as skin colour, cranial or facial features and hair texture.

<sup>57</sup> Ethnicity like race is concerned with the notion of descent or genealogy. The terms ‘ethnicity’ and ‘ethnic group’ are derived from the Greek word *ethnos*, normally translated as ‘nation’ or commonly said people of the same race that share a distinctive culture.

<sup>58</sup> Y Tseming ‘Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion’ (1997) 37 *Indiana Law Journal* 119, 127.

[T]he distinctions between racial and religious categories ... are not clear ... There are borderline cases where racial and religious distinctions are far from clear-cut. Apart from any discrimination, the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities...<sup>59</sup>

The importance of religion and ethnicity (or race) is situated in the fact that religion and race not only has significance for the individual within the framework of the religious belief system or biological foundation of race. Religion and ethnicity (or race) in addition to creating multiple identities also creates collective or shared identity, which has a cultural and social significance for the individual.<sup>60</sup> Therefore, race, ethnicity and religion are indicative of the individual's self identity as well as of the individual's sense of belonging to a cultural community. Consequently, the similarities between race, ethnicity and religion are located within the fact that all play comparable roles in determining the position of an individual within society.<sup>61</sup> It is the premise of this study that in advancing the protection of the right to freedom of religion it is imperative that the collective nature of the right is taken into account.

UNIVERSITY of the  
WESTERN CAPE

*Ascribed or acquired nature of religious belief*

A further factor that may influence the value that religion imposes on the development of an individual's identity rests on divergent views. On the one hand, some see personal identity as an acquired set of characteristics,<sup>62</sup> while on the other hand, others view identity as the result of ascribed set of characteristics.<sup>63</sup> It has been suggested that race

---

<sup>59</sup> United Nations Special Rapporteur on Freedom of Religion or Belief A Amor, *Racial Discrimination and Religious Discrimination: Identification and Measures* [29] UN Doc A/CONF. 189/PC. 1/7 (2000).

<sup>60</sup> Tseming (note 58 above) 123.

<sup>61</sup> *Ibid* 121.

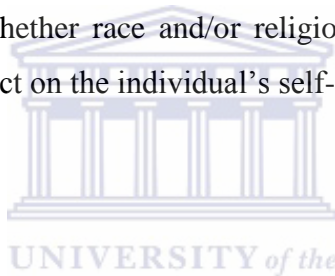
<sup>62</sup> See generally S Macedo *Liberal Virtues, Citizenship, Virtue and Community in Liberal Constitutionalism* (1990).

<sup>63</sup> See generally C Taylor *Sources of the Self: The Making of Modern Identity* Harvard University Press (1989).

and ethnicity on the one hand and religion on the other, appear to deal with entirely different personal attributes. Race and ethnicity are concerned with unchangeable involuntary attributes such as skin colour and genetics, whilst religion appears to have a voluntary nature.<sup>64</sup> However, the individual in determining her identity is not free to reject all forms of ascribed identity.<sup>65</sup> Limitations are imposed by culture and society.<sup>66</sup> The identity of an individual is therefore shaped by the individual herself but always in light of the community to which she belongs.

Therefore, this study is based on the premise that both race and ethnicity are social constructs. Similarly this study asserts that religious belief is usually instilled at an early age, transferred by family, and taught as part of a person's value and belief system,<sup>67</sup> and therefore is 'something the individual did not choose, but which chose him'.<sup>68</sup> Nonetheless, irrespective of whether race and/or religion are/is considered ascribed or acquired, both have a great affect on the individual's self-identity and group membership.

### *Islamic headscarf-hijab*



It is interesting to note that just as the right to freedom of religion is subject to many interpretations, so too is the Islamic headscarf, both in language and appearance. The English term *headscarf* and *veil*, as well as the French terms *foulard*, *voile* and *chador* differ markedly from the Arabic *hijab*:

*Hijab* means curtain, and barrier is an important part of its meaning. It doesn't at any rate mean headscarf (the Arabic word for that is *khimar*) ... *Hijab* is commonly used to mean Muslim dress...<sup>69</sup>

---

<sup>64</sup> *Ibid.*

<sup>65</sup> KA Appiah 'Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction' in A Gutman (ed) *Multiculturalism*.(1994)149-163. See also in general A Gutmann *Identity in Democracy* (2003).

<sup>66</sup> KA Appiah & A Gutman *Color Conscious: The Political Morality of Race* (1998).

<sup>67</sup> Tseming (note 58 above) 133

<sup>68</sup> TL Hall 'Religion, Equality and Difference' (1992) 65 (1) *Temple Law Review* 50, 62.

<sup>69</sup> M Martin 'Cry Freedom and Accept the Muslim Headscarf' *The Times* 1 February 2004.

Within Islamic tradition the extent of covering required from women may differ in accordance with different interpretations of the requirements of the faith. The extent of covering may vary from the headscarf (*hijab*),<sup>70</sup> to coverings such as the face veil that leaves an opening for the eyes (*niqab*), to more extensive coverings such as the head-to-toe all enveloping garment (*jilbab*). The most extensive covering is the *burqa* which covers the entire body and face with a mesh screen for the eyes.

Unless the context requires otherwise, this study will try to be consistent and use the term headscarf-*hijab*, acknowledging that although the headscarf-*hijab* is a form of veiling it can be much more extensive, covering most parts of the body. Furthermore this study is appreciative of the fact that arguments advanced in favour of restricting the face veil (*niqab*) may be more persuasive at times those advocating limitation on the use of for example the headscarf-*hijab*. These limitations may for example be justifiable when it may be important to identify an individual.

Not only is there vagueness about the language used for describing the headscarf-*hijab* but further disagreement exists over whether the Islamic religion mandates the headscarf-*hijab* at all. Within the scope of this thesis these debates are not explored on the basis that the core aspect of the right to freedom of religion is that religious groups have the rights to interpret their own religion. In this regard see the position of the European Court of Human Rights when it takes the view that:

... in principle the right to freedom of religion for the purposes of the Convention excluded assessment by the State of the legitimacy of the religious beliefs or the way in which those religious beliefs are expressed.<sup>71</sup>

---

<sup>70</sup> A female wears the headscarf over her head, generally covering her hair, ears and neck. The term *hijab* in Arabic means 'barrier' or 'screen' from the Arabic word *hajaba* meaning to hide from view or conceal. See Islam on line, Hijab: A Must, Not a Choice, 29 February 2004, available at <[www.islamonline.net/servlet/Satellite?cid=1123996016350&pagename=Islam](http://www.islamonline.net/servlet/Satellite?cid=1123996016350&pagename=Islam)> last accessed on 10 September 2010.

<sup>71</sup> *Metropolitan Church of Bessarabia and Others of Moldova*, Application No 45701/99, ECHR 2001 XII, paragraph 117.



Therefore the point of departure of this study is that the manner in which the right to manifest religious belief is exercised should be left to the individual herself to determine. For this reason, the public domain, including institutions or courts should not entangle themselves in dogmatic questions pertaining to the manifestation of religion.

#### **1.4 Statement of the problem**

##### *Increasing visibility of the conflict relating to the manifestation of religion in the public domain*

The visibility of conflict with regards to the manifestation of religion in the public domain, whether it is in places of employment or education, is on the increase. This is in general due to an array of factors including but not limited to increase in the number of people migrating, followed by a diversification of religious belief systems within what traditionally could have been considered a homogeneous society. As a result, conflict between different religions as well within individual religions has become more prevalent. In addition non-believers have actively employed the concept of state neutrality to actively push religion out of the public and other spheres.

South Africa with its traditional multicultural society and increasing migrant population is a sound example of this emerging diversity and corresponding potential for conflict. Therefore the duty to protect the right to freedom of religion is often confronted with more complexity.

The right to freedom of religion is intrinsically linked to the achievement of every individual's inherent dignity; a limitation of the right in principle hinders the full enjoyment of the broad spectrum of fundamental human rights. Consequently, the failure to adequately protect the right to freedom of religion must be acknowledged as not only an obstacle to the full realisation and protection of human rights. At the same time it is

acknowledged that the right to manifest religious beliefs may be subject to reasonable limitations.

*Scope and meaning of the legal text protecting the right*

Despite the existence of relevant international and regional instruments, as well as the protection of the right to freedom of religion in national constitutions and legislation, the interpretation and application of the rights to freedom of religion and to the manifestation of religious beliefs continues to be problematic and unclear. The potential for conflict in a religiously diverse society is exacerbated by this uncertainty. The following issues regarding the scope and meaning of the right to freedom of religion are evident:

First, the right to freedom of religion is cast as an individual liberty right. The right to freedom of religion therefore confirms our right to be different. The right to freedom of religion also acknowledges diversity and the right not to be discriminated against because of this difference. The provisions relating to equality and non-discrimination are of particular significance with regards to ensuring the optimum protection of the right to manifest religious belief in a diverse society. The interrelated nature of the right to freedom of religion and the right to non-discrimination is fittingly captured in the following statement by Sachs:

This is one of the most important areas for asserting the simultaneity of the right to be the same and the right to be different.<sup>72</sup>

This recognition of our right to be different plays a crucial role in the shaping of identity as this recognition validates our humanity, difference and uniqueness.<sup>73</sup>

Second, in addition to the interrelated nature of the right to freedom of religion and the right to equality, the right to freedom of religion is also protected in terms of other provisions. Principles stem from more general provisions, such as those for example

---

<sup>72</sup> A Sachs *Protecting Human Rights in a New South Africa* (1990) 44.

<sup>73</sup> C Douzinas 'Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights (2002) 29 (3) *Journal of Law and Society* 379,383.

pertaining to the right to freedom of association. Therefore the right to freedom of religion cannot be protected only as an individual right. The collective nature of the right to freedom of religion must be protected as well.

Third, religion and culture play a constitutive role in the formation of identity.<sup>74</sup> As a result, if the demands of the law place a religious observer in a position of conflict between the dictates of her religious practices and the obligations imposed by the law, she accordingly faces a ‘special’ harm.<sup>75</sup> Culture and religion also in general form the basis of the manner in which a minority identifies its difference from the rest of the population.<sup>76</sup>

Finally, the right to believe is a key ingredient of any person’s dignity and for many believers religion is central to all their activities. Religion concerns their capacity to relate to their sense of themselves, their community and their universe. Religion awakens concepts of self-worth and human dignity in every adherent.<sup>77</sup>

The need to balance either the accommodation or the limitation of the right to manifest religion in the public domain needs to take pace with full appreciation of the interrelated scope and meaning of the right to freedom of religion.

### *Relationship between the state and religion*

One approach to furthering the equal treatment of different religions has been in terms of the structure of the relationship between state and religion. States may display degrees of

---

<sup>74</sup> M Menachem ‘From “Honor” To “Dignity”’: How Should A Liberal State Treat Non-Liberal Cultural Groups?’ (2008) *Legal Pluralism, Privatization of Law and Multiculturalism* 609, 610.

<sup>75</sup> JH Garvey ‘Free Exercise and the Values of Religious Liberty’ (1986) *Connecticut Law Review* 179.

<sup>76</sup> K Henrard ‘The Right to Equality and Non-Discrimination and the Protection of Minorities in Africa’ in SA Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 207, 209.

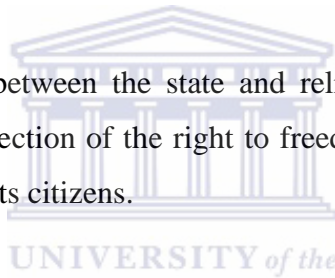
<sup>77</sup> The importance of religion described by Sachs J in *Christian Education v Minister Education* 2000 (4) SA 757 (CC) paragraph 36 as discussed in section 8.8.1.

separation (often termed secularisation)<sup>78</sup> between state and religion. Secular states are said to be neutral toward all religion and in are therefore premised to advance the equal recognition of all religions. The secular nature of the state is founded on the principle that public sphere must be free from religious influence. This foundation however denies the fact that the very nature of religion is that religious people often see life as a whole and aspire to manifest their beliefs in their private and public lives.<sup>79</sup>

## 1.5 Aims of the study

The principal aim of this study is to identify the constitutional, juridical and philosophical framework in terms of which the right to manifest religious belief is optimally protected. To this end the following secondary questions are explored:

Firstly, how the relationship between the state and religion should be structured and interpreted to enhance the protection of the right to freedom of religion and the right to manifest religious belief of all its citizens.



Secondly, how the right to freedom of religion should be interpreted to ensure the optimal protection of the right to freedom of religion and the right to manifest religious belief in diverse societies.

Thirdly, how the adherents of different religions should be assured of equal protection of the right to freedom of religion and the right to manifest religious belief in a diverse society.

---

<sup>78</sup> The term secularism was first introduced by the George Holyoake. In this regard see G Holyoake *Secularism, the Practical Philosophy of the People* (1854). Holyoake defined secularism as ‘the doctrine that morality should be based on regard for the well-being of mankind in the present life, to the exclusion of all other considerations drawn from a belief in God or a future state’

<sup>79</sup> See section 5.2.2.

## 1.6 Research methodology

This thesis is conducted by means of a critical review and analysis of books and journal articles as well as relevant legal texts, followed by an overview of the appropriate international, regional and national instruments protecting the right to freedom of religion. At the level of the United Nations this research discusses the practices of the ICCPR Human Rights Committee as well as the reports of the United Nations Special Rapporteur on Freedom of Religion and Belief, appointed by the Commission on Human Rights to examine incidents and governmental action inconsistent with the ICCPR and the 1981 Declaration. General Comment 22 is of particular importance. In addition, the ICCPR Human Rights Committee's considerations regarding those countries who have accepted the right of individual petition under the first Optional Protocol to the ICCPR are considered. Furthermore the results of examination of State reports submitted under article 40 of the ICCPR are analysed.

On a regional level the regional instruments such as the ECHR, the Pact of San José and the African Charter are analysed as well as the decisions of regional judicial bodies, primarily the decisions of the European Court of Human Rights (ECtHR). On a national level a comparative survey of a mainly five countries France, the United Kingdom (UK) (England), Germany, the United States of America (USA) and Canada is conducted. The application, limitation and interpretation of the right to freedom of religion in these judicial systems are analysed.

At the foreground of this analysis of the application, limitation and interpretation of the right to freedom of religion is the approach of the South African judiciary regarding the interpretation and protection of the right to manifest religious and cultural practice in a diverse society. On the basis of the aforesaid, recommendations will be made as to the jurisprudential and legislative context in terms of which the fullest enjoyment of the right to freedom of religion is most likely to be achieved.

## 1.7 Limitations of the study

### *Not a comparative study*

This study is not a comparative study as understood in its strict sense where three (in some respects, five)<sup>80</sup> successive stages of description, comparison and explanation are employed.<sup>81</sup> While at some stages, comparisons are made in such a way as to reflect what the jurisdictions may learn from each other, the aim is to assess the domestic laws, policies, and practices of the countries in the evaluation. The purpose of the assessment is to appreciate the effectiveness of the South African national legal norms and practices and to gather suggestions about how best to interpret these norms in the event of future challenges.

### *Choice of jurisdictions*

The study covers mainly five countries: France, the UK (England), Germany, the USA and Canada. It is not assumed that other countries would not have been able to do equal justice to the discussion. In addition, every attempt is made to ensure that substantial uniformity exists in the discussion of the countries. However, there may be a dominance of information from particular countries in the study, as a result of for example the availability of resources.

The choices of the countries in the study were made on the basis of a combination of thematic and practical considerations. These criteria are summarised as follows: First, as a common feature all five countries share is a commitment towards the respect for fundamental human rights and all are parties to international and regional texts protecting

---

<sup>80</sup> E Orucu 'Methodological aspects of Comparative Law' (2007) 8 (29) *European Journal of Law Reform* 37, 40.

<sup>81</sup> For a discussion of what comparative family law entails see, generally K Boele-Woelki 'What comparative family should entail' in K Boele-Woelki (ed.) *Debates in Family Law around the Globe at the Dawn of the 21<sup>st</sup> Century* (2009) 3.

the right to freedom of religion. However, all these countries are confronted with challenges posed by religious diversity. Second, the historical culture in France, Germany and the UK is comparable in that all three these countries demonstrate an existing majority culture, predominantly either Roman Catholic or Protestant. The USA and Canada are countries settled by settlers of predominantly European descent. Thirdly, all five countries represent a different arrangement between the state and religion. This relationship ranges from a strictly secular state as present in France, to an established church as found in England. Finally, four of the five countries have written constitutions in terms of which the right to freedom of religion is protected. In the UK the right to freedom of religion is protected in terms of non-discrimination legislation.

Following the survey of these five countries an analysis of the juridical, constitutional and philosophical approach of the South African courts with regards to the protection of the right to manifest religious and cultural practices will be conducted. The South African courts have had the ample opportunity to address issues concerning the right to manifest religious and cultural practices and in particular the Constitutional Court is held in high esteem with regards to the manner in which it has ensured the optimal protection of the right to manifest religious belief and cultural practices.

#### *Restrictions exercised regarding jurisdictions chosen*

The comparative aspect of this thesis aimed to include at least one African state. Similar to the situation in South Africa, the United States of America (USA) and Canada, many African states emerged from British rule. In addition, of these states follow a common law tradition, in which legal development rests primarily in the hands of courts. Some of these states further follow a system of constitutionalism and secularism. Furthermore religious and cultural heterogeneity is prevalent in most African states and incidences of religious conflict are customary. All of these factors lead to the desirability of the inclusion of at least one African state. However, as the main aspect of the thesis is an analysis of the jurisprudence pertaining to a limitation of the right to manifest religious belief, African jurisprudence was limited in this regard. The only matter that was

referred to the African Commission was the South African case of *Prince*<sup>82</sup>. Therefore the inclusion of an African state other than South Africa was discounted.

India was also considered as a possible state for comparative purposes for the following reasons: India too emerged from British rule and in this respect is similar to South Africa, the United States of America (USA) and Canada. In addition, India makes use of a common law tradition, bestowing legal development primarily in the hands of courts. However, India was discounted for the following reasons:<sup>83</sup>

Firstly India is deeply divided along ethnic and religious lines following independence. This divide together with the highly heterogeneous nature of Indian society has made any attempt to define the role of religion in India to be a complex issue.<sup>84</sup> Secondly, the multicultural composition of the Indian society made the separation of religion and state not viable and attempts to demarcate this relationship has resulted in a deeply polarising social conflict. Thirdly, the Indian Constitution provides for a distinct concept of secularism, significantly different from the liberalist 'wall of separation' as employed in the USA. Secularism in the Indian Constitution entails two concurrent and seemingly contradictory objectives: the concept of State neutrality towards religion, in terms of which all religions are equally protected, coupled with the possibility of State intervention in religious affairs for the purpose of uplifting the disadvantaged groups and accelerating their social integration offering special protections to India's Scheduled

---

<sup>82</sup> To date only five matters concerning the right to freedom of conscience have been received by the African Commission of which only the matter against South Africa (*Prince v South Africa* 255/2002 EC.CL/167 (VI)) related to the right to manifest religious belief.

<sup>83</sup> See generally Jacobsohn GJ *The Wheel Of Law: India's Secularism In Comparative Constitutional Context* (2003); Liviatan O 'Judicial Activism and Religion-Based Tensions in India and Israel' Vol. 26, No. 3 (2009) 26 (3) *Arizona Journal of International & Comparative Law* 583.

<sup>84</sup> The U.S. Department of State 2008 Religious Freedom Report on India estimates India's population at 1.1 billion, with Hindus constituting 80.5% of the population, Muslims 13.4%, Christians 2.3%, Sikhs 1.8% and others including Buddhists, Jains, Parsis, Jews and Baha's at 1.1%. USA Department Of State, 2008 International Religious Freedom Report 2008: India (2008), available at

<http://www.state.gov/drl/rls/irf/2008/108500.htm> last accessed on 10 November 2010.



Castes and Scheduled Tribes also known as Dalits or Untouchables. Fourthly, Hindu nationalism has been a permanent feature of Indian politics advancing the notion of *Hindutva* which illustrates Hindu supremacy for the purpose of achieving national unity. Employing *Hindutva* Hindu-Muslim conflict has been exacerbated as illustrated by the Hindu demolition of the Babri Masjid mosque at Ayodhya.

Finally, and most compelling, India has since independence been delaying the implementation of a uniform civil code aimed at replacing the separate systems of personal law that regulated family matters (including marriage, divorce, guardianship, and inheritance) according to the religious doctrines of each faith. A series of laws known as the 'Hindu Code' places the Hindu community along with Buddhists, Jains, and Sikhs to a uniform system of secularised personal law with religious underpinnings while Muslims, Christians, Parsees, and Jews continued to follow their own personal laws. A uniform civil code geared towards legal uniformity and equal protection has still not been achieved. In particular Muslims are against such a code arguing that their constitutional guarantees to religious freedom as well as India's commitment to multiculturalism provided for a separate system of regulation. In terms of Muslim Personal Law Muslims are entitled to take a second wife a practice which is forbidden for Hindu, Buddhist, Jain, and Sikh men. As illustrated by this example, provisions of personal law are often considered in conflict with fundamental human rights.

#### *Not an enquiry into the meaning and truth of religion*


This study is not concerned with a systematic inquiry into the meaning and truth of religious beliefs, nor is it focused on the defence of any particular outlook of any religion. Moreover, the philosophy of religion with the aim of seeking a critical understanding of purpose and meaning of the various religious beliefs in human life also falls outside the scope of this research. However, the research conducted is based on the premise that religious life, in all its various manners and forms, such as emotions, belief and practice, permeates human culture and shapes the conduct and experience of mankind.

## *Cognisant, informed and uncoerced decision*

This study, in the evaluation of the right to manifest religious belief through the display of religious dress and in particular the Islamic headscarf-*hijab*, focuses on the rights of religious women who make a cognisant, informed and uncoerced decision to wear the Islamic headscarf. There are of course competing claims based on equality and provisions of non-discrimination which are advanced in support of arguments that restrict the right of religious women to wear the Islamic headscarf. However, this study is based on the premise that the right of women to manifest their religious belief should not *per se* be limited in an attempt to ensure their equal treatment.

### **1.8 Chapter outline**

#### **Chapter 1**



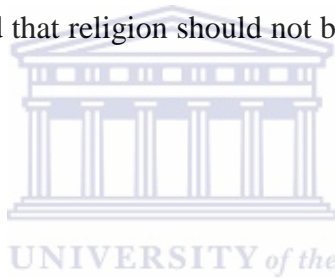
This chapter is introductory and sets out the context of the research, identifies the problem and outlines the methodology. The background to the study is set out, as well as the aims of the study and the questions the study will try to answer. Certain definitions are put forward. The limitations of the study are set out and a chapter outline is provided.

#### **Chapter 2**

This chapter provides a historical overview of the right to freedom of religion. It examines historical religious conflicts and consequent abuses of the right to freedom of religion. The need to formulate agreements aimed at the protection of the right to freedom of religion is discussed. A historical perspective of the international human rights regime, in so far as its development identifies religious conflict as a source of human rights violations and the need to protect the right to freedom of religion, is offered. This chapter concludes that the promotion and protection of the right to freedom of religion are central to ensuring peaceful co-existence in a religiously diverse community.

### **Chapter 3**

This chapter provides an overview of the relationship between the state and religion. The historical origin of this relationship is identified and the influence of religious conflict on the structuring of the relationship between the state and religions is recognised. A range of permutations of possible relationships between the state and religion is identified. The advantages and possible disadvantages of the various permutations, ranging from theocratic to secular states, relating to the protection afforded to the right to freedom of religion, is documented. This chapter argues that the right to freedom of religion of all adherents and not only the dominant religion should be protected and promoted. This promotion and protection of the right to freedom of religion requires that religion be afforded a more public role and that religion should not be restricted to the domain of the private.



### **Chapter 4**

This chapter outlines the international legal context of the right to freedom of religion and examines the important international treaties and declarations protecting the right to freedom of religion. The role, significance, impact and implementation as well as status of ratification of the foundational instruments protecting the right to freedom of religion, namely, the UDHR; the ICCPR and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion (the 1981 Declaration), are dealt with. Selected regional human rights instruments, namely those of the European, American and African systems are dealt with as well.

### **Chapter 5**

This chapter argues for an alternative approach to ensuring the protection of the right to manifest religious belief. Drawing from the conclusions in previous chapters an argument is put forward for a post modern approach to the right to freedom of religion.

The return of religion to a neutral public sphere is suggested. In addition the duty of the state to promote the right to freedom of religion through taking positive measures to protect in particular the religious rights of the minority and marginalised religions is emphasised. This chapter argues that the most extensive promotion and protection of the right to freedom of religion is central to a fulfilling and dignified life. A celebration of difference is exclaimed.

## **Chapter 6**

This chapter outlines the manner in which the international and selected regional judicial bodies (the European Court of Human Rights) have interpreted the right to manifest religious belief through the observation of religious rites and the display of religious dress. The consequent limitations on the right to manifest religious belief are analysed. The need to balance the right to freedom of religion with other conflicting interests is emphasised. This chapter argues that the most extensive promotion and protection of the right to freedom of religion is central to a fulfilling and dignified life and any limitation to the right to manifest religious beliefs must be interpreted in a restricted manner. With regard to the analysis of the regional judicial bodies the emphasis is primarily on the European Court of Human Rights, as to date only five matters concerning the right to freedom of conscience have been received by the African Commission of which only the matter against South Africa (*Prince v South Africa* 255/2002 EC.CL/167 (VI)) related to the right to manifest religious belief. From an evaluation of the jurisprudence of the Inter American Court on Human Rights it is apparent that the right to manifest religious belief has not yet been interpreted by the IACtHR.

## **Chapter 7**

This chapter outlines the national legal context of the right to freedom of religion in the following countries: France, the UK (England), Germany, the USA and Canada. The applicable national legal instruments and the application thereof by the judiciary are evaluated. The legal application of the right to manifest religious belief is analysed in

these countries to appreciate the validity and effectiveness of the South African national legal norms and practices and to gather suggestions about how best to interpret these norms in the event of future challenges.

## **Chapter 8**

This chapter focuses on the historical and philosophical context of the right to freedom of religion in South Africa as well as the application of the right to freedom of religion by the judiciary with reference to international and regional practice. Drawing on the manner in which the right to freedom of religion is applied in a South African context, this chapter examines possible alternative approaches to the protection of the right to manifest religious belief. The focus again is on the jurisprudence relating to the right to manifest religious belief.



## **Chapter 9**

The chapter will provide various conclusions and recommendations on the implementation of the right to freedom of religion in South Africa generally with specific reference to the right to manifest the right to freedom of religion through the wearing of religious adornment or dress or the observances of rituals or practices.

## Chapter 2

### A brief overview of the development of a regulatory framework for the protection of the right to freedom of religion in response to religious conflict

#### 2.1 Introduction

It is sound to maintain that the regulatory framework (in terms of which the right to freedom of religion is protected today) developed historically in response to certain religious conflicts. These historical conflicts also in general influenced the manner in which the relationship between the state and religion ultimately took shape. The relationship between the state and religion is considered in a subsequent chapter.<sup>1</sup> In this chapter is an overview of these religious conflicts, as well as the ensuing development of the stages of protection of the right to freedom of religion is offered.

The overview of historical conflicts contained in this chapter does not suggest that all the conflicts discussed were entirely driven by religion. The true cause of conflict is often difficult to determine. Frequently, a combination of factors - for example, political alliances, economic, ethnic and / or religious differences - may play a role. In addition, there are indications that religious conflicts are often used as a pretext to disguise political, dynastic, or even personal power struggles. For this reason the conflicts that are discussed in this chapter are conflicts which relate predominantly to the issue of religion.

In addition, the brief synopsis of religious conflict and present day challenges to the right to freedom of religion does not claim to be an all-inclusive overview of religious conflict *per se*. This chapter places an emphasis on historical conflicts which resulted in the conclusion of treaties or agreements aimed at addressing or resolving these conflicts. The chapter is therefore based on the following theoretical approach:

---

<sup>1</sup> See section 3.4.

[T]hat human rights however fundamental are historical rights and therefore arise from specific conditions characterised by the embattled defence of new freedoms against old powers. ... Religious freedom resulted from religious wars.<sup>2</sup>

The historical origin of the legal regulatory framework protecting the right to freedom of religion is put forward. Followed by an outline of the manner in which the protection of the right to freedom of religion developed throughout history. The development is structured in three distinct phases; firstly, the protection afforded in terms of the *maxim cuius regio, eius religio*,<sup>3</sup> which provided for the territorial separation of Roman Catholics and the Protestant reformed Lutherans and Calvinists; secondly, the protection of the right to freedom of religion in terms of the minority protection model;<sup>4</sup> and lastly the international human rights model.<sup>5</sup> This is in order to set the foundation for a more detailed consideration of the current protection afforded to the right to freedom of religion in later chapters.<sup>6</sup>

The development of provisions protecting the right to freedom of religion also provides the background for the analysis of the application thereof in South Africa and recommendations as how best to ensure the most comprehensive protection of the right to freedom of religion in religious and cultural diverse nations.<sup>7</sup>

---

<sup>2</sup> HJ Steiner *International Human Rights in Context Law Politics and Morals* (2007) 480 where the remarks of Noberto Bobbio are included from N Bobbio *The Age of Rights* (trans. Allan Cameron) (1996) 18.

<sup>3</sup> Translated to read where there is one lord there shall be one religion. Available at <[http://www.yuni.com/library/latin\\_1.html](http://www.yuni.com/library/latin_1.html)> last accessed on 23 October 2010. Further discussed in section 2.3.1.

<sup>4</sup> See section 2.4.

<sup>5</sup> See section 2.5.

<sup>6</sup> See section 4.2, 4.3 and 4.4.

<sup>7</sup> See section 5.7.

## 2.2 The origin of the protection of the right to freedom of religion: The Edict of Milan (313)

The first declaration of religious freedom is found in the Edict of Milan,<sup>8</sup> proclaimed by St. Constantine, Emperor of the Eastern Roman Empire.<sup>9</sup> Following the crucifixion of Jesus, the Romans persecuted Christians for approximately the first three hundred years of Christian tradition. In terms of the Edict of Milan the right to religious freedom was decreed as follows:

We thought it fit to commend these things most fully to your care that you may know that we have given to those Christians free and unrestricted opportunity of religious worship. When you see that this has been granted to them by us, your Worship will know that we

---

<sup>8</sup> DH Davis 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) *Brigham Young University Law Review* 217, 225.

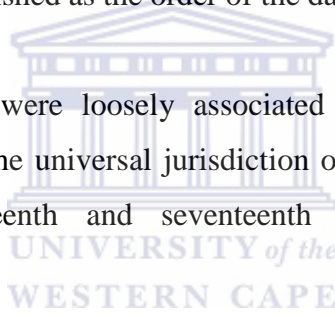
<sup>9</sup> Kelly summarises the development of The Roman Empire as follows: The Roman Empire developed after the ancient Roman civilization. During the Roman Empire the approach towards religion was less spiritual and more based on a relationship between man and the forces (gods or goddesses) which were believed to control people's existence and well-being. Due to its vastness the empire was often divided along an East/West axis, namely the Eastern Roman or Byzantium Empire and the Western Roman Empire. In 313 AD in the Edict of Milan, Christianity was recognised as a religion. Following the fall of the Western Roman Empire in 476 AD Europe was pushed into the dark Middle Ages which lasted until the rise of the Holy Roman Empire in 962 AD. The Holy Roman Empire replaced the Western Roman Empire. The territories and dominion of the Holy Roman Empire in terms of present-day states comprised of Germany, Austria, the Czech Republic, Switzerland and Liechtenstein, the Netherlands, Belgium, Luxembourg, and parts of Slovenia, significant parts of eastern France, northern Italy and western Poland. Although the Holy Roman Empire would nominally exist until 1806, its authority came to an end after 1555 – with the signature of the Treaty of Augsburg. In this regard see generally C Kelly *The Roman Empire: a Very Short Introduction* (2006). The Byzantium Empire remained as the eastern position of the Roman Empire. With regards to the Eastern Roman Empire see generally C Imber *The Ottoman Empire, 1300–1650: The Structure of Power* (2002). Imber indicates that the Eastern Roman or Byzantine Empire endured until 1453 with the capture of Constantinople by the Ottoman Turks creating the Ottoman Empire. The territories of the Eastern Roman Empire in terms of present-day states includes Turkey, Egypt, Bosnia and Herzegovina, Serbia, Albania, Romania, Bulgaria, Cyprus, Palestine, Algeria, Tunisia and Syria. As indicated above the Holy Roman Empire replaced the Western Roman Empire that comprised of territories including amongst others Germany and parts of France, discussed in more detail in section 2.3 below.



have also conceded to other religions the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases; this regulation is made we that we may not seem to detract from any dignity or any religion.<sup>10</sup>

From Constantine's reign to the Middle Ages the church and state were united in the *Republica Christiana* (a united Christendom). Any onslaught on the *Republica Christiana* was met with force. The authority of the *Republica Christiana* (Roman Catholic Church) was most evident in the wars it waged on Islam and Judaism during the period of the Crusades,<sup>11</sup> as well as the Spanish Inquisition.<sup>12</sup> These wars were in general aimed at maintaining the integrity of the Catholic faith. This period of history endorsed the notion that a common religion is the foundation of a stable society. Enforcement of religious uniformity was established as the order of the day.<sup>13</sup>

During this period all laws were loosely associated with natural law, which was interpreted as divine law.<sup>14</sup> The universal jurisdiction of the *Republica Christiana* was challenged during the sixteenth and seventeenth centuries, by the Protestant Reformation.<sup>15</sup>



---

<sup>10</sup> University of Pennsylvania, Department of History 'Translations and Reprints from the Original Sources of European history', Philadelphia: University of Pennsylvania Press (1897) Volume 4, Issue 1, 28-30. The Edict was replaced in 380 by Emperor Theodosius who declared Trinitarian Christianity a state religion.

<sup>11</sup> For a discussion of the Crusades, from the eleventh century to the fourteenth century, see generally S Runciman *A History of the Crusades Volume One The First Crusade and the Foundation of the Kingdom of Jerusalem* (1962); see also S Runciman *A History of the Crusades Volume Two The Kingdom Of Jerusalem and the Frankish East* (1962); K Armstrong *Holy War: The Crusades and Their Impact on Today's World* (2001); DC Munro 'The Popes and the Crusades' (1916) 55(5) *Proceedings of the American Philosophical Society* 348.

<sup>12</sup> See generally A Alcalá *The Spanish Inquisition and the Inquisitorial Mind* (1987).

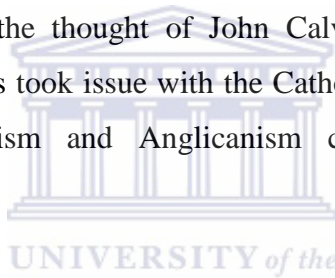
<sup>13</sup> Davis (note 8 above) 220.

<sup>14</sup> A Eide 'The Framework Convention in Historical and Global Perspective' in M Weller (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* (2005) 25, 28.

<sup>15</sup> *Ibid.*

### 2.3 The first phase of reluctant recognition: the Protestant Reformation (1517 – 1648)

The Protestant Reformation can broadly be defined as a religious and political movement in 16th-century Europe to reform the Roman Catholic Church.<sup>16</sup> Hillerbrand explains that in this time humanist scholars questioned the authenticity of documents establishing papal supremacy. In Germany, the Reformation was initiated by the teachings of Martin Luther, who in October 1517 launched the Protestant Reformation by posting his ninety five theses on the Castle Church door in Wittenberg. Luther's theses rejected the *Republica Christiana* and the relationship between church and state in terms of which religious uniformity was demanded. This stream of Protestant thought became known as Lutheranism. Lutheranism generally progressed into the more vigorous Calvinist tradition, with its origins in the thought of John Calvin (1509-1564).<sup>17</sup> In France, Calvinists known as Huguenots took issue with the Catholic faith. Similarly in England various forms of Protestantism and Anglicanism came into disagreement with Catholicism.



The name 'Wars of Religion' has been given to a series of European wars following the onset of the Protestant Reformation.<sup>18</sup> Although sometimes unconnected, all of these

---

<sup>16</sup> See generally HJ Hillerbrand *The Protestant Reformation* (2009). The Protestant Reformation by means of the Peace of Augsburg brought about recognition of the Protestant faith. Although the Peace of Augsburg was a step towards the leaving behind an Empire based on a common religion it did not wholeheartedly accept religious diversity but merely reluctantly recognised it as to ensure peace as will be more fully described in section 2.3.1 below.

<sup>17</sup> Van't Spijker describes the life of John Calvin (1509 – 1564) briefly in the following terms. Calvin trained as a lawyer and become fascinated with Christian humanist scholarship which led him to the reformist ideology. After fleeing France he went to Strasbourg, Basel and eventually Geneva where he established a reformist community after 1541. See generally W Van't Spijker *Calvin: a brief guide to his life and thought* (2009). For evangelical ideas put forward by Calvin, see generally J Calvin *Institution of Christian Religion* (1536).

<sup>18</sup> Generally MD Evans 'Historical Analysis of Religion or Belief as a Technique for Resolving Religious Conflict' in T Lindholm, CW Durham and BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 1, 4.

wars were strongly influenced by the religious change of the period. Within the scope of this study the ‘Wars of Religion’ in Germany and France will be highlighted as these wars principally gave rise to agreements in terms of which protection for the right to freedom of religion was included.

### **2.3.1 The Protestant Reformation in German territories: The Peace of Augsburg (1555)**

Kelly describes that the region of the Holy Roman Empire, encircling present-day Germany, was a fragmented collection of semi-independent states with an elected Holy Roman Emperor as its head. In the German territories, Protestant and Lutheran monarchs became progressively discouraged by the religious privileges conferred on Catholic monarchs. The major Protestant and Lutheran monarchs were eager to secure legal recognition for the churches they had played a role in establishing. However, the Catholic bishops, in particular, felt threatened by the Protestant allegiance and wished to preserve the *status quo*.<sup>19</sup> The position of the Catholic bishops is delineated in the maxim *ubi unus dominus ibi una sit religio*,<sup>20</sup> in terms of which political stability presupposed cultural and religious homogeneity, signifying adherence to the Catholic faith. The conflict of interest between the Lutheran (Protestant) monarchs and their followers and the Roman Catholic monarchs and their supporters in the German territories, was a main cause of the war fought during the Protestant Reformation. One of the first attempts to secure peace was in terms of the Religious Peace of Augsburg (1555).<sup>21</sup>

---

<sup>19</sup> In this regard see generally Kelly (note 8 above). See also TA Brady, E Cameron and H Cohn ‘A Roundtable Discussion on The Politics of Religion: The Peace of Augsburg 1555’ (2006) 24 (1) *German History* 85, 86.

<sup>20</sup> Translated to read where there is one lord there shall be one religion, available at <<http://2ndlook.wordpress.com/tag/war/>> last accessed on 23 October 2010.

<sup>21</sup> DW Cole ‘Perspectives on Religious Liberty: A Comparative Framework’ in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 1, 7.

The Peace of Augsburg provided for recognition of the Protestant faith in the region according to the maxim *cuius regio, eius religio*. In terms of this principle each monarch could determine the religion of his subjects, whether Lutheranism or Roman Catholicism. Although the Peace of Augsburg was a significant step towards the abandonment of an Empire based on a common religion it did not wholeheartedly accept religious diversity. The maxim *cuius regio, eius religio* simply granted Catholic or Lutheran adherents the right to move to a territory of their faith.<sup>22</sup> Areas consequently would reflect the religious homogeneity of the ruler. In addition the Peace of Augsburg did not grant equal recognition to Lutheranism alongside Catholicism, but rather reluctant recognition of the Protestant faith.<sup>23</sup> The maxim *cuius regio eius religio* did not accept comprehensive religious freedom throughout the territory and the choice of religion was restricted to an option between Roman Catholicism and the Lutheran Confession.<sup>24</sup> From the above discussion it is apparent that the Peace of Augsburg was severely flawed in so far that this Peace did not unequivocally recognise the existence of religious diversity and the right of all religious adherents to be able to freely practice their religion of choice. Religiously motivated tension therefore remained latent within the region.

UNIVERSITY of the

Even with these shortcomings, the Peace of Augsburg undeniably prevented further religious and civil wars within the German territories for a considerable period of time that otherwise afflicted other territories, for example France.<sup>25</sup> However the suppressed religiously motivated tension in seventeenth-century Germany was a major factor in the outbreak of the Thirty Years War (1618 – 1648)<sup>26</sup> which was subsequently brought to an end through the Peace of Westphalia of 1648, discussed later.<sup>27</sup>

---

<sup>22</sup> MD Evans *Religious Liberty and International Law in Europe* (1997) 48.

<sup>23</sup> Brady, Cameron and Cohn (note 19 above) 86.

<sup>24</sup> In this regard see Evans (note 18 above) 4.

<sup>25</sup> Brady, Cameron and Cohn (note 19 above) 100.

<sup>26</sup> In this regard see generally Evans (note 18 above) 5.

<sup>27</sup> See section 2.3.3.

### 2.3.2 The Protestant Reformation in the French territories: The Edict of Toleration (1562) and the Edict of Nantes (1598)

In France, religious conflict between Protestant Calvinists and Catholics prompted Catherine de' Medici,<sup>28</sup> to issue the Edict of Toleration in January 1562 in an attempt to promote peace. The Edict provided for limited legal recognition of Huguenots. In terms of the Edict, the practice of Protestantism was no longer considered a crime, although it was restricted to preaching in open fields outside the towns and to the private estates of Huguenot nobles. The Edict therefore allowed Huguenot nobles to organise and protect Huguenot congregations on their rural estates.<sup>29</sup> This Edict was not well-received by many Catholics as illustrated by the massacre of Vassy where the killing of over eighty Huguenots were ordered Francois, the Duke of Guise in 1562. This began what was to be called the First French War of Religion.

The religious wars in France which began with the Edict of Toleration in 1562 lasted until the Edict of Nantes in 1598, signed in an attempt to end the religious wars. The Edict of Nantes granted Huguenots freedom of worship and civil rights for almost a century.<sup>30</sup> The Edict of Nantes did recognise and enforce many Protestant rights; however, the general articles were still restrictive of religious freedom. The right of French Catholics to congregate for the Catholic mass was respected in all places and consequently French Catholics enjoyed complete religious freedom. Huguenots'

---

<sup>28</sup> Carroll describes that Catherine de' Medici married Henry, Duke of Orléans, the future Henry II of France, in Marseille in 1533. All three their oldest sons, consecutively became king of France in an age of almost constant civil and religious war. Francis II, was King of France in 1559. When Francis II died in 1560, she became regent on behalf of her ten-year-old son King Charles IX, King of France for the period 1560 – 1574. After Charles died in 1574, Henry III, became the King of France for the period 1574 – 1589. Catherine played a key role in the reign of her second King Charles IX and third son, Henry III. See generally S Carroll *Noble Power During the French Wars of Religion: The Guise Affinity and the Catholic Cause in Normandy* (2005); see also MP Holt *The French Wars of Religion, 1562–1629* (1995).

<sup>29</sup> Holt (note 28 above) 47.

<sup>30</sup> *Révocation de l'Edit de Nantes* in 1685. King Louis XIV revoked the truce, forcing many Huguenots to emigrate to Holland, Germany and America.

however remained restricted to only congregate in cities and towns controlled by Huguenots in August 1597, as well as the private homes of Protestant nobles. The Edict of Nantes accordingly regulated religion in France in terms of the maxim *Une foi, un loi, un roi*,<sup>31</sup> merely allowing Protestants to exist as a heretical minority in a Catholic monarchy.

It is argued that Edict of Nantes merely attempted to still religious conflict while at the same time protecting the dominance of the Roman Catholic faith. The religious rights of Huguenots were only afforded restricted acknowledgement and therefore not treated equally in relation to the Catholic faith.

### **2.3.3 The Thirty Years' War (1618 – 1648) and the resulting Peace of Westphalia (1648)**

The Thirty Years' War (1618–1648) fought primarily in what is today known as Germany was one of the most destructive conflicts in European history. The Peace of Westphalia that ended the Thirty Years' War recognised the modern state together with a new constitutional principle of limited freedom of religion. The Peace of Westphalia consists of the two peace treaties of Osnabrück<sup>32</sup> and Münster.<sup>33</sup> The Peace of Westphalia in effect redrew the territorial map of Europe. Parker confirms that generally negotiations at Westphalia were about choosing nationalism over Roman Catholic universalism.<sup>34</sup>

---

<sup>31</sup> Translated to mean 'One faith, one law, one king'. Available at <<http://www.lepg.org/wars.htm>> last accessed on 23 October 2010.

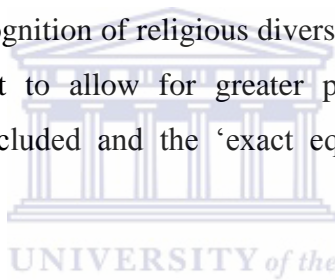
<sup>32</sup> Treaty of Osnabrück (Sweden and the Empire) (15 May 1648), 1 CTS 119, concluded between Sweden and the Empire.

<sup>33</sup> Treaty of Münster (France and the Empire) (24 October 1648), 1 CTS 271, concluded between France and the Empire.

<sup>34</sup> For further reading on the Thirty Year War and the Peace of Westphalia see generally G Parker *The Thirty years' War* (1997).

The Peace of Westphalia readjusted the religious and political affairs of Europe and extended the Peace of Augsburg's provisions for religious toleration to the Reformed Calvinists Church.<sup>35</sup> As a result, the ruler of each territory still determined the official religion of the territory, but the religious liberty of Catholic, Lutheran and Calvinists whose religion differed from their ruler was protected. Accordingly, the three religious communities, the Roman Catholic, Lutheran and Calvinist were now recognised.<sup>36</sup> The protection of the right to freedom of religion of the new found states remained to be determined according to the maxim *cuius regio, eius religio* as incorporated in the Peace of Augsburg.

The peacemakers in 1648 realised that religious issues had brought about the war within the Empire and needed to be resolved. The treaties of Osnabrück and Münster respectively confirmed the recognition of religious diversity as contained for in the Peace of Augsburg, but amended it to allow for greater parity between Protestants and Catholics. Calvinism was included and the 'exact equality' of all three faiths was proclaimed.<sup>37</sup>



Differences in belief continued to exist, but competing faiths were obliged to accept each other's existence. Previously the majority Catholic Church merely endured the existence of the Protestants in terms of the Peace of Augsburg (1555) as well as after the promulgation of the Edict of Nantes (1598). The Peace of Westphalia (1648) however determined that Catholic, Lutheran and Calvinist reformed rulers of the Empire were able to determine the faith of their territories but had to respect the faith of others in their territories.

---

<sup>35</sup> In this regard see generally Evans (note 18 above) 7.

<sup>36</sup> Z Machnyikova 'Article 8' in M Weller (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* (2005) 225, 226.

<sup>37</sup> Brady, Cameron and Cohn (note 19 above) 86.

The Peace of Westphalia is said to mark the break of religious medieval unity into a secular system of territorially-limited sovereign states. The treaties initiated a new political order in central Europe, based upon the concept of a sovereign state governed by a sovereign. The main tenets of the Peace of Westphalia were that all the parties would recognise the right to freedom of religion in terms of the Peace of Augsburg maxim *cuius regio, eius religio*.<sup>38</sup>

Through the incorporation of the maxim of *cuius regio, eius religio* into the Peace of Westphalia, the Peace of Augsburg continued to furnish an example of how accommodation may be reached between opposing religious parties. However, as fundamentalism grew rather than declined, much more human suffering was endured before a more durable solution was found.<sup>39</sup>



#### **2.4 The second phase: Protection of the rights of religious minorities in terms of the Minority Treaties of the Treaty of Berlin (1878)<sup>40</sup> and the Paris Peace Conference (1919)**

The Peace of Westphalia codified confessional diversity, in the drawing of different states and in this way affirmed the Augsburg formulation of *cuius regio eius religio*.<sup>41</sup> Danchin argues convincingly that the formation of the state and the concept of nationalism were founded in the notion of group separation, rather than inclusivity.<sup>42</sup> This point of view is confirmed by Kennedy, when he states that religion is:

---

<sup>38</sup> *Ibid* 100.

<sup>39</sup> See generally M Keating *The new regionalism in Western Europe: territorial restructuring and political change* (2000).

<sup>40</sup> Minority Treaties of the Treaty of Berlin (1878). Extract of the treaty can be studied at <<http://www.fordham.edu/halsall/mod/1878berlin.html>> last accessed on 23 November 2010.

<sup>41</sup> D Nexon 'Religion, European Identity, and Political Contention in Historical Perspective' in TA Byrnes and PJ Katzenstein (eds) *Religion in an Expanding Europe* (2006) 256, 277.

<sup>42</sup> PG Danchin 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2008) 23 *Journal of Law & Religion* 455, 488.



[W]hat we had before we had law, [and therefore] [i]nternational law understands its birth as a flooding forth from the darkness of religious strife, antidote to the passions of faith, on guard against their re-emergence as ideology.<sup>43</sup>

For the entire period from the Peace of Westphalia (1648) until after World War I (1919), the protection offered to the right to freedom of religion was regulated in terms of the fact that competing faiths were obliged to accept each other's existence through the incorporation of protection of the rights of minorities. Following the Peace of Westphalia the territorial boundaries of the nation states were, from time to time, revised as a result of the impact of expansionist nationalism. Changes to the territorial boundaries in Europe were often coupled with the protection of minority rights through agreement. These minority treaties were attempts by the new states to prevent ethnic violence while at the same time ensuring peaceful state formation.<sup>44</sup> Examples of these agreements include the Treaty of Vienna (1815),<sup>45</sup> the Treaty of Berlin (1878)<sup>46</sup> and the Treaty of Versailles (1919),<sup>47</sup> discussed in more detail below.

The Treaty of Vienna (1815) granted certain minorities the right to practice their religion and certain civil rights in terms of a non-discrimination provision, which stipulated that

---

<sup>43</sup> D Kennedy 'Losing Faith in the Secular: Law, Religion and the Culture of International Governance' (1999) 313 *Religion and International Law* 115, 120.

<sup>44</sup> Regarding the protection of minorities see generally See generally C Fink *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection* (2004); see also M Mazower 'Minorities and the League of Nations in interwar Europe' (1997) 126 (2) *Daedalus* 126, 47.

<sup>45</sup> The Congress of Vienna 1814-1815 gave rise to a new form of international co-operation, known as a Holy Alliance between the Protestant Empire of Prussia, the Catholic Emperor of Austria, and the Orthodox Tsar of Russia. The Treaty of Vienna (1815) was an attempt to recapture the essence of the *republica Christiana*, but headed under three different emperors, representing three different versions of Christianity. In this regard see Eide (note 14 above) 46.

<sup>46</sup> The agreement reached between Great Britain, Austria-Hungary, Germany, Italy, Russia and Turkey at the Congress of Berlin (1878) in terms of which the independence of Montenegro, Serbia and Romania were recognised, outlined the protection of the rights of minorities, including the protection of the right to freedom of religion. In this regard see Eide (note 14 above) 31.

<sup>47</sup> Eide (note 14 above) 37.

no person would be excluded from the enjoyment of civil and political rights due to a difference in religious beliefs.<sup>48</sup>

The Treaty of Berlin (1878) included the protection of minority rights in the following manner:

[T]he difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employment, functions and honours, or the exercise of the various professions and industries in any location whatsoever.<sup>49</sup>

Religion could therefore not be a ground for discrimination in the exercise of rights.

Franz-Willing describes that unrestrained state sovereignty led to a build up of tension following the Peace of Westphalia. This tension gave rise to the Napoleonic wars as well as the outbreak of the First World War. After World War I, the Paris Peace Conference attempted to settle past disputes through a number of peace treaties with the defeated states of Germany, Austria, Hungary, Bulgaria and Turkey. The conclusion of the Treaty of Versailles following the Paris Peace Conference once again redrew the map of Europe in light of the collapse of the Austro-Hungarian and Ottoman empires and the secession of the Tsarist Russian Empire to the Soviet Union. The creation of new states followed that strived to identify the new states with specific ethnic, linguistic or religious lines. This desire for homogenous national states was however not realistic in that population distribution was not demarcated in this precise fashion. Therefore provisions regulating the rights of minorities were subsequently incorporated into the Treaty of Versailles (1919).<sup>50</sup>

The Polish Minority Treaty (1919), annexed to the Treaty of Versailles, was designed to protect the Jewish population in the new state of Poland and its applicability to other than

---

<sup>48</sup> For an overview of the history and origin of the Polish Minority Treaties see MD Evans 'The Polish Minority Treaties' in *Religious Liberty and International Law in Europe* (2009) 104.

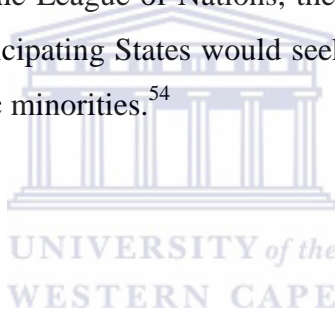
<sup>49</sup> Article 5 of the Treaty of Berlin (1878).

<sup>50</sup> See generally G Franz-Willing 'The Origins of the Second World War' (1986) 7(1) *The Journal of Historical Review* 95.

Jewish minority groups was merely coincidental. Therefore it can be considered a misnomer to refer to this treaty as a minority treaty.<sup>51</sup> Article 2 of the Polish Minority Treaties provided that:

Poland undertakes to assure the full and complete protection of the life and liberty of all inhabitants in Poland without distinction of birth, nationality language race or religion. All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with the public order or public morals.

Lerner mentions that these guarantees for the protection of religious rights of minorities were the forerunner to the League of Nations protection system of minority rights.<sup>52</sup> The League of Nations was also formed at the Paris Peace Conference of 1919.<sup>53</sup> In terms of article 22 of the Covenant of the League of Nations, the right to freedom of conscience and religion provided that participating States would seek to protect the national, ethnic, religious, cultural and linguistic minorities.<sup>54</sup>



---

<sup>51</sup> Evans (note 48 above) 104.

<sup>52</sup> For a historical overview of the drafting of the Covenant of the League of Nations see MD Evans 'The League of Nations: Drafting the Covenant' (2009) in *Religious Liberty and International Law in Europe* (2009) 83.

<sup>53</sup> Townshend reports that during World War I several world leaders such as Woodrow Wilson, President of the USA, and Jan Smuts, Prime Minister of the Union of SA began advocating the need for an international organisation to preserve peace and settle disputes by arbitration. When peace negotiations began in October 1918, Woodrow Wilson insisted on the formation of the League of Nations. The constitution of the League of Nations was adopted at the Paris Peace Conference in April 1919. The Covenant of the League of Nations called for collective security and the peaceful settlement of disputes by arbitration. It was decided that any country that resorted to war would be subjected to economic sanctions. The League of Nations did not meet during World War II. In 1946 the responsibilities of the League of Nations was handed over to the UN. In this regard see C Townshend *The League of Nations and the United Nations*. Available at [http://www.bbc.co.uk/history/worldwars/wwone/league\\_nations\\_01.shtml#three](http://www.bbc.co.uk/history/worldwars/wwone/league_nations_01.shtml#three) last accessed on 5 May 2010.

<sup>54</sup> For further reading on minority treaties, see generally N Lerner *Group Rights and Discrimination in International Law* 2ed (2003).

Evans notes that these Minority Treaties were carried forward through the work of the League of Nations in a system in which ethnic, religious and cultural groups across Europe were able to preserve religion, culture and language, while at the same time participating in the political affairs of the state. However, with the rise of Nazi-Germany and the beginning of World War II this success was short-lived. While the Covenant of the League of Nations, emphasised state sovereignty coupled with the important qualification of equality and self-determination of the people, the harm caused to in particular Jewish minorities during World War II created a new awareness for the need to protect ethnic, cultural and religious minorities.<sup>55</sup>

## **2.5 The third phase: The International protection of individual human rights**

The endeavour to protect individual human rights through international treaties began through the work of the League of Nations and expanded after World War II due to the role of the United Nations (UN).<sup>56</sup> The international human rights regime was developed in response to the atrocities committed during World War II with the establishment of the UN. The objectives of the UN as posed in its Charter are to maintain international peace and security,<sup>57</sup> to develop friendly relations among nations based on respect for the principle of equal rights,<sup>58</sup> and to promote respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>59</sup> The first UN instrument to deal specifically with individual religious rights is the Universal Declaration of Human Rights of 1948 (UDHR),<sup>60</sup> which subsequently influenced further

---

<sup>55</sup> In this regard see generally Evans (note 18 above).

<sup>56</sup> Signature of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153, entered into force 24 October 1945 established the United Nations.

<sup>57</sup> Article 1.1 of the Charter of the United Nations.

<sup>58</sup> Article 1.2 of the Charter of the United Nations.

<sup>59</sup> Article 55 of the Charter of the United Nations.

<sup>60</sup> The Universal Declaration of Human Rights (1948) (UDHR). Adopted by the General Assembly of the United Nations, resolution 217 (III) of 10 December 1948. UN Doc. A/3/810 (1949).

international instruments.<sup>61</sup> With the adoption of the UDHR the emphasis of the protection of minority group rights shifted from the collective to the protection of the individual right to freedom of religion.<sup>62</sup>

The necessity to protect the international protection of the individual right to freedom of religion was already acknowledged during the drafting of the Covenant of the League of Nations. President Wilson of the United States of America (USA) campaigned for the inclusion of an article in the Covenant that read as follows:

The High Contracting Parties agree that they will make no law prohibiting or interfering with the free exercise of religion, and that they will not in any way discriminate, either in law or in fact, against those who practise any particular creed, religion, or belief whose practices are not inconsistent with public order or public needs.<sup>63</sup>

This proposal recognising a individual right to freedom of religion was a far-reaching departure from the League of Nations practice of protecting religious minorities in newly created or enlarged states. Therefore this proposal was not included in the Covenant of the League of Nations. This proposal was however later reflected in article 18 of the UDHR as adopted by the UN.

The protection of human rights has been the aim of the UN, as can be read from the Charter of the UN as well as the UDHR. The completion of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic Social

---

<sup>61</sup> International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) Adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXII) of 16 December 1966, 999 UNTS 171 entered into force Mar. 23, 1976. Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration). Proclaimed by the General Assembly of the United Nations, resolution 36/55 of 25 November 1981. GA Resolution.

<sup>62</sup> On the drafting of the UDHR see M Scheinin 'Article 18' in A Eide and G Alfredsson (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 379, 389.

<sup>63</sup> Supplementary Agreement 7, as subsequently modified. This proposed inclusion relates to the First Amendment to the USA Constitution of 1791.

and Cultural Rights in December 1966 also provides evidence to this statement. Following the ratification of these covenants in 1976, the UN has seen the birth of various instruments aimed at enhancing the protection of specific rights.<sup>64</sup> In all these seminal instruments the right to freedom of religion is entrenched as a core fundamental human right.<sup>65</sup> Despite this advancement for the protection of the right to freedom of religion, religious discrimination has continued and still continues to play an important political role in present conflicts in various countries.

## 2.6 Recent religious abuses

Religion remains as a prominent ground for tension and conflict in numerous countries: For example, civil conflict remains present in many African countries such as Rwanda,<sup>66</sup> Sudan<sup>67</sup> and Nigeria,<sup>68</sup> and demands for political change persist in the Islamic world.<sup>69</sup>

---

<sup>64</sup> C Chinkin 'International Law and Human Rights' in T Evans (ed) *Human Rights fifty years on: a Reappraisal* (1998) 105, 105.

<sup>65</sup> For a further discussion on the protection of the right to freedom of religion in the international context see section 4.2, 4.3 and 4.4.

<sup>66</sup> See generally P Gourevitch *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (1998) (describing the role of ethnic conflict between Hutus and Tutsis in the 1994 Rwandan genocide). The Rwanda genocide was mainly an ethnic conflict between the Hutu majority and the Tutsi minority. The religious split in the country (75% Christian, mostly Roman Catholic, and 25% indigenous) appeared to not have been a significant factor. See also HM Hintjens 'Explaining the 1994 genocide in Rwanda' (1999) 37 (2) *The Journal of Modern African Studies* 241.

<sup>67</sup> The civil war in Sudan has a significant religious component among Muslims, Christians and Animists. However, inter-tribal warfare, racial and language conflicts also play a role. See generally regarding the conflict in Sudan, M Basedau & A de Juan 'The "Ambivalence of the Sacred" in Africa: The Impact of Religion on Peace and Conflict in Sub-Saharan Africa' (2008) *GIGA Research Programme: Violence, Power and Security* No. 70. Available at <[www.giga-hamburg.de/workingpapers](http://www.giga-hamburg.de/workingpapers)> accessed on 10 May 2010.

<sup>68</sup> For an overview of the conflict between 'indigenes' and 'settlers' which in certain instances translates to the conflict between Christianity and Islam in Nigeria see generally AO Adesoji & A Akin 'Indigeneship and Citizenship in Nigeria: myth and reality' (2009) 2 (9) *The Journal of Pan-African Studies* 151, 153; see also A Higazi 'Interpreting Religious Conflict in Nigeria' (2009) *CRISE Internal Paper*; Human Rights Watch *They do not own this place: government discrimination against "non-indigenes" in Nigeria* (2006);

The recent conflict between Serbs and Croats in the former Yugoslavia;<sup>70</sup> the contemporary dilemmas of a divided Israel,<sup>71</sup> and the apparent resolved conflict in

---

B Kraxberger 'Strangers, Indigenes and Settlers: contested geographies of citizenship in Nigeria' (2005) 9 (1) *Space and Polity* 9.

<sup>69</sup> The tension between the Sunni and Shia in Iraq, and the Christian and Muslim in Indonesia has also yielded devastating consequences.

<sup>70</sup> Powers recounts that seceding from the newly declared independent Republic of Bosnia and Herzegovina, the Bosnian Serb nationalist leader Radovan Karadzic declared that Serbs would carve out their own nation. War erupted in 1992. Backed by Serbian Slobodan Milosevic, the Bosnian Serb Army had tremendous military victories. At the heart of the Serbian effort was the policy of 'ethnic cleansing' against Croats and Bosnian Muslims. Entire regions of people were forced from their homes, women and children raped, victims buried alive and otherwise tortured, and civilian neighbourhoods shelled. Milosevic, aided by Bosnian-Serb leader Karadic, pursued a clear strategic aim to create a new Yugoslavia in name but a greater Serbia in reality. In this regard see generally GF Powers 'Religion, conflict and prospects for reconciliation in Bosnia, Croatia and Yugoslavia' (1996) 50 (1) *Journal of International Affairs* 221, see also M Sells *The Bridge Betrayed: Religion and Genocide in Bosnia* (1998) xiii-xiv asserting that the national religious mythology of Serbia played a crucial role in the conflicts across the Balkans during the 1990s.

<sup>71</sup> Tessler recalls that the dilemma of the divided Israel is directly related to the withdrawal of Britain in the 1940's, during which time Britain, which governed Palestine under mandates from the League of Nations and the UN, proposed partitioning as a solution to conflict between Jewish and Arab movements in Palestine. However in time Britain became increasingly unable and unwilling to arbitrate the dispute between the Jews who were entering at an increasing rate and the Arab inhabitants who were afraid of being displaced. Discouraged, it handed over the matter to the UN which set up a committee and upon its recommendation the second General Assembly on 29 November 1947 voted to partition Palestine into one state for the Jews and another one for the Arabs. Concurrently, Britain announced that it would terminate its mandate over Palestine on 15 May 1948. On 14 May 1948, the Jews announced the establishment of the State of Israel and on 15 May, armies of the surrounding Arab states invaded Palestine, intending to undo the November 1947 resolution. Lands assigned to Palestine were taken up by Israel, Jordan, and Egypt. Since the establishment of a State of Israel various truces have been put in place and broken resulting in incessant clashes between Israel and Palestine, resulting in the death of many. Israel's blockade of Gaza and restrictions on movement to protect illegal West Bank settlements, along with Palestinian rocket attacks on Israeli towns and abuses by Fatah and Hamas against each other's supporters, all attribute to the human rights crisis in the Israeli-Occupied Palestinian territories. In this regard see generally MA Tessler *A History of the Israeli-Palestinian conflict* (1994); see also Israel and Palestine: A brief History- Part 1. Available at <<http://www.mideastweb.org/briefhistory.htm>> last accessed on 23 August 2010.

Northern Ireland, between Protestant unionists and Catholic nationalists during the time of 'The Troubles',<sup>72</sup> brought to a hesitant end through the signature of the Belfast Agreement in 1998,<sup>73</sup> are all indicative of the persistent and political nature of religious conflict.

Although research indicates that with the end of the Cold War<sup>74</sup> there had been a noticeable decline in conflict between states,<sup>75</sup> the Stockholm International Peace

---

<sup>72</sup> Ever since the division of Ireland under the Anglo-Irish Treaty of 1921 into a mainly Protestant North and a Catholic Irish Free State, which in 1949 became the Republic of Ireland, the Protestants in the North had been determined to maintain their prominence. See generally C Mitchell *Religion, Identity and Politics in Northern Ireland* (2005) 1-3 (discussing the prominent role that religion played in the Northern Ireland conflict).

<sup>73</sup> The Belfast Agreement, also known as the Good Friday Agreement, an agreement between the British and Irish governments and the political parties in Northern Ireland was reached on 10 April 1998. See generally J Stevenson 'Peace in Northern Ireland: Why Now?' (1998) 112 *Foreign Policy* 41, 42. Stevenson indicates that the purpose of the agreement is to deal with relations between the two communities in Northern Ireland; relations between the two parts of Ireland; and between Ireland north and south and the other parts of the British Isles. All parties undertook to renounce violence and to use their influence to ensure that weapons were decommissioned. The Good Friday Agreement avoids the instability of outright self-determination. As an alternative, it calls for amendments to the Irish constitution to define Ireland's nationhood in terms of its people 'in all the diversity of their identities and traditions' rather than in terms of physical territory. Under the Agreement, Britain retains sovereign dominion over the province as long as its electoral majority so elects. However, the Irish Republic has a permanent and potentially expanding role in Northern Irish government.

<sup>74</sup> Gaddis describes that the term 'Cold War' is the term used for the period from 1946 – 1991. In 1946, after World War II, the temporary division of Germany into Soviet and Western occupation zones solidified Joseph Stalin's demands for reparations and American and British aspirations were at odds with each other. The USSR by the same token refused free elections in the eastern European nations still occupied by its troops and subsequently these soon fell under the control of Communist and became isolated. This 'iron curtain' as the division was labelled by Winston Churchill, was drawn open again by a series of upheavals which took place between 1988 and 1991, amongst which the following dissolution of the Communist Party by a newly elected Soviet Parliament in 1991, followed by the dissolution of the Soviet Union itself, into eleven constituent republics, namely: the Baltic states occupied by Soviet troops during World War II which seceded; the Communist regimes established in eastern European nations in 1945 which were overthrown, and the East Germans whom tore down the Berlin Wall in 1989. East



Research Institute<sup>76</sup> asserts that one of the most significant sources of present day conflict has been identified as violence carried out on the basis of culture, ethnicity and religion. In particular the issue of religion and conflict has received increased attention.<sup>77</sup>

Recently many countries of the former Soviet bloc have taken measures to protect the traditional state religion against the influx of new religious movements in an attempt to rebuild a national identity in those states.<sup>78</sup> Also noticeable is the increasing religious intolerance against Muslims since the 11 September 2001 attack on the World Trade Centre in New York City, coupled with concern towards fears of Muslim extremism. The prevalent conflicts that currently persist are all embedded in, or are aggravated by, tensions between ethnic, religious and cultural communities within states.<sup>79</sup>

---

Germany itself disappeared soon thereafter, and Germany was reunified after forty-five years. In this regard see generally JL Gaddis *The Cold War: a New History* (2006). See further J Rothschild & NM Wingfield *Return to Diversity: A Political History of East Central Europe Since World War II* (2008); M Sells (note 70 above); *The Reader's Companion to Military History* (1996). Available at <[http://www.credoreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold\\_war](http://www.credoreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold_war)> last accessed on 3 August 2010. Stokes explains that the dismantling of the 'iron curtain' forced an intersection of many ethnic and religious diverse groups which in return lead to conflict not only along ethnic lines but also between the religious diverse Protestants, Roman Catholic and Eastern Orthodox believers as well as followers of the Islamic tradition. The conflict discussed in the above events in Yugoslavia is illustrative of this point. In this regard see generally G Stokes *From Stalinism to Pluralism: A Documentary History of Eastern Europe since 1945* (1996).

<sup>75</sup> University of British Columbia, Human Security Centre, Overview *The Human Security Report 2005: War and Peace in the 21st Century* (2005) 15.

Available at <<http://www.humansecurityreport.info>> last accessed on 27 January 2010.

<sup>76</sup> NJ Melvin 'Islam, Conflict and Terrorism' (2006) *SIPRI Armaments, Disarmament and International Security* 123, 124.

<sup>77</sup> See generally L Reyhler 'Religion and Conflict' (1997) 2 (1) *International Journal of Peace Studies* 1.

<sup>78</sup> A Sarkissian 'Religious Reestablishment in Post-Communist Polities' (2009) 51(3) *Journal of Church and State* 472, 494.

<sup>79</sup> RH Tuschl *Ethnic and Religious Conflicts in the Southern Hemisphere* EPU Research Papers Issue 03/06 (2006) 23. Available at <[www.epu.ac.at/epu/research/rp\\_0306.pdf](http://www.epu.ac.at/epu/research/rp_0306.pdf)> last accessed on 23 October 2010.

In Europe, the debates regarding the reference to God in the preamble to the European Constitution,<sup>80</sup> the Salman Rushdie controversy,<sup>81</sup> the murder of Theo van Gogh in the Netherlands,<sup>82</sup> the uproar over the Danish cartoons of Mohammed<sup>83</sup> as well as the *affaire du foulard*<sup>84</sup> in France<sup>85</sup> all are indicative of the ongoing nature of religious discrimination and abuse.

A Human Rights Watch World report of 2009, reflecting on the events of 2008, affirms the continuous nature of threats to the right to freedom of religion.<sup>86</sup> At the 9<sup>th</sup> World Summit of Nobel Peace Laureates in 2008 in Paris, former South African President F W

---

<sup>80</sup> See generally R McCrea 'The Recognition of Religion within the Constitutional and Political Order of the European Union' (2009) 10 *Europe in Questions Discussion Paper Series* Available at <<http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper10.pdf>> last accessed on 24 November 2010; see also AJ Menendez, 'A pious Europe? Why Europe should not define itself as Christian' (2005) 30 (1) *European Law Review* 133.

<sup>81</sup> T Modood 'British Asian Muslims and the Rushdie Affair' (1990) 61 *Political Quarterly* 143.

<sup>82</sup> The murder of the film maker Theo van Gogh, in November 2004 was in reaction to a ten minute film called *Submission*, in which violence against women in Muslim societies was portrayed and four abused and naked women in see-through dresses with verses from the Qu'ran painted on their bodies were depicted.

<sup>83</sup> T Modood 'The liberal dilemma: integration or vilification?' (2006) 1. Available at <[www.opendemocracy.net/content/articles/PDF/3249.pdf](http://www.opendemocracy.net/content/articles/PDF/3249.pdf)> last accessed on 23 October 2010.

<sup>84</sup> The *Affaire du Foulard*, refers to the French relationship with the Islamic headscarf-*hijab* that commenced in the 1980 when two young girls were expelled from their school in Creil for wearing headscarves. More recently culminating with the passing of the French Law of 2004 following the recommendations of the Stasis Commission as discussed in section 7.2.2. In this regard see generally A Bradford *The Affaire du Foulard: a new French identity?* (2007).

<sup>85</sup> See generally G Davie 'Vicarious religion: A methodological challenge' in N Ammerman (ed) *Everyday Religion: Observing Modern Religious Lives* (2007) 21.

<sup>86</sup> Human Rights Watch *World Report 2009 (Events of 2008)* Available at <[www.hrw.org](http://www.hrw.org)> last accessed on 27 January 2010. For example in June 2008, the highest administrative court in France, the *Conseil d'Etat*, denied citizenship to a Moroccan Muslim woman married to a French man on the grounds that her 'radical' religious practices were incompatible with French values, in particular that of gender equality. In Germany restrictions on wearing the headscarf, are persistently applied to teachers and other civil servants, despite concerns that the measures discriminate on the grounds of religion: courts in three states upheld headscarf bans for teachers since December 2007.

de Klerk confirmed that the continuing inability of some cultural, religious and ethnic communities to coexist represents a significant threat to the maintenance of peace and consequently called for action to address the problem of ethnic, cultural and religious conflict.<sup>87</sup> De Klerk continued by identifying that ethnic, religious and cultural diversity is on the increase. Approximately 70% of the countries of the world have ethnic, religious and cultural minorities that comprise more than 10% of their populations. De Klerk also stipulated that across the world, once homogenous countries and cities are becoming increasingly multiethnic because of the influence of legal and illegal immigration and globalisation.<sup>88</sup>

As previously indicated this study is concerned with the protection provided to the right of freedom of religion and belief in terms of international and other instruments.<sup>89</sup> These international instruments are primarily entered upon in response to the perpetration of abuse of fundamental rights. Similarly various religious conflicts and the need to address these particular conflicts as well as to avoid similar conflicts in the future have ensured the entrenchment of the right to freedom of religion or belief in various international instruments. For this reason the history of religious conflicts leading to the signature of these instruments during the pre-World War I and post-World War II periods have been dealt with.

## 2.7 Conclusion

From the discussion above it is apparent that the international protection of the right to freedom of religion has evolved through three key phases. The first phase was the protection in terms of the provisions of the Augsburg Treaty – the *cuius regio, eius*

---

<sup>87</sup> FW de Klerk to *The 9th World Summit of Nobel Peace Laureates* Paris, 11 December 2008. Available at [http://www.givengain.com/cause\\_data/images/2137/Building\\_peace\\_and\\_the\\_world\\_without\\_violence.pdf](http://www.givengain.com/cause_data/images/2137/Building_peace_and_the_world_without_violence.pdf) last accessed on 27 January 2010.

<sup>88</sup> *Ibid.*

<sup>89</sup> See discussion in section 4.2, 4.2, 4.4, 4.8, 4.9 and 4.10.

*religio* phase. This maxim at first only allowed for the recognition of Lutheran adherents in a specific region. Religious diversity was not embraced and only the territorial separation of Catholics and Protestants were established. The maxim *cuius regio eius religio* did not recognise the equal status of the Protestant faith which was only afforded restricted acknowledgment. Following the application of the *cuius regio eius religio* maxim, the next phase of the protection of the right to freedom of religion was in terms of the minority protection model as encapsulated in the Polish Minority Treaty and the operation of the League of Nations. The minority protection model allowed for the equal protection of minority ethnic, cultural, religious and linguistic groups. The final phase in the protection of the right to freedom of religion was in terms of the international human rights model, incorporated in principle into the UDHR and the ICCPR in response to the atrocities committed during World War II.

On the whole it was apparent that the right to freedom of religion at first received negligible protection. The dominance of a specific religion, *in casu* the Roman Catholic religion, merely granted the other religion, specifically the Protestant religion reluctant recognition and toleration and not parity, as illustrated by the Peace of Augsburg, the Edict of Toleration as well as the Edict of Nantes. Furthermore this minimal recognition was offered only after tremendous loss of human life and unending battles had been waged. This reluctant recognition and consequential discrimination over time incited further conflict as seen through, for example, the onset of the Thirty Years War. Although the peace agreement allowed for greater parity between Protestants and Catholics, the prime concern of the Treaties of Westphalia was the concept of nationalism and the creation of national states along ethnic, cultural and linguistic lines. Such a homogenous drawing of boundaries was however not practically achievable.

Under the concept of nationalism, old empires were replaced with new states requiring a newly formed state to associate with 'the people' or 'nation' of the state. In this manner the 'old' divides of Catholic and Protestant were replaced by 'new' divides of culture or language. The supreme Catholic state was substituted by the imposition of a preferred language or a certain culture. The minority groups in these new states therefore had to

rely on the provisions of minority treaties to provide reluctant recognition and toleration to their language, religion and culture.

In these newly formed states the participation of minority groups was generally restricted. With the rise of fascism and Nazism, Europe was forced into the World War II. The human suffering and abuse indicated the ineffectiveness of minority rights treaties under the auspice of the League of Nations.

In response to this perpetration of abuse of fundamental human rights the UDHR was drafted, and to this day the Declaration together with the provisions of the ICCPR and the ICESCR still remains the most authoritative international text regarding the protection of the right to freedom of religion. No specific convention relating to the right to freedom of religion explicitly exists and even a mere declaration, the Declaration on the Elimination of All Forms of Religious Discrimination (1981), took almost 20 years in the making.

An overall impression that emerges in relation to the right to freedom of religion is that for most part religious freedom has not been endorsed as an end in itself, but as a means of managing conflict or preserving peace. Treaties, conventions and other instruments of protection have generally more readily extended protection to the right to freedom of religion or belief as a way of avoiding conflict, rather than as a means of facilitating equal recognition of diverse religious beliefs. The underpinning of these instruments aimed at the protection of the right to freedom of religion originates from the religious wars, and in this regard it is apt to confirm that '[w]hen it comes to democracy, human rights and equality, God is a recent convert'.<sup>90</sup>

Notwithstanding these instruments aimed at the entrenchment of the right to freedom of religion, threats to the right to freedom of religion or belief are as evident in the present-

---

<sup>90</sup> See contribution submitted by JB Fontelles, member of the convention: *Let's Leave God Out of This* Brussels, 22 January 2003, CONV 501/03 available at

<<http://register.consilium.europa.eu/pdf/en/03/cv00/cv00501en03.pdf>> accessed on 5 April 2008.

day as in times past. Moreover the continuing inability of some cultural, religious and ethnic communities to coexist represents a global threat to the maintenance of peace and consequently urgent action is needed to address the problem of ethnic, cultural and religious conflict.

The exercise of freedom of religion or belief can indeed bring about conflict with those who do not share a common belief. For this reason, religious conflict is often approached not as a means of facilitating the right to freedom of religion, but more often by way of restricting the right to freedom of religion or belief. This restriction is often imposed with the expectation that limiting the right to freedom of religion will help diffuse the conflict. Such a limitation however does not attempt to accommodate the interests of all concerned. Disregarding the religious adherents' inherent religious belief often gives rise to conflict.

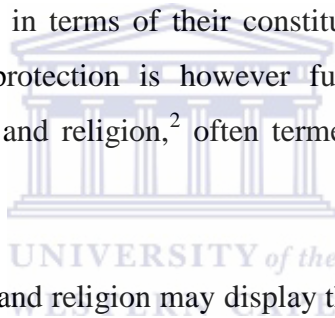
It is evident from the above discussion that religious conflict is prevalent in the present day as in the past. On the whole, it is argued that development of a framework for the international protection of the right to freedom of religion has not been able to bring to an end disregard of the right to freedom of religion. Despite the international instruments protecting the right to freedom of religion, as will be discussed in section 4.2, 4.3 and 4.4 there still is a glaring need to improve the protection afforded to religious groups from discrimination and other violations of the right to freedom of religion.

## Chapter 3

### The relationship between the state and religion

#### 3.1 Introduction

The preceding chapter examined the history of religious conflict and the subsequent development of the regulatory framework aimed at the protection of the right to freedom of religion and other associated rights. The formation of the League of Nations as well as the United Nations (UN) and their respective roles in the promotion and protection of the right to freedom of religion were introduced as well. The right to freedom of religion is however not only protected in terms of the UN instruments. Regional groupings too, promote the protection of the right to freedom of religion.<sup>1</sup> In addition, most countries offer more concrete protection in terms of their constitutional or national legal orders. The nature of the national protection is however fundamentally fashioned by the relationship between the state and religion,<sup>2</sup> often termed the relationship between the state and church.<sup>3</sup>



The relationship between state and religion may display the following configurations: the existence of religious states or states with an established or recognised religion. Countries may also display degrees of separation (often termed secularisation)<sup>4</sup> between state and religion, which is known as so-called secular states. None of these

---

<sup>1</sup> The international and regional mechanisms which provides for the protection of the right to freedom of religion will be explored in more detail in 4.2, 4.3, 4.4, 4.8, 4.9, and 4.10.

<sup>2</sup> The manner in which the protection of the right to freedom of religion is interpreted in a national context in light of the relationship between the state and religion will be more fully explored in section 3.7.

<sup>3</sup> This study will predominantly refer to the relationship between the ‘state and religion’, as arguably the terminology ‘state and church’ depicts a particular point of view regarding religion, that of a Christian religion.

<sup>4</sup> Secularism is defined as ‘the doctrine that morality should be based on regard for the well-being of mankind in the present life, to the exclusion of all other considerations drawn from a belief in God or a future state’. See generally the *Shorter Oxford English Dictionary* (1933), available at <http://www.endgametrust.co.uk/secularism.pdf> last accessed on 17 November 2010.

arrangements are without difficulty in so far as the protection of the right to freedom of religion is concerned. For example, states with an established religion may offer entrenched protection for the recognised religion in specific fields, for instance, in education and social service, such as prisons and child welfare. Especially problematic are religious states that frequently condition their acceptance of international human rights obligations on the compatibility of these obligations with the states' religious beliefs, typically Islamic law (*Sharia* law). Secular states too are not unproblematic; particularly in as far as the manifestation of religion in the public domain is concerned. A closer analysis of the relationship between state and religion is therefore necessary to determine the corresponding relationship between religion and law in national legal systems.<sup>5</sup>

As the nature of the national protection of the right to freedom of religion is influenced by the relationship between the state and religion it is important to appreciate the various ways in which the structuring of this relationship can be influenced. Similar to the development of the regulatory framework, in terms of which the right to freedom of religion is protected; the relationship between the state and religion too, in general, developed in response to certain religious conflicts. These conflicts also influenced the manner in which this relationship further evolved. For example, strict separation between state and religion may often have occurred in an attempt to deal with the excess of religion.

It is important to understand the impact of these historical events in the process of separation, as the separation is generally in response to these events. Therefore this chapter will first consider the process of separation and identify factors that may have had an impact on the separation process. This will be followed by an overview of various manners in which the relationship between the state and religion may be structured. The overview is aimed at illustrating the influence of the relationship between the state and religion on the protection of the right to freedom of religion. In addition this overview

---

<sup>5</sup> The impact of the relationship between the state and religion on the protection of the right to freedom of religion will be evaluated in more detail in section 3.7.



forms the foundation for a critical evaluation of the relationship between the state and religion to determine which arrangement affords the right to freedom of religion the most extensive protection.

### 3.2 Process of separation (secularisation)

Modern societies are generally recognised as secular.<sup>6</sup> The act of secularism, in terms of which laws based on religious scripture (such as the Torah<sup>7</sup> and Sharia<sup>8</sup> law) are replaced, is generally a foreign concept to contemporary Eastern societies.<sup>9</sup> The emphasis will be on modern societies as one of the premises of this study is that some form of separation between state and religion is required to ensure the protection of the right to freedom of religion.

The state historically was associated with a particular religion, this generally being Catholicism. Over time this historical association declined. Separation between state and

---

<sup>6</sup> See generally <<http://www.secularnations.org/index.php?page=secularCountries>> last accessed on 23 November 2010.

<sup>7</sup> Law regulating Judaism.

<sup>8</sup> Islamic law.

<sup>9</sup> Huntington identifies nine major contemporary civilizations, based largely on the predominant religious culture in each society: Western Christianity (a European culture that spread to North America, Australia and New Zealand), Muslim (including the Middle East, Northern Africa, and parts of South East Asia), Orthodox (Russian and Greek), Latin American (predominately Catholic), Sinic/ Confucian (China, South Korean, Vietnam and Korea), Japanese, Hindu, Buddhist (Sri Lanka, Burma, Thailand, Laos, and Cambodia), and (possibly) Sub-Saharan Africa. See generally SP Huntington *The Clash of Civilizations and the Remaking of World Order* (1996). Furthermore within these civilizations variations are possible. For example, the Muslim world has, over the last two centuries, adopted four major positions with regard to the rise of Western modernism and secularism. The first is a total adaptation of Western culture for example as displayed by Atatürk in Turkey; the second is outright rejection, the third is critical engagement with Western cultural values and the fourth position can be described as dialogue with the West while maintaining one's cultural tradition. In this regard see generally T Asad *Formations Of The Secular: Christianity, Islam, Modernity* (2003); also IM Lapidus 'The Separation of State and Religion in the Development of Early Islamic Society' (1975) 6 (4) *International Journal of Middle East Studies* 363.

religion generally incorporates three separate processes.<sup>10</sup> Firstly, most secularisation theories presume an inevitable decline of the importance attached to religious beliefs and practices.<sup>11</sup> Secondly, secularisation incorporates the theory of the inevitable privatisation of religion, in terms of which religion is relegated to being domain of the private.<sup>12</sup> Lastly, secularisation includes the aspect of institutional separation between the state and religion.<sup>13</sup> With regard to these three processes the following observations are put forward. In the light of the prevalence of religious conflict in the past and present day as documented,<sup>14</sup> it is questionable whether the importance of religion is on the decline.<sup>15</sup> Further, the notion that privatisation of religion is inevitable is also contested. In actual fact this study is conducted on the premise that the theory of privatisation is in competition with the theory of de-privatisation of religion.<sup>16</sup> This theory of de-privatisation calls for the re-politicisation of the private and moral spheres, through the ‘renormativization of the public, economic and political spheres’.<sup>17</sup> In accordance with this re-politicisation theory, it can be argued that the age of modernity does not necessarily imply a reduction in the level of religious belief or practice, nor the relegation

---

<sup>10</sup> V Bader ‘Religions and States. A new typology and a plea for Non-constitutional pluralism’ (2003) 6 *Ethical Theory and Moral Practice* 55, 56.

<sup>11</sup> See generally F Nietzsche *The Gay Science: With a Prelude in Rhymes and an Appendix of Songs* (1974) translated with commentary by Walter Kaufmann Vintage Books which includes a story of a madman rushing into the town market place shouting ‘I am looking for God’. Bystanders burst into laughter to which the man reacts with a torrent of questions, ‘Where has he gone?’ to which he responds, ‘I will tell you. We have killed him – you and I! We are all his murderers’. Nietzsche’s story of the madman’s announcement of the death of God has often been interpreted as prophetic of the western history of religion.

<sup>12</sup> J Casanova *Public Religions in the Modern World* (1994) 6.

<sup>13</sup> *Ibid* 25.

<sup>14</sup> See section 1.1 and 2.1.

<sup>15</sup> In support of this point of view see also Marquand and Nettle who note that 100 years ago most secular progressives assumed that following the age of modernity, coupled with the political marginalisation of religion, secularisation would become universal. This however has not occurred and the role played by religion remains significant. See generally D Marquand & RL Nettle *Political Quarterly Religion and Democracy* (2000) 1, and more specifically Casanova (note 12 above) 29 & 214.

<sup>16</sup> Regarding the de-privatisation of religion see the discussion in section 5.2.2.

<sup>17</sup> Casanova (note 12 above) 6.

of religion to the private sphere, but rather an affirmation of the public role of religion.<sup>18</sup> This argument will be explored in more detail in section 5.2.2.

Therefore this chapter will discuss only the third process of secularisation, namely the development of institutional separation and the consequent secularisation of society through the separation of religion and state.

### **3.3 Institutional separation**

The act of institutional separation may take on various forms. This diversity in the manner in which institutional separation displays itself is generally caused by the interaction of various factors. For example, the so-called catalysts to secularisation as well as the influence of other factors or ideologies during the secularisation process, all may have an impact on the manner in which secularisation ultimately reveal itself. As a result it has been suggested that secularisation can best be analysed as a process in which '[E]ach of these carriers developed different dynamics in different places and at different times'.<sup>19</sup>



Accordingly institutional secularisation will be discussed as follows: firstly, in relation to the so-called carriers<sup>20</sup> of secularisation; secondly, the influence of other factors for example the influence of the dominant religion; and thirdly, ideologies that may have played a role during the secularisation process.

#### **3.3.1 Carriers of separation**

---

<sup>18</sup> G Davie 'Europe: The Exception that Proves the Rule?' in PL Berger (ed) *The Desecularization of the World Resurgent Religion and World Politics* (1999) 65, 78.

<sup>19</sup> Casanova (note 12 above) 25.

<sup>20</sup> See generally CG Brown & M Snape *Secularisation in the Christian World* (2010).

The relationship between religion and the state was mostly influenced as a result of the following carriers:<sup>21</sup> the Reformation,<sup>22</sup> the Revolution<sup>23</sup> and the Renaissance,<sup>24</sup> during which period rationalism gave birth to liberalism, which in return initiated the separation of the personal religious beliefs from social existence.<sup>25</sup> Therefore, the current relationship between state and religion is only understandable in light of the historical

---

<sup>21</sup> For a further discussion of the various carriers of secularisation see generally O Tschannen 'The Secularization Paradigm: A Systematization' (1991) 30 (4) *Journal for the Scientific Study of Religion* 395.

<sup>22</sup> See section 2.3 for a more comprehensive discussion of the Reformation. This study does not explore the historical relationship between the church and the state during the period preceding the Protestant Reformation. The emphasis is on the relationship that developed from the time of the Reformation until the contemporary age. The reason for this limitation, as indicated in Chapter 2, is that the Protestant Reformation formed the basis for development of legal text relevant to the protection of the right to freedom of religion and belief. For an overview of the relationship between the state and the church from the Second to the Eight century see R Hugo *Church and State in Early Christianity* (1961).

<sup>23</sup> For a discussion on the role of the Revolution see generally A de Tocqueville *The Old Regime and the Revolution* (1998). Berman suggests it took five great revolutions to separate secular law from religion. These included the Protestant Reformation in Germany in the sixteenth century, the English Revolutions between 1640 and 1689, the American and French Revolutions of 1776 and 1789 and the Russian Revolution of October 1917. In this regard see generally HJ. Berman, 'Religious Foundations of Law in the West: An Historical Perspective' (1983) 1 *Journal of Law & Religion* 3.

<sup>24</sup> The emancipation of various realms from the control of religion may have transpired as a consequence of, for example, the dawn of natural and social sciences or the so-called scientific revolution, or as a result of the birth of Enlightenment philosophy. In this regard see generally L Dupré *The Enlightenment and the Intellectual Culture of Modernity* (2004) 282–288. The nineteenth and early twentieth centuries represent a period of radical transformation in Western traditional understanding of religion. Influential intellectuals such as Kant no longer believed that the universe was created by God, viewing them rather part of evolutionary development. Autonomy of man and scientific reason were placed central to all understanding. In terms of Positivism and Kantian ethics, the conscience is declared autonomous and independent of God. According to Kant, reason alone is the determiner of 'oughtness'. In this regard see generally CL Firestone & S Palmquist *Kant and the New Philosophy of Religion* (2006).

<sup>25</sup> R Rémond *Religion and Society in Modern Europe* (1999) 166. See also JT Gunn 'Religious Freedom and Laïcité: A Comparison of the United States of America and France' (2004) *Brigham Young University Law Review* 419. For further reading on the emergence of secularisation, see S Bruce *Religion and Modernization* (1992) and T Robbins and R Robertson (eds) *Church-State Relations* (1987).

context in which the relationship was formed.<sup>26</sup> A case in point is, for example, appreciating the cause as well as the success or failure of the Reformation, or whether revolutions were acts which divided internally (like in France)<sup>27</sup> or united against external influences (like the American revolt against England).<sup>28</sup>

All these factors have an influence on the form of secularisation that results. These intricate factors, as will be shown, still form part of the legacy of conflict that surrounds the right to freedom of religion to this day.

### 3.3.2 Influence of the dominant religion on separation

In addition to the above discussed carriers of separation, the emerging pattern of secularisation is also shaped by the character of the predominant religion in an applicable state, for example, whether Catholic or Protestant, or religious plural as well as the

---

<sup>26</sup> Rémond (note 25 above) 8.

<sup>27</sup> During the sixteenth and seventeenth centuries emergent nation-states were united according to the principle of *cuius regio, eius religio* as discussed in section 2.3. The notion of European nationalism emerged after the Treaties of Westphalia. Nationalism became the newfound civic religion. In this regard Anthony Marx has stated that in France, the ‘one thing’ that potentially united people who would come to be known as French, was their Catholicism. See AW Marx *Faith in Nation: Exclusionary Origins of Nationalism* (2003) 46. The French Revolution merely replaced the Catholic universalism that developed in response to the Protestant Reformation with the universalism of the Rights of Man and Citizen. For a detailed reflection of the relationship between religion and the birth of the Rights of Man see generally DK van Kley *The Religious Origins of the French Revolution From Calvin to the Civil Constitution 1560 – 1791* (1996).

<sup>28</sup> Berger *et al* maintains that the approach to separation between state and religion is fundamentally different in the United States of America (USA) from France and is best understood in relation to Europe. It has been said that the reaction to religion in Europe was so compelling as to drive people across the ocean as they sought to escape religious persecution in Europe. In the USA separation between state and church occurred from the onset as there were simply too many churches for any to successfully dominate. While in Europe religion was closely identified with the state, disillusionment with the one, inevitably included the other. Therefore, in Europe, the historical dominant church to this day remains the assumed model and religious minorities are inevitably treated differently. See P Berger, G Davie & E Fokas *Religious America Secular Europe? A Theme and Variations* (2008) 24.

degrees of religious pluralism.<sup>29</sup> Bader distinguished between the following religious variables: A 'total monopoly' irrespective of it being a religious or secular variety; a 'duopoly', for example as found in Protestant societies which contain considerable Catholic minorities (60% to 40%), such as Germany; a situation of qualified pluralism with competition between the established church and competitors such as found in England; and finally complete pluralism as personified in the position of the United States of America (USA).<sup>30</sup>

In a monopoly the influence of the dominant power on the process of secularisation is most evident. This influence is even more acute in the event of the display of any intolerance by the dominant religion towards other religions. The degree of intolerance or even persecution will have a direct relationship to the degree of separation.<sup>31</sup> For example, it has been noted that French modernity developed through the carriers of the Reformation and the Revolution and in conflict with the Catholic Church.<sup>32</sup> The Reformation and Revolution sought to eliminate the intolerance displayed by Catholicism in the persecution of the Protestants.<sup>33</sup> To this extent contemporary secularist culture has been attributed to religious conflict, in that:

---

<sup>29</sup> Bader (note 10 above) 57. See also Durham's support of this argument in that the protection afforded to religious liberty is dependent upon not only the traditional relationship between the state and religion but also on the degree of religious pluralism in the given state. WC Durham 'Perspectives on Religious Liberty: A Comparative Framework' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal* (1996) 1, 2. See also Mitra, who contends that the 'specific role attributed to religion at a given time and place depends primarily upon the status of religion in the constitutional framework and the social meaning attached to it in SK Mitra 'Desecularising the State: Religion and Politics in India after Independence' (1991) 33(4) *Comparative Studies in Society and History* 755, 758.

<sup>30</sup> Bader (note 10 above) 58.

<sup>31</sup> Bader (note 10 above) 57.

<sup>32</sup> J Baubérot 'The Place of Religion in Public Life: The Lay Approach' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 441, 442.

<sup>33</sup> In this regard see Villa-Vicencio who with reference to liberalisation from the period of colonisation alerts that one must be mindful of the fact that liberation is an anarchical reaction against established authority. Villa-Vicencio indicates that in the passage from liberation to liberty lurks the greatest threat of liberty. Therefore liberation does not *per se* become a new order where liberty reigns. It could become a

[T]he transition in question was not, or at least not chiefly, ideologically driven. It was religious war and the destruction of social peace that made it necessary to abandon the old idea that public culture must be based on religious unity.<sup>34</sup>

From the above it is evident that the form of separation is not only influenced by the various carriers of separation, but also by the prominence of the role that the dominant religion plays. The transition to separation, however, may also be driven by other ideologies. The role of these ideologies follows next.

### 3.3.3 The influence of ideology on separation

To the same extent that secularisation may take on several diverse and even contradictory forms, secularism (which is the support of secularisation) is equally varied in meaning, and the resultant secular society is also representative of this variety.<sup>35</sup> Kuru draws

---

new form of oppression. Political independence at the end of the colonial period does not mean the death of the forces that had acted during the colonial period. In this regard see generally the text of the Kampala Assembly of the All African conference of Churches during 1963, called *Freedom and Unity in the Nation Liberty and Anarchy in the Colonial Era* as mentioned in C Villa-Vicencio *Between Christ and Caesar Classic and Contemporary Texts on Church and State* (1986) 168. See also Arendt who contends that the act of revolution creates its own dilemma of authority. H Arendt *On Revolution* (1963) 159 – 165.

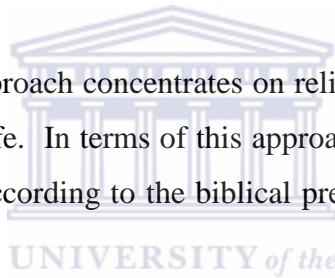
<sup>34</sup> Pannenberg further explains: ‘When in a number of countries no religious party could successfully impose its faith upon the entire society, the unity of the social order had to be based on a foundation other than religion. Moreover, religious conflict had proven to be destructive of social order. In the second half of the seventeenth century, therefore, thoughtful people decided that, if social peace was to be restored, religion and the controversies associated with religion would have to be bracketed. In that decision was the birth of the modern secular culture. It would in time lead to secularism and a culture that is properly described as secularist’ See W Pannenberg ‘How to think about Secularism’(1996) 64 *First Things* 27, 28 - 9. See also Mitra, who contends that the ‘specific role attributed to religion at a given time and place depends primarily upon the status of religion in the constitutional frame-work and the social meaning attached to it in Mitra (note 29 above) 758.

<sup>35</sup> See also Bader (note 10 above) 59 in which he confirms that as a result of the interplay between these carriers of secularisation as well as the diversity of religious variables the resultant relationship between religion and the state is extremely diverse.

attention to the fact that France,<sup>36</sup> the USA<sup>37</sup> as well as Turkey,<sup>38</sup> are all secular states. Yet they all have different policies towards, for example, the wearing of religious garments.<sup>39</sup> In seeking clarification for these differences, he analyses the existing state policies at the time of the establishment of the nation states.

In Kuru's analysis of state policies concerning political religious arrangements, the following three theories are employed: First, the modernisation theory, second, the civilisational approach and third, the rational choice theory.<sup>40</sup> Firstly, according to the modernisation theory, the modernisation of a state is mainly measured by the following three criteria of development: the gross domestic product per capita, the literacy rate and the life expectancy. It is contended that the level of modernisation has a direct impact on the development of a secular policy towards religion.<sup>41</sup>

Secondly, the civilisational approach concentrates on religious text to explain the impact of religion on socio-political life. In terms of this approach, Christianities' compatibility with secularism is measured according to the biblical prescription found in Luke, which



---

<sup>36</sup> Article 1 of the 1958 Constitution ensures the equality of all citizens before the law, without distinction of origin, race or religion. It ensures respect of all beliefs and declares that: 'France is an indivisible, secular, democratic, and social Republic. She ensures equality before the law to all citizens without distinction based on origin, race or religion. She respects all beliefs'. For a further discussion on the relationship between the state and religion in France see section 7.2.1.

<sup>37</sup> The Constitution of the USA proclaims in the First Amendment: 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof'. These provisions have been said to create 'a wall of separation between state and church', which was referred to by Thomas Jefferson in his letter of 1 January 1802 to the Danbury Baptist Association. Letter of Thomas Jefferson's letter to Messers Nehemiah Dodge *et al* 'A Communication of the Danbury Baptist Associations' (1 January 1802), available at <<http://www.loc.gov/lcib/9806/danpost.html>> last accessed on 10 May 2010. For a further discussion on the relationship between the state and religion in the USA see section 7.5.1.

<sup>38</sup> As proclaimed in article 2 of the Constitution of the Republic of Turkey (1982).

<sup>39</sup> AT Kuru 'Passive and Assertive Secularism Historical Conditions, Ideological Struggles, and State Policies towards Religion' (2007) 59 *World Politics* 568, 569.

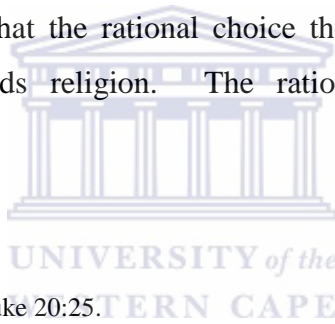
<sup>40</sup> *Ibid* 572.

<sup>41</sup> *Ibid* 573.



states ‘Render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s’.<sup>42</sup> Accordingly, in Christian civilisation God is distinguished from Caesar, and therefore religion is distinguished from the state.<sup>43</sup> In contrast to the arrangement in Christianity, the position of the political in Islam<sup>44</sup> is determined by the origin of eternal and divinely ordained rules and therefore no distinction exists between the state and Islam.<sup>45</sup>

Thirdly, in contrast with the argument that secularism is determined by either economic considerations or religious text is the rational choice theory that claims that secularism is a choice. The rational choice theory attaches importance to the following factors that could influence the formulation of state policy, namely: individual preferences, the rational calculation thereof,<sup>46</sup> and the structural constraints within which preference is exercised.<sup>47</sup> It is contended that the rational choice theory is most informative when analysing state policy towards religion. The rational choice theory takes into



---

<sup>42</sup> The Bible (King James Version) Luke 20:25.

<sup>43</sup> D Martin *On Secularization Towards a Revised General Theory* (2005) 3. The Reformation produced a variety of models of probable relationships between the church and state. Dominant models were those of Martin Luther (1483-1546) and John Calvin (1509-1564), both of which underlined a doctrine of two kingdoms.

<sup>44</sup> Hayne's explains that Islam is often seen as naturally theocratic in that: 'It is often suggested that religion and politics are inseparable in Islam. It is said that the *umma*, the Islamic community, has traditionally seen itself as simultaneously both religious and political community that is the community of believers and the nation of Islam.' See J Haynes *Religion in Global Politics* (1998) 128.

<sup>45</sup> Artz has clarified that in Islam no divide between the state and Islam exists as 'Islam is religion and the State as held by the Islamic maxim *al -Islam din wa dawla*'. See DE Artz 'The Application of International Human Rights Law in Islamic States' (1990) 12 *Human Rights Quarterly* 202, 203.

<sup>46</sup> In this argument Kuru is supported by Calhoun, who claims that the main cause for secularism is need to balance religious diversity with national cohesion and the necessity therefore to reserve religion to the private realm. See C Calhoun 'Secularism, Citizenship and the Public Sphere' (2008) 10 (3) *Hedgehog Review* 7, 7.

<sup>47</sup> Kuru (note 39 above) 577.

consideration the importance of human agency, in that religious groups commonly align their political preferences with due regard to the prevailing socio-political conditions.<sup>48</sup>

Kuru, however, takes the rational choice theory a step further by acknowledging the pertinent role that ideology plays in the exercise of these distinct preferences.<sup>49</sup> The importance of a dominant ideology is used to explain diverse results in similar cases. For example, the different policies of the USA and France. These are two secular states, which are both similar in terms of economic development and civilisational identity, but different in terms of dominant ideology.<sup>50</sup> In contrast, France and Turkey are different in terms of economic development and civilisational identity, but have similar ideological policies towards religion, as influenced by their similar dominant ideology. France and Turkey both support an ideology in which the public domain has to be free from any religious influence.<sup>51</sup>

Arguably Kuru, in identifying the importance of the dominant ideology, draws together the influence of the carrier to secularisation, as well the role of religion in the secularisation process. This dominant ideology not only shapes the variation in the form of secularisation present in a state, but also continues to remain relevant in the current application of state policy towards religion.<sup>52</sup>

---

<sup>48</sup>For example, the influential Islamic movement, Jamaat-i Islami, defends an Islamic state in Pakistan, where Muslims are the majority, while it supports the secular state in India, where Muslims are a minority. See generally PR Kumaraswamy 'The Strangely Parallel Careers of Israel and Pakistan' (1997) IV(2) *Middle East Quarterly* 39.

<sup>49</sup> Kuru (note 39 above) 578.

<sup>50</sup> In relation to the difference between the USA and France, see generally Berger *et al* (note 28 above). Berger *et al* explores the reasons why two economically advanced groups of societies can be so different in terms of their religious dimensions. America is seen as a religious society and Europe as a secular society. The difference between the essentially French ideology of 'freedom from believe' and the opposite thereof across the Atlantic, namely the 'freedom to believe' in the USA is explored.

<sup>51</sup> Kuru (note 39 above) 579.

<sup>52</sup> In this opinion he is supported by Saktanber and Corbacioglu who further contend that to understand these present ideological struggles, they need to be seen in their historical context. See generally A Saktanber & G Corbacioglu 'Veiling and Headscarf-Skepticism in Turkey' (2008) *Social Politics*:

With the above overview of the process of separation, the carriers of separation, and the role of religion – as well as ideology – are all factors that generally play a role in the separation process that have been outlined. These factors influence the possible variations in which the relationship between the state and religion will evolve.

### **3.4 Variations of the relationship between state and religion**

The relationship between state and religion, ranging from a state religion on the one hand of the spectrum, to secularism in its diverse forms at the other end of the spectrum, is discussed next. In light of the range of legal arrangements regulating the relationship between the state and religion, a coherent classification of the relationship between the state and religion is essential. The formulation of well reasoned conclusions regarding to the impact of this relationship on the right to freedom of religion is dependent thereon. The following classifications have been suggested by several scholars:

Mojzes distinguishes between religious absolutism, where one particular religion is given preferential treatment; religious toleration, where the state is benign to all religions but offers preferential treatment to a dominant religion; secular absolutism, where all religions are rejected in favour of a secular point of view; and pluralistic liberty, where the state is indifferent and neutral to religion and non-religion alike.<sup>53</sup>

Shelton and Kiss, classify the relationship between the state and religion as, state control over religion, state neutrality towards religion, divisions of control between the state and religious spheres, and state hostility towards religion.<sup>54</sup>

---

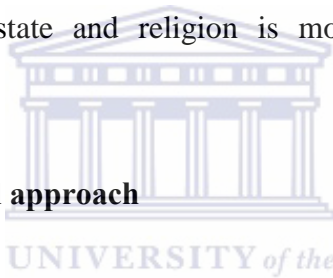
*International Studies in Gender, State & Society* 514. The relevance of the historical context was also previously signified by Rémond, in this regard see generally Rémond (note 25 above). Further appreciation of the continued relevance of the dominant ideology towards religion will be illustrated in section 3.3.3.

<sup>53</sup> P Mojzes ‘Religious Human Rights in Post-Communist Balkan Countries’ in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 263, 266-69.

<sup>54</sup> D Shelton & A Kiss ‘A Draft Model Law on Freedom of Religion, with Commentary’ in JD van der Vyver & J Witte Jr (ed) *Religious Human Rights in a Global Perspective Legal Perspective* (1996) 497, 578.

Mitra, in a model most comparable with that of Mojzes, proposes the following four different categories of the possible relationships between religion and the state: theocratic; hegemonic, where one religion dominates, but other religions are tolerated; secular; and neutral, where government is even-handed in its approach to all religions.<sup>55</sup>

In contrast with Mojzes and Mitra, Bader, however, maintains that the actual relationship between the state and religion cannot be framed in a simplistic dualist format. Quite the opposite is suggested, in that he identifies that the relationship between state and religion is regulated in various dimensions, for example, constitutional, legal, administrative, political and cultural.<sup>56</sup> Moreover, the aims of the state towards religion may vary considerably, ranging from tolerance to protection of all religions or neutrality towards religion or the granting of privileges to some religions.<sup>57</sup> Arguably the composite nature of the relationship between state and religion is most accurately reflected in the classification of Durham.<sup>58</sup>



### 3.4.1 Durham's dimensional approach

When drawing distinctions between the various relationships between the state and religion, Durham identifies that the degree of religious liberty should be assessed along the following two dimensions: the dimension relating to religious liberty and, the relationship between the state and religion.<sup>59</sup> Regarding religious liberty, the continuum ranges from total religious freedom, on the one end of the scale, to degrees of religious

---

<sup>55</sup> Mitra (note 29 above) 770.

<sup>56</sup> Bader (note 10 above) 61.

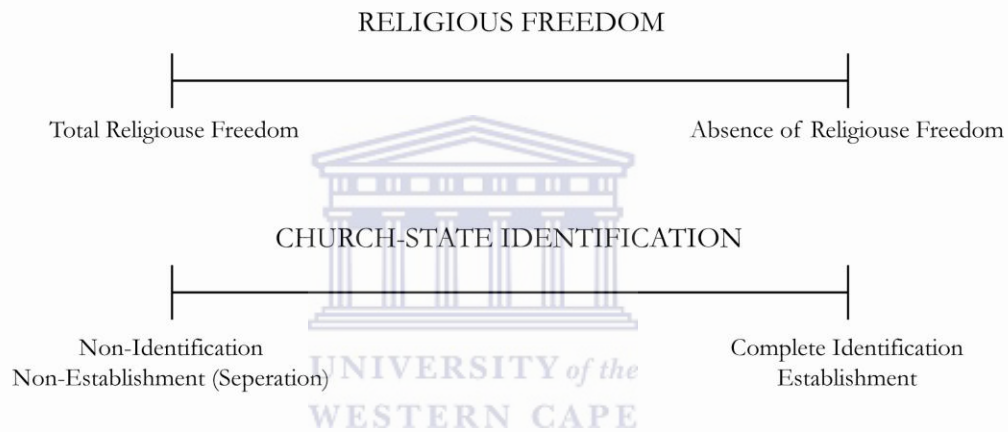
<sup>57</sup> Bader (note 10 above) 63, 64 where Bader indicates that this privilege may be further exacerbated in instances where state policies are not only applicable in the religious field but also in other fields, such as, education, employment, health and welfare.

<sup>58</sup> Durham (note 29 above) 1 – 44.

<sup>59</sup> Durham acknowledges that the model has to some extent been created with reference to the insights of a former student, see GR Ryskamp 'The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship between Church-State Identification and Religious Liberty' (1980) *Brigham Young University Law Review* 616, 616.

toleration, and the absence of religious freedom on the other end. With regards to the relationship between the state and religion, the continuum places non-identification (or anti-religion or persecution) on the one end of the scale, followed by negative identification of religion, which precedes the separation of religion and the state. This followed by positive identification, and finally, complete identification (or theocracies) on the other end of the continuum, as shown in figure 1.

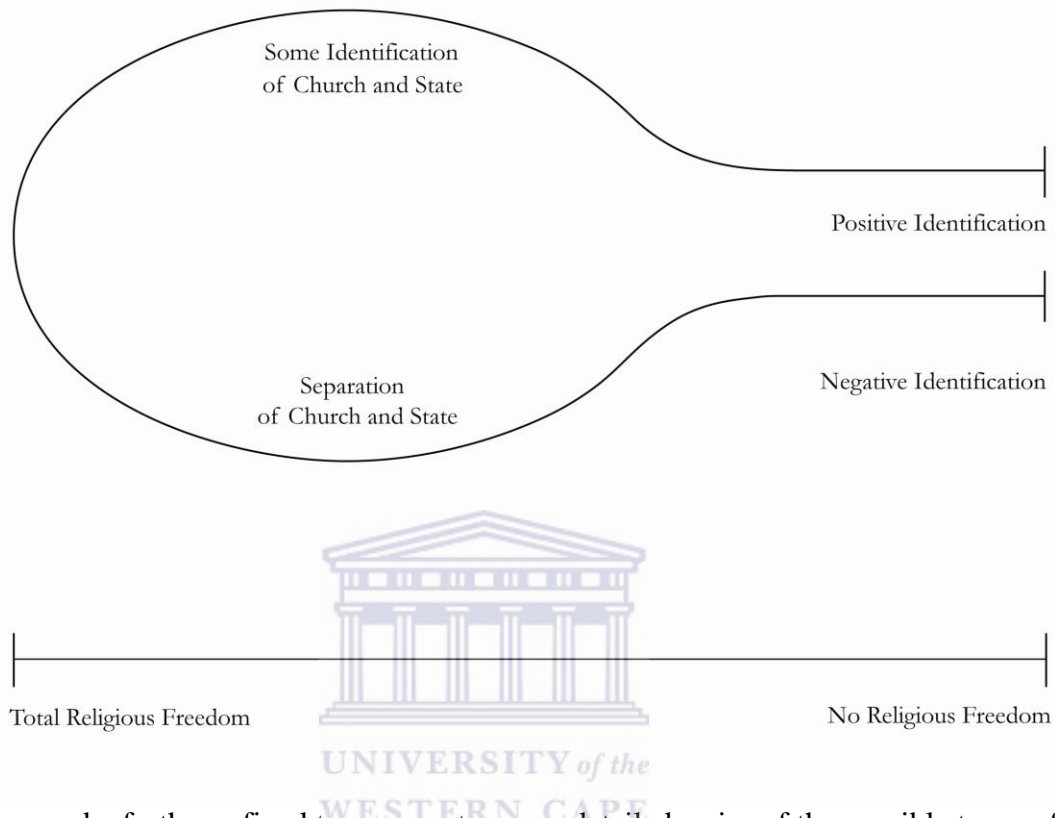
Figure 1<sup>60</sup>



Both strong negative identification as well as strong positive identification correlates with low levels of religious freedom. For this reason Durham suggests that the relationship between the religion and the state continuum should be re-conceptualised as a loop rather than linear. In this manner, both dimensions are reflected more accurately, as shown in Figure 2.

<sup>60</sup> Durham (note 29 above) 23.

Figure 2<sup>61</sup>



The loop can be further refined to represent a more detailed series of the possible types of state religion regimes. These possibilities can range from absolute theocracies to established churches, ranging from a monopoly in religious affairs to an established church that guarantees equal treatment for all other beliefs. It can also range from endorsed churches, where a particular church has a special position in the traditions of the country to cooperationist states, where the state continues to cooperate with churches in various ways. Further ranging areas includes an accommodationist regime, where a separation is apparent, but benevolent neutrality towards religion is noticeable. It can also include separationist regimes which too may cover a broad variation.

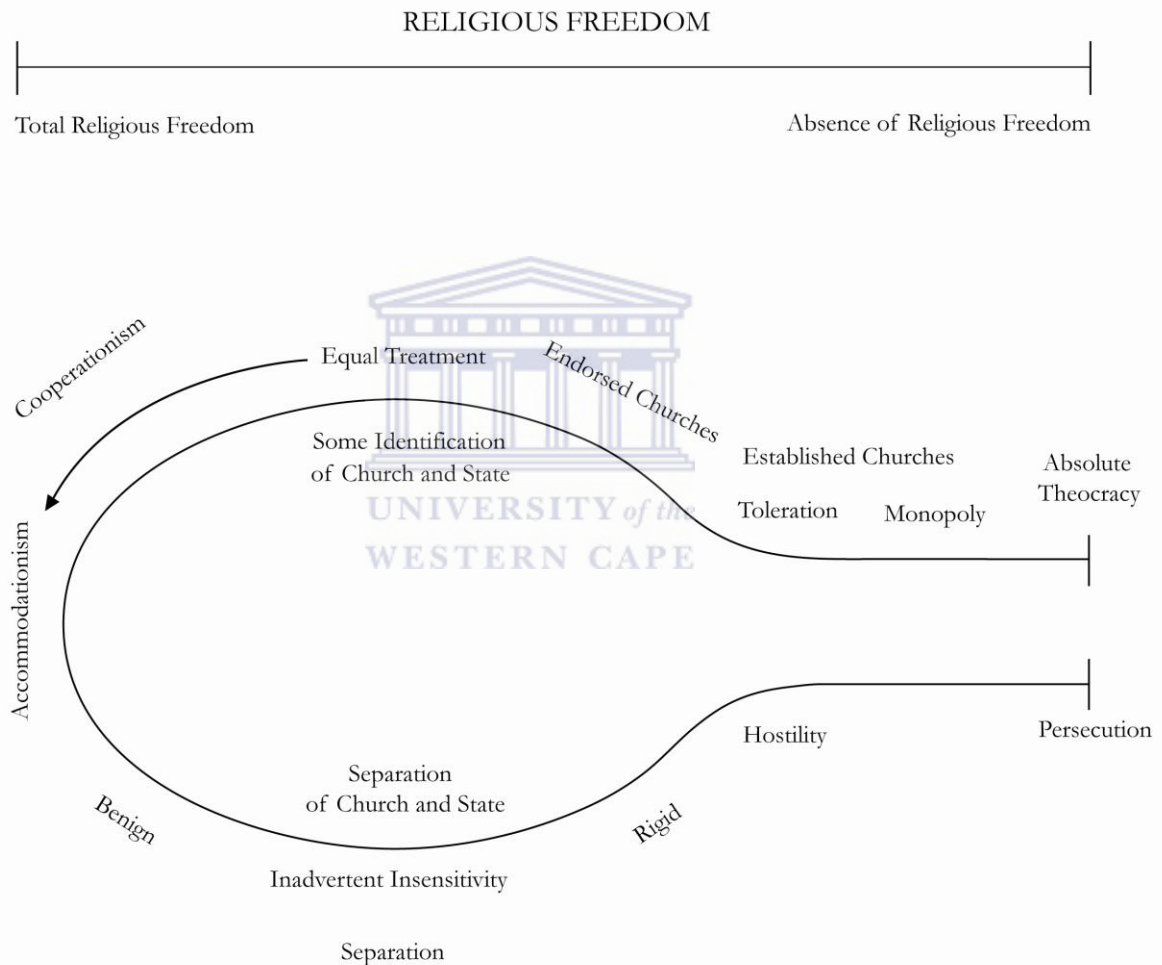
Durham's broad variation of separationist regimes may include the following alternatives: Firstly, separationist regimes in that may be compared with accommodationist regimes, but with the qualification that any form of public support of a

---

<sup>61</sup> Durham (note 29 above) 18.

religion is deemed inappropriate. Secondly, separationist regimes that apply more severe forms of separation or even display inadvertent insensitivity. Thirdly, separationist regimes that follow a rigid separation between religion and the public sphere; and finally, those regimes in which hostility towards religion is prevalent or the possibility of persecution of religion exists, as shown in figure 3.

Figure 3<sup>62</sup>



In this chapter the loop continuum classification of Durham will be applied, as this classification arguably incorporates the proposals of Mojzes, Shelton and Kiss, as well as

<sup>62</sup> Durham (note 29 above) 23.

that of Mitra. However, the loop continuum will be regrouped into three principal categories.

### **3.5 Principal categories of the arrangement between state and religion**

The 'Durham' classifications are regrouped in the following three categories: firstly states which display no separation between state and religion, so-called 'confessional states'; secondly, states which display some degree of identification and or some degree of separation between the state and religion 'predominantly confessional states'; and third, states which display separation between the state and religion, so-called 'secular regimes'.<sup>63</sup> This arrangement is inclusive of all the regimes discussed by Durham, but is mindful that regimes may, from time to time, change. For example, neutral separation between state and religion may shift towards an inadvertent insensitivity towards religion, which may even over time expand towards rigid insensitivity. However, this transfer will generally only occur within the limits of the arrangement suggested above, namely states which display no separation between the state and religion, or states with some degree of identification or separation with religion and lastly, states in which religion is separated from the institutions of the state. What follows next is a discussion of each component of this arrangement.

#### **3.5.1 No separation between the state and religion: confessional states**

Confessional states can be subdivided into absolute theocratic and hegemonic states. A confessional state requires a dedicated relationship between religion and politics, as usually seen in Islamic countries. The Islamic Republic of Iran<sup>64</sup> and Saudi Arabia<sup>65</sup> are

---

<sup>63</sup> CF Hallencreutz & DS Westerlund 'Introduction: Anti-Secularist Policies of Religion' in DS Westerlund (ed) *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics* (1996) 1, 23.

<sup>64</sup> In compliance with article 4 of the Constitution of the Islamic Republic of Iran, all civil, criminal, financial, economic, administrative, cultural, military, political and other laws and regulations must be based on Islamic criteria.

<sup>65</sup> The Constitution of the Kingdom of Saudi Arabia(1992) determines that:



in the strict sense examples of confessional states and may even be considered theocracies, as these states have established religious laws and religious courts as the basis for their legal and judicial systems.<sup>66</sup> Most Islamic states, however, do uphold in their constitutions the principle of religious freedom and non-discrimination.<sup>67</sup>

The existence of a confessional state may stem from the civilisational approach<sup>68</sup> or flow from the so-called *ancien régime*,<sup>69</sup> where the state historically was associated with a

---

Article 1: 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital.'

Article 26 [Human Rights] 'The state protects human rights in accordance with the Islamic Shari'ah'.

The Constitution of the Kingdom of Saudi Arabia(1992). Available at

<<http://www.servat.unibe.ch/icl/sa00000.html>> last accessed on 2 December 2010.

<sup>66</sup> Kuru (note 39 above) 569.

<sup>67</sup> Thomson explains that Sudan has two distinct major cultures: North Sudan defines the Sudanese identity in Arab and Islamic terms. While Southern Sudan predominantly practise traditional indigenous beliefs and Christianity. A peace agreement in 2005 granted Southern Sudan autonomy for six years, to be followed by a referendum about independence. The Comprehensive Peace Agreement has brought an interim system of Government for Sudan together with a separate Interim Constitution for Southern Sudan. In this regard see generally G Thomson *Countries of the World & Their Leaders Yearbook 08, Volume 2* (2007). The Sudanese Constitution of 1998 (before the peace agreement) acknowledged religious freedom in the following manner: Constitution of the Republic of Sudan (1998) Article 24 - Right to Religion or Conscience:

'Everyone has the right to freedom of conscience and religion and the right to manifest and disseminate his religion or belief in teaching, practice or observance. No one shall be coerced to profess a faith in which he does not believe or perform rituals or worship that he does not voluntarily accept. This right shall be exercised in a manner that does not harm public order or the feelings of others, and in accordance with law'. The Constitution of Sudan (1998)). Available at:

<<http://www.sudan.net/government/constitution/compile.html>> last accessed on 3 December 2010.

<sup>68</sup> See section 2.3.

<sup>69</sup> See section 2.3. The *ancien régime* is a term indicative of the tenet in 16<sup>th</sup> century Europe in terms of which the state was historically associated with a particular religion. In France *une foi, un loi, un roi*, (literally one faith, one law, one king as incorporated into the Edict of Nantes in 1598). In Germany *cuius regio, eius religio* (literally 'whose the region (or realm), his the religion' as incorporated into the 1555 Treaty of Augsburg). Sovereigns therefore frequently did their utmost to lessen religious dissent through

particular religion, which generally was Catholicism. The contrary, however, is true for modern day Catholicism where the Roman Catholic Church has recognised the legitimacy of the modern national state as expressed in *Error 10, Relating to Modern Liberalism*, as contained in the *Syllabus of Errors*.<sup>70</sup>

That in the present day, it is no longer necessary that the Catholic religion be held as the only religion of the State, to the exclusion of all other modes of worship: whence it has been wisely provided by the law, in some countries nominally Catholic, that persons coming to reside therein shall enjoy the free exercise of their own worship. ... That the Roman Pontiff can, and ought to, reconcile him to, and agree with, progress, liberalism, and modern civilization.

A hegemonic state indicates states with an established religion by means of the existence of an established church.<sup>71</sup> The established church may display an enforced or strict monopoly toward religion, as was found in Spain at certain times in the past.<sup>72</sup>

---

various means. René Rémond includes numerous examples of forcible expulsion of non-Catholics. One such example is in Spain, where Catholic kings drove Jews and Muslims out, and in France, where Jews and later Protestants were expelled as well. Great Britain is often thought of as an exception, as since 1707 the Monarch was the head of the Church in England but not in Scotland. Voltaire in his *Lettres anglaises ou philosophiques* (1732) praised the confessional plurality of Great Britain. However, Rémond mentions that at a time when Voltaire was praising England's tolerance, England continued to practice discrimination according to denomination. Political careers were restricted to members of the Established Church of England, access to universities such as Oxford and Cambridge too was restricted to members of the established church. The ban on teaching by academics from other than the Anglican faith was only lifted in 1871 with the abolition of the Test of Anglicanism. In this regard see Rémond (note 25 above) 31.

<sup>70</sup> *The Syllabus of Errors* (1864) as included in H Bettenson *Documents of the Christian Church* (1989) 274.

<sup>71</sup> Several European states operate variations of state religious establishments: The United Kingdom – the Church of England and the Church of Scotland; Denmark – Lutheranism; Greece – Greek Orthodox Church; Sweden – Church of Sweden; Norway – Lutheranism; Finland – Lutheran Orthodox Church of Finland; Malta – Roman Catholicism and Bulgaria -Bulgarian Orthodox Church.

<sup>72</sup> Kuru states that in two hundred years secularisation has made tremendous inroads, as there are hardly any confessional states left. Examples of confessional states include Greece, and the Scandinavian democracies and England, where the heir to the throne, Prince Charles, has revealed his intention to treat all religions on equal footing. In this regard see Kuru (note 39 above) 570.

Alternatively the established church is dominant, but other religions are tolerated or afforded equal treatment, as found, for example, in Greece<sup>73</sup> and in England.<sup>74</sup>

A further category of hegemonic states are states where a particular church has a special position in the traditions of the country, a so-called endorsed church.<sup>75</sup> The most important difference between hegemonic states and theocracies is that in hegemonic states, despite this establishment or endorsement of religion, the legislative and judicial processes are not fulfilled by religious leaders.

Theocracies in particular, as well states with established churches with a strict monopoly over religious affairs do not allow for the right of religious freedom of non-believers or those belonging to a dissimilar faith. Therefore the right to freedom of religion of these adherents is not protected.<sup>76</sup> In addition, even adherents to the state religion may also

---

<sup>73</sup> The Eastern Orthodox Church of Christ is singled out as ‘the prevailing religion’ in Greece – see article 3 of the Constitution of Greece (1975). Other examples include: the Roman Catholic Church which is the established church in Argentina – see article 2 of the Constitution of the Argentine people (1994). In Norway, the King and the majority of the cabinet are required to be members of the state Lutheran church and Christianity is a mandatory subject in Norwegian public schools. Buddhism is the established religion in Sri Lanka – see article 9 of the Constitution of the Democratic Socialist Republic of Sri Lanka; and Nepal has proclaimed itself a Hindu state – see article 4 of the Constitution of Nepal (1990).

<sup>74</sup> See Act of Supremacy, 1 Elizabeth (1558). Anthony Marx states that in England Catholicism was unchallenged until the early sixteenth century. However, when the pope refused Henry VIII his request for a divorce, Henry broke with Catholic Church and established himself head of the Church of England in 1532. The Reformation in England was briefly interrupted by the reign of Queen Mary who sought to restore Catholicism. Her efforts however had the opposite effect and bolstered anti-Catholicism sentiments. Mary’s successor, Elizabeth, at first more tolerant of Catholicism, later incited England towards Protestant conformity when Rome supported the invasion of Ireland and excommunicated her. See Marx (note 27 above) 58 - 65.

<sup>75</sup> For example in Panama, freedom to profess any religion is subject to ‘respect for Christian morality and public order’ as per article 35 of the Political Constitution of the Republic of Panama (1972).

<sup>76</sup> Van der Vyver confirms this argument through reference to the position in Iran and Sudan. Articles 13 and 14 of the Constitution of Iran and article 16 of the Constitution of Sudan expressly excludes non-Muslims who are neither ‘People from the Book’ (Zoroastrians, Jews, and Christian) or non-Muslims who

suffer an infringement on their right to freedom of religion, particularly in those instances where it is not allowed to abandon the belief of the dominant religion.<sup>77</sup> Hegemonic states, which positively identify with a dominant religion, also infringe on the right to freedom of religion, even in the event where such an endorsement does not significantly affect free choice, as this endorsement does amount to arbitrary promotion of the beliefs of the dominant religion. From the above discussion it is clear that the establishment of a confessional state does not serve the interest of religious freedom in that the beliefs of the state religion are continually advanced.

Religions other than the state or dominant religion are therefore not afforded equal treatment. Adherents of these religions will at best feel like outsiders<sup>78</sup> and at worst be subjected to severe limitations on their right to manifest their religious belief. Therefore it is asserted that confessional states do not ensure the protection of the right to freedom of religion of religions other than the state religion.

### **3.5.2 Some degree of identification or separation between the state and religion: predominantly confessional states**

In predominantly confessional states the endorsement of a particular religion may be even more subtle than in confessional states. In these regimes some form of identification between religion and the state is prevalent. However, the identification does not extend as far as the establishment of a confessional state. These ‘predominantly confessional states’ also cover a range of configurations. Included in this range are cooperationist regimes, where the state continues to cooperate with religion. For example, allowing for the provision of state financial support to religious institutions, without the cooperation

---

are neither adherents of other ‘heavenly faiths’ from protection of their rights, see JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 33-34.

<sup>77</sup> Abandoning Islam or converting to another religion is under *Sharia* law punishable by death. Iran, amongst other complies with this command, as conversion from Islam constitutes a capital crime in this country.

<sup>78</sup> See section 3.3.3 and section 3.7.

extending to the establishment of a state religion. In Spain, Italy, Belgium and Luxembourg, state budgets continue to provide for certain religious denominations, while in Austria, Switzerland, Denmark Germany, Norway and Finland<sup>79</sup> religious taxes exist. These cooperationist regimes, however, do not endorse any religion in particular and are committed to the equal treatment of all religions.

This cooperation may even range to benevolent neutrality towards religion without the provision of financial support to religion, found in so-called accommodationist regimes. This system of passive accommodation is comparable to a regime of tolerance in which:

[T]he state is not expressly committed or involved with the maintenance of religion, but allows for an affirmative climate in which the individual believers are not thwarted in any way and in which institutionalised religion can make efforts to preserve itself and to carry out religious activities.<sup>80</sup>

It may even be contended that the benevolent neutrality of the accommodationist regime meets the requirements of a state in which religion is institutionally separated from the functioning of the state. These accommodationist states may even be similar to states in which so-called benign separation between state and religion is evident.

It is clear that confessional states do not allow for extensive protection of the right to freedom of religion, as was concluded in section 3.5.1 above. A similar conclusive finding is not *per se* possible regarding states that are predominantly confessional states.

---

<sup>79</sup> In considering the Finnish Report in terms of the Framework Convention for the Protection of National Minorities, the Committee of Ministers of the Council of Europe, stressed that where public funding is automatically provided to selected churches only, particular attention must be paid to the situation of other religions, and called upon the government to review its national legislation. See in general paragraph 29 of the Advisory Committee Opinion on Finland, ACFC/INF/OP/I (2000) 002, 2000. However, the Finish government argued that the privileged position of the Evangelical Lutheran Churches and the Orthodox Church were justified in that they fulfilled important social duties.

<sup>80</sup> J Temperman 'The Neutral State: Optional or Necessary? A Triangular Analysis of State-Religion Relationships, Democratisation and Human Rights Compliance' (2006) 1 *Religion and Human Rights* 269, 279.

Quite the contrary is contended in that the ideology of the given state will ultimately influence the extent of the neutrality of the accommodation or tolerance displayed towards all religion or beliefs. Dependant on this ideology, the benign neutrality towards religion in general may indeed allow for extensive protection of the right to freedom of religion or belief of all believers, in that all religions are valued. However, the positive climate created by the state towards religion in general should not in any way favour one religion over another as this may impede on the right to freedom of religion of other religions.<sup>81</sup> It is argued that an accommodationist regime or regime of tolerance that creates such an environment might serve the interests of religious freedom to the utmost.

However, most countries demonstrate some fashion of separation between state and religion, so-called secular states. These states generally defend the principle that secularism demands a neutral public domain in which religion is relegated to the private sphere. The application of this division between the public and private sphere is problematic as the very nature of religion does not generally allow for a distinction between public and private.<sup>82</sup> However this division is even more challenging for those religions that dictate the manifestation of religion in the public sphere, as for example the wearing of the Islamic headscarf-*hijab* dictates. Evaluation of secular states therefore in particular warrants closer scrutiny.

### **3.5.3 Separation between state and religion: secular states**

Separation between state and religion, or secularisation<sup>83</sup> displays the following characteristics:<sup>84</sup> legislative and judicial processes are free of religious control and no

---

<sup>81</sup> India may be classified as a neutral state in which the state does not symbolically endorse religion, or a particular religion. In India fairness in allocation of public support to different religious groups is permitted. The Constitution of India contains a guarantee of state 'equidistance' from religions, which seems to stand for a guarantee of neutrality of effect. In this regard see R Verma *Secularism and Communal Violence in Indian Politics* Thesis prospectus presented to the Department of Government, Harvard University (1992).

<sup>82</sup> See discussion in section 5.2.2.

<sup>83</sup> See the definition of secularisation in section 3.2.

established religion exists. Secularisation is therefore generally seen as the act of exclusion of a religious presence from the public domain and the limitation of the role of religion to the private sphere.

Secular regimes too, display a wide-ranging variation.<sup>85</sup> Distinctions may be drawn between secular regimes that differ very little from an accommodationist regime, but with the qualification of any form of public support of a religion is deemed inappropriate, on the one end of the spectrum. To secular regimes in which hostility towards religion is prevalent or the possibility of persecution of religion exists, on the other extreme of the spectrum.<sup>86</sup> In between these extremes the following classification are situated: separation, inadvertent insensitivity and rigid separation.

The broad spectrum of secular regimes is the result of interplay between different factors<sup>87</sup> such as: the carriers of the process of separation<sup>88</sup> (whether the separation was the result of the Reformation, or a Revolution or the Renaissance); the role of the dominant religion;<sup>89</sup> as well as the dominant ideology<sup>90</sup> of the state when transforming. All of these may influence the manner in which separation manifests as well as the ultimate protection afforded to the right to freedom of religion. For this reason a further evaluation of the possible variations of a secular state is needed.

---

<sup>84</sup> Kuru (note 39 above) 569.

<sup>85</sup> As discussed in section 3.5.3 and 3.6.

<sup>86</sup> The Soviet Union was the first regime in history to reject all forms of religious belief. Inspired by Marxist theory state atheism was ordered by Lenin in 1918 through the decree of Separation of State and Church and lasted till Gorbachev, in 1988, symbolically invited the leading bishops of the Russian Orthodox Church to the Kremlin. For a discussion the position in the previous Soviet Union see HJ Bergman 'Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 289-293.

<sup>87</sup> See section 3.3

<sup>88</sup> See section 3.3.1.

<sup>89</sup> See section 3.3.2.

<sup>90</sup> See section 3.3.3.

### 3.6 An assessment of the possible variations in secular states

As discussed above secular regimes reveal extreme variations.<sup>91</sup> Secular regimes that are similar to an accommodationist regime generally allow for a more favourable protection of the right to freedom of religion when compared to a secular regime in which hostility towards religion exists. It is important that the probable causes for these extreme variations in secular regimes are appreciated.

#### 3.6.1 Passive and assertive approaches towards secularism

A possible cause for these extreme variations in secular states can be related to a distinction between the application of either a passive or an assertive approach towards secularism.<sup>92</sup> It is argued that either passive or assertive secularism became the dominant approach during the historical period of secular state-building. This was the phase when the *ancien régime*<sup>93</sup> was replaced with the secular state. This point of view is suitably illustrated with reference to France and the USA. In France the *ancien régime* was based upon the intimate relationship between the monarchy and the Catholic Church. The birth of the French Republic was conceived from the violent conflict with this regime.<sup>94</sup> As a result of this conflict assertive secularism became the dominant ideology in France.<sup>95</sup> On

---

<sup>91</sup> See section 3.6.1.

<sup>92</sup> See Kuru (note 39 above) 587. In support of Kuru, see Martin who identifies that perhaps the reason why secularisation was so penetrating in Western Europe is precisely for the reason that Christianity has been tangled with the structures of power. See Martin (note 43 above) 23.

<sup>93</sup> See section 3.5 above.

<sup>94</sup> See discussion of historical conflict in section 2.3.

<sup>95</sup> See Baubérot, who maintains that *laïcité* (laicism or secularism) may have ended the ‘conflict of two Frances’ (the conflict between the Catholic and Protestant faiths) but it did not ease the tension over religion in France. While assertive secularists (termed *laïcité de combat* (combative secularism)) are dominant and seek to confine religion to the private sphere and to the individual’s conscience, the passive secularists (termed *laïcité plurielle* (pluralistic secularism)) struggle to make a more public role available for religion. Baubérot (note 32 above) 445.



the other hand, in the USA,<sup>96</sup> which was then a new country of immigrants, religion was neither seen as an ally or as a foe, and therefore the cause of passive secularism was generally supported.<sup>97</sup>

Passive secularism requires that the state plays a passive role in avoiding the establishment of any religion, thereby maintaining state neutrality towards religion. Religion may therefore still be present in the public domain. Assertive secularism, however, actively excludes religion from the public sphere.<sup>98</sup> Therefore it can be argued that assertive secularism appears to be incompatible with religions that have public claims while passive secularism tolerates public visibility of religion.<sup>99</sup>

In this regard the application of assertive secularism has caused considerable litigation, especially on the role of religion in schools, as religious groups are eager to have an influence on the world view of impressionable youths.<sup>100</sup> These debates often focus on the role of prayers or pledges in schools, the format of religious instruction, the possibility for private religious education (and the availability of government funding for these schools) and the manner in which science, morality and human sexuality ought to

---

<sup>96</sup> This difference in application of secularism is also reflected in the respective declarations of rights of these countries, both drafted at the end of the eighteenth century. The American Declaration of Independence (1776) avers that ‘all men are created equal, that they are endowed by their Creator with certain inalienable Rights’. The French Declaration of the Rights of Man and Citizen (1789) on the other hand does not proclaim that God is the origin of the rights but sets the rights out as ‘rights of man’. The difference between France and the USA, with reference their respective declarations of rights, is discussed in Baubérot (note 32 above) 442 onwards.

<sup>97</sup> See Kuru (note 39 above) 586. Although it is maintained that the USA predominantly follows a passive ideology towards secularism, Kuru suggests that support for assertive secularism constitutes a marginal group within the USA. See Kuru (note 39 above) 579-80.

<sup>98</sup> Kuru (note 39 above) 571.

<sup>99</sup> Kuru (note 39 above) 594.

<sup>100</sup> SV Monsma and JC Soper *The Challenge of Pluralism Church and State in Five Democracies* (1997) 571.

be taught.<sup>101</sup> It has been argued that it is usually minorities and the powerless in societies that have fewer options and are dependent on government for services. If government does not provide options in line with their values and faith commitments they have no alternatives than to make use of the government services that may not be as accommodating to their religious needs.<sup>102</sup>

As a result minorities of the marginalised in society may be coerced into acting in conflict with the tenets of their religious belief. The effect of this coercion on these vulnerable groups will be their right to manifest religious belief is at the best constrained and at the worst nullified.<sup>103</sup>

In addition, the difference in approach towards secular state policies towards religion, whether assertive or passive can either be exclusionary or inclusionary. For example, it can be said that the USA follows a more inclusionary approach towards religion while France and Turkey follow more exclusionary approaches.<sup>104</sup> These distinct approaches are the consequence of the 'ideological struggles' between 'passive secularism' and 'assertive secularism' as identified above.

Krishnaswami asserts that the mere existence of separation *per se* does not ensure non-discrimination, and that it depends on the conduct of the state to appreciate which type of relationship leads to discrimination and which does not.<sup>105</sup>

---

<sup>101</sup> SG Scott *The Seeds of Secularization Calvinism, Culture and Pluralism in America, 1870 – 1915* (1985) 93. Once again note support for assertive secularism constitutes a marginal group within the USA. See Kuru (note 39 above) 579-80.

<sup>102</sup> SV Monsma and JC Soper *The Challenge of Pluralism Church and State in Five Democracies* (1997) 571.

<sup>103</sup> As will be discussed in more detail in section 6.3.

<sup>104</sup> Kuru (note 39 above) 571.

<sup>105</sup> Report of Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 12 U.N. ESCOR Sub-Comm'n on Prevention of Discrimination and Protection of Minorities (Agenda Item 5), U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960)

### 3.6.2 Accommodationist, separationist and neutral interpretations of secularism

In addition to the distinction between an assertive or passive approach towards secularism, in the USA, a debate exists between the proponents of the accommodationist and the separationist interpretation of secularism.<sup>106</sup> Accommodationists do not view close state-religion interactions as incompatible with secularism, as long as the state-religion interaction does not establish a particular religion.<sup>107</sup> This view claims that only the establishment of a state church or coercion towards religious participation violates the establishment clause.<sup>108</sup>

Separationists, on the other hand, seek an impenetrable ‘wall of separation’ between state and religion.<sup>109</sup> This approach of seeking a ‘wall of separation’ between the state and

---

[hereinafter Krishnaswami Study]. ‘Krishnaswami Study’ (1979) 11 *New York University Journal of International Law & Politics*. 227.

<sup>106</sup> Kuru (note 39 above) 579-80.

<sup>107</sup> See generally See MW McConnell ‘Accommodation of Religion’ (1985) 1 *Supreme Court Review* 1, 14 who contends that the accommodationist approach calls for government support of religion.

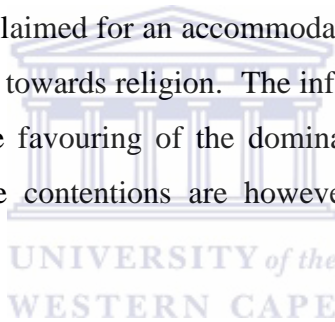
<sup>108</sup> In the USA, the First Amendment states that: ‘Congress shall make no law respecting the establishment of religion’. The First Amendment includes clauses prohibiting both governmental interference with the ‘free exercise’ of religion, and governmental ‘establishment’ of religion. Together, the ‘free exercise clause’ and ‘establishment clause’ are considered to accomplish a ‘separation of church and state’. E Chemerinsky ‘Why Church and State Should be Separate’ (2008) 49 *William and Mary Law Review* 2215, 2204 where Chemerinsky contends that the Supreme Court of the present day, which has not recently dealt with any establishment clause issues, consists of more accommodationist than strict separationist and hence the law regarding the establishment clause in the USA could witness some radical changes. This contention of Chemerinsky will not be pursued further as this chapter aims to understand the relationship between state and religion that would most effectively protect the right to freedom of religion and following there from the right to freely manifest ones religious beliefs within a diverse society.

<sup>109</sup> See also generally A Gill *The Political Origins of Religious Liberty* (2007) for a discussion on the dynamics of secularism in state policies toward religion in the USA, France, and Turkey see AT Kuru, ‘Globalization and Diversification of Islamic Movements: Three Turkish Cases’ (2005) (Summer) *Political Science Quarterly* 120.

religion has also been termed strict separation,<sup>110</sup> between the state and religion in terms of which religion is relegated to the private sphere.<sup>111</sup>

Between an accommodationist interpretation, on the one hand, and a separationist interpretation of secularism on the other, a third interpretation of the establishment clause has been suggested,<sup>112</sup> which indicates that governments should be neutral with regard to religion. This further approach has included the requirement that government should not symbolically endorse religion, or a particular religion, but should follow a neutral approach.<sup>113</sup>

It is contended that this neutral approach will most likely ensure the most comprehensive protection of all religious adherents' right to freedom of religion as no religion will be favoured. The same could be claimed for an accommodationist interpretation in so far as this interpretation is not hostile towards religion. The influence of the dominant religion, nevertheless, may result in the favouring of the dominant religion to the detriment of marginalised religions. These contentions are however evaluated in more detail in section 3.7.



---

<sup>110</sup> E Chemerinsky 'Why Church and State Should be Separate' (2008) 49 *William and Mary Law Review* 2193, 2196.

<sup>111</sup> This point of view reflects Thomas Jefferson's 'wall of separation between church and state'. See section 7.5.

<sup>112</sup> E Chemerinsky 'Why Church and State Should be Separate' (2008) 49 *William and Mary Law Review* 2193, 2196.

<sup>113</sup> Justice O'Connor was the first to develop a test in terms of which the neutral approach of government should be determined. This test is known as the 'endorsement test'. See *Lynch v Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J concurring). In section 7.5.1 a more general overview of the jurisprudence of the court regarding the establishment clause will be provided.

### 3.6.3 Evaluation of the nature of the approach towards and the method of interpreting secularism

As indicated previously,<sup>114</sup> the ideology towards secularism encapsulates the influences of the carrier to secularisation, as well as the role of religion in the separation process. This ideology further manifests itself in the approach towards secularism, whether it is an assertive or passive approach. The ultimate effect of secularism on the right to freedom of religion is therefore influenced by the ideology of a given state.

A passive approach will most probably allow for more extensive protection of religious freedom than an assertive approach. As too will an accommodationist or neutral approach towards the interpretation of separation. The application of a passive approach and accommodationist interpretation allows for the inclusion of all religious adherents. However, in applying an assertive approach or separationist interpretation towards separation, the probability of exclusion of religious believers, as well as the infringement of the right to freedom of religion becomes more likely.

The inclinations to follow an assertive approach towards secularism and to interpret secularism in a separationist manner are both suggestive of a possible infringement of the right to freedom of religion. This tendency towards restricting the right to freedom of religion is particularly disconcerting, in light of the fact that the separation between state and religion is generally proclaimed to be the best approach towards ensuring religious freedom. For this reason it is argued that secularism *per se* should be examined. Further, it is important that the theory that secularism is the best approach towards ensuring the equal protection of the right to freedom of religion in a diverse society be challenged. A critical assessment of secularism accordingly forms the basis for further discussion.

---

<sup>114</sup> See Kuru and his discussion on the importance of the dominant ideology as discussed in section 3.3.3.

### 3.7 Critique of secularism: freedom of religion or freedom from religion?

Secularism is based on the foundation that equal protection of the right to freedom of religion of all believers is best ensured through a neutral state which does not display any favouritism towards any religion. However, often this neutrality has resulted in the state preferring secular values over religious values, which in return has had the effect of supporting the notion of secularism to the detriment of religion. As a result secularism applied in this manner does not ensure the equal protection of all religions, as it effectively ‘disestablishes’ religion to establish a civil religion, that is to say secularism.<sup>115</sup> For this reason the continued application of a single set of secular values in terms of which the public domain is predominantly regulated is challenged and the policy of strict secularism or laicism, as a traditional response to religious pluralism is questioned.<sup>116</sup>

Not only does secularism disestablish religion but also in the event of the application of a passive approach towards the disestablishment of religion from the public domain, the influence of the dominant religion cannot be circumvented. The impact on minority or marginalised religions becomes even more harmful if their religious claims are not permitted in the public discourse. The impact of this exclusion on the right manifest religious belief in particular may be severe. Presently the heterogeneity in the population of states is invariably composed of different racial, ethnic, cultural and religious groups,

---

<sup>115</sup> The term disestablish is used to indicate an end the official relationship between the state and a nation's established church or religion. The term has also been used as part of the United States Supreme Court establishment jurisprudence.

Regarding the establishment of a civil religion see generally LB Tremblay ‘The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?’ 18 *EUI Working Paper LAW* (2009). Available at <<http://ssrn.com/abstract=1557594>>last accessed on 10 May 2010.

<sup>116</sup> T Lindholm ‘Philosophical and Religious Justification of Freedom of Religion or Belief’ in T Lindholm, WC Durham, BG Tahzib-Lie Bahia (eds) *Facilitating Freedom of Religion or Belief: A Deskbook*, (2004) 19, 44-46.

which presents the world with more complex issues regarding religious freedom.<sup>117</sup> Consequently the continued effectiveness and applicability of secularism in the light of growing religious diversity is questioned.

The critique of secularism is based on the following understandings of secularism. First, secularisation, the civil religion of the present day, originated as a result of the impact of one or other carrier of separation. It is argued that the impact of these carriers is no longer applicable in current day. Second, the principle of secularism, which professes neutrality towards religion, has been shown to have a tendency towards exclusion of certain religions. In addition secularism may be incompatible with religions that have public claims, for example the display of the headscarf as required by the tenets of Islam. It is argued that this exclusion of certain religions does not adequately meet the needs of the diverse society of the present day. This argument is supported by cultural pluralists who advocate that a single 'civil religion' which defines and limits the public rights of others should not be forced upon religious communities.<sup>118</sup> It is premised that in light of the above arguments a need for a new political philosophy which is devoid of the unrealistic claim to privatise religion must be established.<sup>119</sup> Advocates of the principle of secularism should recognise that all morality, which includes both secularism and religious belief, evolves<sup>120</sup> and that the principles of secularism need to be adapted to reflect this evolution.

The adaption called for above appreciates that present day society continues to require a certain degree of actual *de facto* differentiation between state and religion. However, the manner in which this separation presents itself should be assessed.<sup>121</sup> It has been

---

<sup>117</sup>D Shelton & A Kiss 'A Draft Model Law on Freedom of Religion, With Commentary' in *Religious Human Rights in a Global Perspective Legal Perspectives* JD van der Vyver & J Witte Jr (eds) (1996) 559, p566.

<sup>118</sup> D Smit & EM Conradie *Essays in public theology: collected essays* (2007) 103.

<sup>119</sup> J Keane 'Secularism?' in D Marquand & RL Nettler *Political Quarterly Religion and Democracy* (2000) 5, 17.

<sup>120</sup> Keane (note 119 above)18.

<sup>121</sup> Bader (note 10 above) 60.

suggested that *de facto* differentiation could present itself in different legal forms, which may extend from constitutional and legal non-establishment on the one hand, to some ‘weak’ establishment of one church on the other.<sup>122</sup> However, any absolute constitutional or legal disestablishment must be questioned, in that:

Constitutional and legal non-establishment is definitively not the same as ‘separation of state from religion’ let alone of ‘nation from religion’, neither historically nor structurally.<sup>123</sup>

With the re-emergence of religion into the public discourse a sincere commitment to religious liberty necessitates a cultivation of religious pluralism.<sup>124</sup> True religious pluralism requires the fostering and nurturing of difference and not merely the toleration thereof. The challenge, however, is how to introduce these aspects in a neutral manner. One possible solution to the introduction of these aspects in a neutral manner is in the conceptualisation of a post secular ideology.<sup>125</sup> In terms of this ideology the secular theory of the privatisation of religion is confronted with the theory of de-privatisation of religion, in terms of which private relations and moral spheres are re-politicised.<sup>126</sup>

### 3.8 Conclusion

---

<sup>122</sup> *Ibid.*

<sup>123</sup> Bader (note 10 above) 61.

<sup>124</sup> MC Modak-Truran ‘Beyond Theocracy and Secularism (Part I): Toward A New Paradigm for Law and Religion’ (2007) 27 *Mississippi College Law Review* 159, 177-186.

<sup>125</sup> Habermas claims that secular citizens must learn to live in a post secular society, as religious citizens have already adapted to the ethical expectations of democratic citizenship, in so far as they have adopted towards their secular environment. According to him conservative religious people are expected to be tolerant of forms of behaviour many of them find testing (for example explicit forms of sexuality or same-sex unions), while secular liberals refuse to tolerate religious manifestations. Secular citizens in the point of view of Habermas should engage beyond mere tolerance but with a respect for the worldview of difference of the religious person. In this regard see generally J Habermas ‘Religion in the public sphere’ (2006) 14 (1) *European Journal of Philosophy*, 1, 2.

<sup>126</sup> See section 5.2.2.



In principle a separation between the state and religion is required to ensure the protection of the fundamental right to freedom of religion or belief. However, the complete constitutional disestablishment of religion is criticised. In particular, the interpretation and application of the principle of separation at the expense of the right to religious freedom, within the context of increased religious pluralism, is questioned. Therefore, the separation of state and religion ought not to result in ‘freedom from religion’ where religion is actively excluded from the public sphere. Quite the contrary should be strived for, in that the state should play a passive role in avoiding the establishment of any religion, thereby maintaining state neutrality towards religion, yet at the same time allowing for religion to be visible in the public domain.

Religious communities should be allowed the space to represent their different views and should not be subjected to a single ‘civil religion’. Secular citizens should learn to live in a post secular society in which secularism means not merely the absence of religion but the capacity for discourse across the lines of religious difference. Secularist citizens therefore have to overcome their secularist consciousness and engage with religion. Public life should represent ethnic, national, religious or cultural difference and religion should be allowed to re-emerge in the public discourse. Therefore a new political philosophy which is devoid of the unrealistic claim to privatise religion should be pursued. Parties should reach agreement on the limitations placed on their positive liberty to practice their own religion, while recognising the negative liberty of being spared the religious practices of others. The manner in which this re-entry should occur will form the basis of research in a further chapter.<sup>127</sup>

---

<sup>127</sup> See section 5.2.2.

## Chapter 4

### Legal context of the right to freedom of religion: International and regional level

#### 4.1 Introduction

As discussed previously,<sup>1</sup> the earlier protection concerning the right to freedom of religion was in accordance with the Peace of Augsburg (1555). The Peace of Augsburg established that those adhering to a religion other than the dominant religion were protected from state persecution according to the provision of the maxim *cuius regio, eius religio*.<sup>2</sup> This provision was thereafter included in the Peace of Westphalia (1648).<sup>3</sup> Subsequently, the protection of the right to freedom of religion was incorporated into various models for the protection of the right to freedom of religion of minorities, in terms of so-called minority treaties.<sup>4</sup> In these minority treaties, states, in addition to pledging to refrain from discrimination, undertook to recognise and respect diversity.<sup>5</sup>

The undertaking to protect human rights by means of international treaties essentially only began in 1919 through the framework of the League of Nations.<sup>6</sup> Knock emphasises that while the Covenant of the League of Nations emphasised state sovereignty coupled with the important qualification of equality and self-determination of people, the

---

<sup>1</sup> See discussion in section 2.2.

<sup>2</sup> Literally translated as ‘whose the region (or realm), his the religion’. The war of religion following the Protestant Reformation in Germany was discussed in more detail in section 2.3.1 and 2.3.2.

<sup>3</sup> See section 2.3.3.

<sup>4</sup> See section 2.4.

<sup>5</sup> Before the advent of the League of Nations, Steiner *et al* writes: ‘Within Europe, religious issues became a strong concern since states often included more than one religious denomination, and abuse by the state of a religious minority could lead to intervention by other states where that religion was dominant. Hence peace treaties sometimes included provisions on religious minorities. Generally see HJ Steiner (*et al*) *International Human Rights in Context Law Politics and Morals* 3<sup>rd</sup> ed (2007) 96.

<sup>6</sup> See generally TJ Knock *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (1992); see also EA. Korovin ‘The Second World War and International Law’ (1946) 40 (4) *The American Journal of International Law* 742.

framework of the League of Nations proved ineffective in protecting national minorities in light of the atrocities perpetrated against minorities with the onset of World War II. Following their victory against Germany, the Allied countries agreed that a new international organisation would be needed to promote international peace and security, as well as for the protection of fundamental human rights. Under the international human rights system the protection of the right to freedom of religion has been embraced with the concept of individual human rights.<sup>7</sup> After World War II the attempt to further the protection of human rights was continued through the efforts of the United Nations (UN), as well as regional bodies, such as, the Council of Europe (CoE),<sup>8</sup> the Organization of American States (OAS),<sup>9</sup> and the Organization for African Unity (OAU),<sup>10</sup> now known as the African Union (AU),<sup>11</sup> all of which will be discussed in more detail below.

## 4.2 The United Nations

The UN was established in 1945 and the Charter of the UN<sup>12</sup> is widely considered to be the constitution of the international community.<sup>13</sup> The objectives of the Charter of the

---

<sup>7</sup> For an historical overview of the debates around the drafting of the Universal Declaration of Human Rights see MD Evans 'The UN System' in MD Evans (ed) *Religious Liberty and International Law In Europe* (2009)172, 173.

<sup>8</sup> The Statute of the Council of Europe CETS No 001. Opened for signature in London on 5 May 1949. Entered into force on 3 August 1949. The Council of Europe was founded in 1949 in the context of a post war movement aimed at promoting European Unity. This Statute was signed by the representatives of Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, the United Kingdom and Sweden. The number of member states has continually increased as democracy has spread throughout Europe.

<sup>9</sup> Charter of the Organization of American States. Signed on 30 April 1948 at the Ninth Conference of the American States in Bogotá, Columbia and entered into force on 13 December 1951.

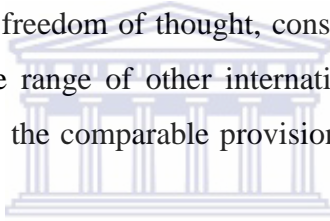
<sup>10</sup> Charter of the Organisation of African Unity. Signed in the city of Addis Ababa, Ethiopia on 25 May 1963 and entered into force on 13 September 1963.

<sup>11</sup> See generally R Murray *Human Rights in Africa From the OAU to the African Union* (2004).

<sup>12</sup>The Charter of the United Nations. Signed on 26 June 1945 in San Francisco, United States of America and entered into force on 24 October 1945.

UN include protecting future generations from the ‘scourge of war’ and promoting ‘fundamental human rights’ and the ‘dignity and worth of the human person’.<sup>14</sup> The purpose of the UN is to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights, and to promote respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>15</sup>

Soon after the founding of the UN, and pursuant to the aims of the UN, a committee<sup>16</sup> tasked with the writing of an International Bill of Rights<sup>17</sup> was established. The Universal Declaration of Human Rights (UDHR),<sup>18</sup> a set of recommended standards was produced by the committee. Steiner contends that the UDHR is considered the foundational instrument to protect the right to freedom of religion in particular and other rights in general. The right to freedom of thought, conscience and religion, in addition, features prominently in a wide range of other international human rights instruments, within the UN context, such as the comparable provisions in the International Covenant



---

Available at <<http://untreaty.un.org/cod/avl/ha/cun/cun.html>> last accessed on 10 May 2010.

<sup>13</sup> In terms of its Charter, the United Nations System is composed, amongst others, of the following bodies, the Security Council, International Court of Justice, Economic and Social Council and General Assembly and Secretariat.

<sup>14</sup> Preamble to the Charter of the UN.

<sup>15</sup> Article 55 of the Charter of the United Nations.

<sup>16</sup> In 1946 the Economic and Social Council of the United Nations established the United Nations Commission on Human Rights tasked with formulating a document aimed at securing legal protection for fundamental human rights, similar to the historic French Declaration of the Rights of Man and of the Citizen (1789) and the United States Bill of Rights (1791), but applicable to every human being. Its members included distinguished individuals such as René Cassin of France, Eleanor Roosevelt of the United States of America and Charles Malik of Lebanon. The Commission on Human Rights was the body responsible for choosing to proceed by means of a declaration instead of a convention. See generally J Morsink *The UDHR of Human Rights: Origins, Drafting and Intent* (1999).

<sup>17</sup> See Steiner (note 5 above) 60. For an analysis see C Chinkin ‘International law and human rights’ in T Evans (ed) *Human rights fifty years on: a reappraisal* (1998) 105-129.

<sup>18</sup> The Universal Declaration of Human Rights. Adopted by the General Assembly of the United Nations, resolution 217 (III) of 10 December 1948. UN Doc. A/3/810 (1949).

on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, (ICESCR),<sup>19</sup> as well as the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion.<sup>20</sup>

One of the purposes of this chapter is to provide a detailed assessment of the fundamental elements of freedom of thought, conscience and religion and the manifestation of this freedom as developed in the international and regional arena. Therefore the role, significance, impact and implementation as well as the status of these foundational instruments and the ancillary instruments protecting the right to freedom of religion within the international framework will be discussed next.

#### **4.2.1 The Universal Declaration of Human Rights**

The third General Assembly of the UN adopted the UDHR on 10 December 1948, three years after the end of World War II. In their final comments, the delegates to that Assembly made it clear that the Declaration was brought into being out of the experience of the war that had just ended.<sup>21</sup> It is significant that in the course of two years the

---

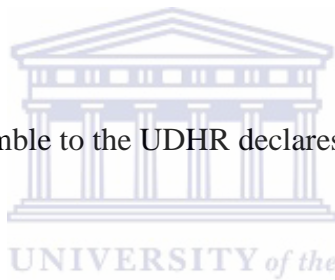
<sup>19</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976; International Covenant on Economic, Social and Cultural Rights, (ICESCR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) and entered into force Jan. 3, 1976.

<sup>20</sup> Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Proclaimed by the General Assembly of the United Nations, resolution 36/55 of 25 November 1981. GA Resolution.

<sup>21</sup> J Morsink 'World War Two and the Universal Declaration' (1993) 15(2) *Human Rights Quarterly* 357, 357. Mr Malik, the representative from Lebanon, said that the document 'was inspired by opposition to the barbarous doctrines of Nazism and fascism.' See U.N. GAOR, 3rd Sess., 181 st-183rd plenary meeting at 857, U.N. Docs. A/C.3/SR.181-183 (1948). He recalled in later years that 'it was impossible to brush aside the reflection that the proclamation of the Declaration in 1948 was really something of a miracle, so that if it were not proclaimed then, possibly we would still be working on it now.' C Malik 'Report of the 8th Session of the Human Rights Commission (14 April-13 June 1952)' 13 *U.N. Bulletin* (Sept. 1952) 248. Malik was the rapporteur of all three sessions of the Human Rights Commission that drew up the Declaration and the president of the Third Committee in which 'the great debates' took place.

international community was able to agree on a declaration, while the adoption of the subsequent covenants on civil and political rights as well as social and economic rights took over two decades.<sup>22</sup>

The UDHR was proclaimed to be ‘a common standard of achievement for all peoples and all nations’.<sup>23</sup> The UDHR, as a General Assembly Resolution is not legally enforceable. Indeed the UDHR was the first significant international instrument aimed at promoting principles of religious liberty.<sup>24</sup> It has however been noted that the UDHR expresses what in the fullness of time, ought to become general principles of law recognised and acted upon by state parties.<sup>25</sup> Indeed, many of the rights enshrined in the UDHR are now considered to be general principles of law. Some even have the status of customary international law.<sup>26</sup> In addition, the formulation of later binding treaties was fashioned on the provisions of the UDHR.<sup>27</sup>



The first paragraph of the Preamble to the UDHR declares:

---

<sup>22</sup> M Nowak *Introduction to the International Human Rights Regime* (2003) 75.

<sup>23</sup> To reach agreement on what presents a common standard for all people is no simple feat. Morsink comments that as human rights can be characterised in two manners, as a positive and a negative, and as it is often impossible for persons of different philosophical persuasions or of different cultural backgrounds to agree on what belongs to the essence-of a human being, the positive human rights, agreement is more readily achieved through the negative path of non-discrimination, Morsink (note 21 above) 357, 365. See further MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

<sup>24</sup> DH Davis ‘The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief’ (2002) *Brigham Young University Law Review* 217, 223.

<sup>25</sup> Steiner (note 5 above) 147. Regarding the drafting and value of the UDHR see generally Morsink (note 16 above).

<sup>26</sup> Steiner *ibid* 137.

<sup>27</sup> The UDHR is a set of recommended standards which includes six groups of rights including security rights, due process rights, and liberty rights, rights of political participation, equality rights, and social rights. The right to the free exercise of religion was one of the four basic liberty rights or freedoms.

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

The recognition of this inherent dignity of free and equal human beings is affirmed in article 1 which reads:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Steiner *et al* observes that the UDHR was far more influenced by a dignitarian approach than individualistic rights.<sup>28</sup> Individualistic rights implicitly place the highest priority on individual freedom, are typically formulated without any explicit reference to limitations, and are usually not expressed in relation to other rights and responsibilities. Dignitarian rights, place more emphasis on the fact that the bearer of rights is situated within a family and a community. The limitations of the right in relation to other rights and responsibilities are clearly expressed, with greater attention given to the existence of duties in relation to the exercise of rights.<sup>29</sup> In terms of the dignitarian influence of the UDHR everyone is considered a unique individual, but constituted by and through relationships with others. Accordingly everyone is expected to act towards others ‘in a spirit of brotherhood’ as determined in article 1.

The aim of the UN was largely the eradication of discrimination.<sup>30</sup> Article 2 specifically refers to religion in the quest for equality when it states that:

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

---

<sup>28</sup> Steiner (note 5 above) 141. The wording of article 1 of the UDHR shows some resemblance to the African concept of *ubuntu*, that means ‘constituted by and through relationships with others’. In this regard see the discussion on *ubuntu* in section 5.6.

<sup>29</sup> *Ibid.*

<sup>30</sup> Morsink (note 21 above) 405.

The substantive right to freedom of religion or belief is set out in article 18 of the UDHR. This article is mirrored by almost all other international, most regional and several national instruments. Article 18 of the UDHR reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

From this reading it is apparent that '[e]veryone' has the right to religious liberty by virtue of their very nature as human beings. Furthermore, the right to freedom of religion is broadly defined partly because religion is inherently indefinable. The meaning of the term is potentially limitless as definitions may unacceptably limit the application of the right.<sup>31</sup> A particularly important aspect of the right to freedom of religion or belief is that it protects the communal dimension of manifesting ones belief in community with others. The manifestation of religion or belief is described in a list of activities that are representative of the right and include teaching, practice, worship and observance.

In addition to the provisions protecting the right to freedom of religion in terms of article 18, religious freedom is also protected in terms of other provisions in the UDHR. Equality before the law, particularly important for religious discrimination cases, in a separate equality and non-discrimination clause is contained in article 7.<sup>32</sup> The right to education as a means of advancement throughout one's life is established in Article 26 and is directed toward the full development of the human personality. Moreover, education is tasked with promoting understanding, tolerance and friendship amongst all

---

<sup>31</sup> The UDHR made sure to include 'whatever' before 'belief' in the preamble and in article 1(1). This has been well received as it sends out a message that the Declaration protects agnosticism, atheism and rationalism. Davis (note 24 above) 217, 229.

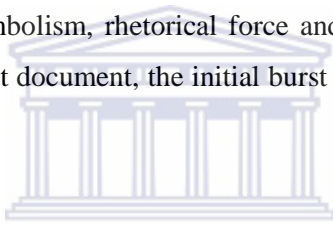
<sup>32</sup> Article 7 of the UDHR reads: 'All are equal before the law and are entitled without any discrimination to the equal protection of the law. All are entitled to equal protection without any discrimination against any discrimination in violation of this Declaration and against any incitement to such discrimination'.



nations, racial and religious groups.<sup>33</sup> The right of parents to choose the education that shall be given to their children is guaranteed in article 26(3)<sup>34</sup> and the right to a religious cultural life is protected in terms of article 27.<sup>35</sup>

After the creation of the UDHR, the Human Rights Commission<sup>36</sup> continued to attempt to formulate treaties that would make the rights in the UDHR into binding norms of international law. Almost twenty years after the UDHR, the United Nations General Assembly (UNGA) finally approved the ICCPR and the ICESCR.<sup>37</sup> These treaties embodying UDHR rights received sufficient ratifications to become operative in 1976 and are at present the most important UN human rights treaties and together with the UDHR are referred to as the International Bill of Rights.<sup>38</sup> This significance of the role played by the UDHR is encapsulated by the following phrase:

To this day it retains symbolism, rhetorical force and significance in the human rights movement. It is the parent document, the initial burst of idealism and enthusiasm, terse,



---

<sup>33</sup>Article 26(2) of the UDHR reads: ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace’.

<sup>34</sup> Article 24(3) of the UDHR reads: ‘Parents have a prior right to choose the kind of education that shall be given to their children’.

<sup>35</sup> Article 27(1) of the UDHR reads: ‘Everyone has the right to freely participate in the cultural life of the community...’

<sup>36</sup> In 2006 the longstanding UN Human Rights Commission was replaced by a new Human Rights Council.

<sup>37</sup> International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature and accession by the UNGA, resolution 2200 ( XXI) of 16 December 1966. Entered into force on 3 January 1976. With regards to the provisions of the ICESCR reference to religion is made in terms of article 2(2), which provides for non discrimination in the following terms: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

<sup>38</sup> See generally Steiner (note 5 above); M Nowak *UN Covenant on Civil and Political Rights: ICCPR Commentary* 2<sup>nd</sup> ed (2005); and Nowak (note 22 above).

more general and grander than the treaties, in some sense the continuation of the whole movement.<sup>39</sup>

### **4.3 International Covenant on Civil and Political Rights**

The preamble to the ICCPR<sup>40</sup> states that it takes into consideration the principles of the Charter of the UN, and affirms the inherent dignity and equal and inalienable rights of all members of the human family. Furthermore, the preamble acknowledges the UDHR and considers the obligation of states under the Charter to promote the universal observance of human rights and freedoms.

The ICCPR has been ratified by more than three quarters of the states in the world and is one of the most significant treaties on human rights. Unlike the values contained in the UDHR, the ICCPR binds states to observe its guarantees and imposes on state parties the obligation to implement the ICCPR through legislative and other means.<sup>41</sup> In particular, the state agrees to ensure to all within its jurisdiction, without distinction, the rights guaranteed in the ICCPR.<sup>42</sup> The ICCPR reaffirms the right to self-determination.<sup>43</sup>

---

<sup>39</sup> Steiner (note 5 above) 120.

<sup>40</sup> International Covenant on Civil and Political Rights (1966) (ICCPR) Adopted and opened for signature, ratification and accession by the UNGA, resolution 2200 (XXI) of 16 December 1966. Entered into force on 23 May 1976.

<sup>41</sup> Article 2, Part II of the ICCPR reads:

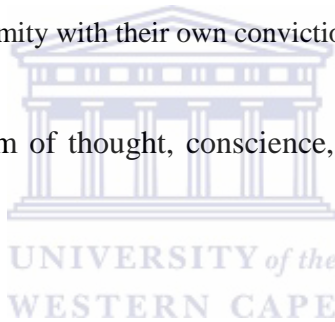
‘1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The obligations of state parties are established in Article 2(1) specifically mentions religion. Article 2(1) has been enhanced by requiring state parties in Articles 2(2) and 2(3) in relation to adopting legislative or other measures as maybe necessary to give effect to the rights recognized in the present Covenant. Through imposing this obligation a remedy is provided for those whose rights as protected in the Covenant have been abused’.

<sup>42</sup> Article 2, Part II of the ICCPR.

Article 18 deals specifically with the right to freedom of religion and reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.<sup>44</sup>
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In addition the right to freedom of thought, conscience, and religion is listed in article 4(2) as a non-derogable right.<sup>45</sup>



---

<sup>43</sup> Article 1, Part I of the ICCPR reads: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

<sup>44</sup> Articles 18(1) and 18(2) of the ICCPR are different from Article 18 of the UDHR in that the UDHR specifically protects the freedom to change one's religion or belief, whilst the ICCPR limits itself to protecting the freedom to have or to adopt a religion or belief of one's choice as well as forbidding any coercion that would harm this freedom. This change was introduced by the Muslim countries as through one of the understandings of Islamic Law it is a capital offence for a Muslim to denounce Islam or convert to another faith. In this regard see B Dickson 'The United Nations and Freedom of Religion' (1995) 44(2) *The International and Comparative Law Quarterly* 341, 342.

<sup>45</sup> Article 4(1) of the ICCPR provides for the derogation from obligations under the ICCPR 'in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ... provided that such measure are not inconsistent with [State Parties'] other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin'. Article 4(2) states that 'No derogation from Articles 6, 7, 8 (para 1 and 2), 11, 15, 16 and 18 may be made under this provision'.

The implementation of the ICCPR is monitored by the ICCPR Human Rights Committee,<sup>46</sup> which issues General Comments,<sup>47</sup> as interpretative guidelines of the provisions in the ICCPR<sup>48</sup>. Regarding the right to freedom of religion, the ICCPR Human Rights Committee has issued General Comment 22.<sup>49</sup> Therefore the discussion of the provisions of article 18 incorporates the interpretative guidelines of General Comment 22.

Article 18 consists of four sections. First, the guarantee to freedom of thought, conscience, and religion, described as the *forum internum*; second, aspects concerning coercion and proselyting. Third, the limitation of manifestation of religious freedom, or the so called *forum externum* and lastly, a special clause on the religious education of children and the religious rights of parents and guardians is included.<sup>50</sup>

Regarding the *forum internum*, General Comment 22 signifies that the *forum internum* goes beyond religion alone. Freedom of thought and conscience are entitled to equal protection.<sup>51</sup> The ICCPR Human Rights Committee, although specifying that religion and belief should be widely construed has not provided a clear definition of the terms religion, thought or conscience.<sup>52</sup> However, article 18 is not restricted to the protection

---

<sup>46</sup> The body of independent experts monitoring the implementation of the provisions of the ICCPR is known as the ICCPR Human Rights Committee (HRC). For a further discussion on the role of the ICCPR Human Rights Committee see section 4.7.1.

<sup>47</sup> Article 40(4) of the ICCPR provides that: 'The Committee shall study the reports submitted but the State Parties to the present Covenant. It shall transmit reports, such as general comments as it may consider appropriate to the State Parties...' These general comments may range for those which are authoritative interpretations of the relevant treaty norms, to others that are no more than mere advisory opinions. See generally Steiner (note 5 above) 837 and further.

<sup>48</sup> Nowak (note 38 above) 80.

<sup>49</sup> See UN ICCPR Human Rights Committee, 20 July 1993 (CCPR/C/21/Rev.1/Add.4): General Comment 22, article 18, UN Doc. HRI/GEN/I/Rev. 1,35.

<sup>50</sup> Article 18(4) of the ICCPR is similar to article 13(3) of ICESCR by creating interdependence between the two covenants.

<sup>51</sup> ICCPR Human Rights Committee General Comment 22 paragraph 1.

<sup>52</sup> ICCPR Human Rights Committee General Comment 22 paragraph 2.

of long established religions, as it covers theistic, non-theistic and atheistic beliefs as well. The internal freedom of religion includes the right to change religion.<sup>53</sup> This internal freedom protects the rights of parents and guardians to ensure the religious upbringing of children in conformity with their own convictions.<sup>54</sup>

#### **4.3.1 The right to manifest religious belief**

It is in particular the right to manifest religious belief that calls for a more detailed discussion.<sup>55</sup> Regarding the right to manifest religious belief, article 18(3) of the ICCPR provides for the regulation of the external freedom of the right to manifest religious belief. In terms of the external freedom, everyone has the right, either alone or in community with others, in public or private, to manifest his or her religion or belief in teaching, practice, worship and observance.<sup>56</sup> Article 18 clearly contains a community aspect, namely ‘individually or in community with others’. Nevertheless, it remains an individual right, not a group right.<sup>57</sup> Regarding the manifestation of religious belief, the ICCPR Human Rights Committee lists the following different forms of manifestation:

The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts, including the building of places of worship and the use of ritual formulae and

---

<sup>53</sup> The ICCPR Human Rights Committee has observed that “the freedom to ‘have or adopt a religion or belief necessarily entails the freedom to choose a religion or belief, including *inter alia* the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.” - ICCPR Human Rights Committee General Comment 22 paragraph 5.

<sup>54</sup> Article 18(4) of the ICCPR.

<sup>55</sup> For further reading on the protection of the right to freedom of religion and the right to manifest religious belief see N Lerner ‘The Nature and Minimum Standards of Freedom of Religion or Belief’ in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 63 – 83.

<sup>56</sup> Article 18(1) of the ICCPR.

<sup>57</sup> The recognition of group rights is evident from the provisions of the African Charter, Article 27(2) provides for an indirect duty, in so far as it states that ‘the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’.

objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.<sup>58</sup>

The external freedom, the manifestation of one's religion or belief, may only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or moral or fundamental rights of others.<sup>59</sup> The ICCPR Human Rights Committee accentuates that article 18(3) is to be 'strictly interpreted'<sup>60</sup> and limitations may not be applied in a manner that would vitiate the right to freedom of religion.<sup>61</sup> The grounds on which the right to freedom of religion may be limited also differs from others rights contained in the ICCPR,<sup>62</sup> and are more limited than in other articles.<sup>63</sup> Article 18(3) is not inclusive of restrictions that are necessary for the protection of 'public order (*ordre public*)' and 'national security', and unlike other ICCPR provisions, restrictions under article 18 are only allowed if they are to protect the 'fundamental' rights and freedoms of others'.<sup>64</sup> Consequently restrictions are not allowed on grounds not specified. It is not clear whether 'public' qualifies 'order', 'health' and 'morals' even though the preferable point of view is that it should.<sup>65</sup> Limitations may be applied for only those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>66</sup>

---

<sup>58</sup> ICCPR Human Rights Committee General Comment 22 paragraph 4.

<sup>59</sup> Article 18(3) of the ICCPR.

<sup>60</sup> ICCPR Human Rights Committee General Comment 22 paragraph 8.

<sup>61</sup> A Amor 'Foreword By the United Nations Special Rapporteur of Religion or Belief' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2001) xvi.

<sup>62</sup> ED Malcolm '*Religious Liberty and International Law in Europe*' (1997) 223.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> TM Parker 'Freedom to Manifest Religious beliefs; An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2007) 17 *Duke Journal of Comparative & International law* 91, 95.

When states, for example, seek to compel or prohibit the wearing of the Islamic headscarf-*hijab* the principles contained in article 18(3) will be central to the claim of the state. Accordingly the state would have to show that the limitation is ‘prescribed by law’ and is ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. In accordance with the interest rule any proposed limitation on religious liberty would have to meet a dual test:

[T]he liberty limited would have to be uniformly limited with respect to all, or very nearly all, persons, regardless of faith, and the limitation would have to constitute ‘the least restrictive means’ of achieving the interest.<sup>67</sup>

Of particular relevance is the enquiry that the states’ interest in preserving national security, order, health or some other value is not a manipulated as a mere ploy for the oppression of religious minorities.<sup>68</sup> The limitation on the right to manifest religious belief through the wearing of the Islamic headscarf-*hijab* amongst other forms of manifestation will be discussed in more detail in section 6.2.

In addition to the provisions protecting the right to freedom of religion in terms of article 18, religious freedom is also protected in terms of other provisions in the ICCPR. Children’s rights to religion are guaranteed under article 24,<sup>69</sup> as well as in the non-discrimination clause.<sup>70</sup> The right to equal treatment and the prohibition of discrimination on the ground of religion is discussed in more detail below.

---

<sup>67</sup> A Nathan ‘A Human Rights Imperative: Extending Religious Liberty beyond the Border’ (2000) 33(2) *Cornell International Law Journal* 47, 63.

<sup>68</sup> *Ibid* 47, 63.

<sup>69</sup> Article 24(1) of the ICCPR reads that: ‘Every child shall have, without discrimination as to race, color sex, language, religion, national and social origin, property or birth, the right to such measures of protection as required by his status as a minor, on the part of his family, society and the State’.

<sup>70</sup> Article 26 of the ICCPR.

### 4.3.2 The right to non-discrimination

The right to non-discrimination in the ICCPR covers discrimination based on the ground of religion.<sup>71</sup> Equality before the law, particularly important for religious discrimination cases, in a separate equality and non-discrimination guarantee is contained in article 26 which states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Religion is specifically mentioned as a ground for non-discrimination. General Comment 22 on the right to freedom of thought, conscience, and religion, places an emphasis on equality and non-discrimination. Therefore, any limitation on the right to manifest religious belief is only permissible if it is not discriminatory. The achievement of equality is often elusive as a result of the influence of the state or majority. The dictates of equality towards religion and non religion alike requires that a particular viewpoint may not receive privileges or be valued as the official ideology in opposition to other religions or beliefs. In practice actual neutrality *vis-à-vis* other religions is sparse<sup>72</sup> and

---

<sup>71</sup> Article 2(1) of the ICCPR reads that: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

<sup>72</sup> This is aptly illustrated by the decision of the European Court of Human Rights in *Hoffmann v Austria* 17 EHRR 293 (1994) (ECtHR 255-C, 23 June 1993). This case clearly illustrates the prejudice of the Austrian Supreme Court against Jehovah's witnesses. Mrs. Hoffmann, originally of Roman Catholic belief, married to a Roman Catholic; subsequently joined the Jehovah's witnesses. Following the breakdown of her marriage, she left the matrimonial home, together with her two baptised Roman Catholic children. Both parents applied for custody. The Austrian Supreme Court reversed the lower courts grant of custody to the mother. In motivation of this decision the Austrian Supreme Court referred to the religion of the mother and argued that in the event of her children in future needing a blood transfusion her total rejection of this treatment would not to be in the best interest of the children. The Austrian Supreme Court reached this



the elusive notions of state neutrality and uniformity are often indicative of a predisposition towards traditional religions.

The effect of this predisposition is that the rights of adherents of non-traditional religions may be limited. This limitation has a further consequence that the limitation is discriminatory on the basis of religion or belief in that the limitation only affects adherents of religious belief who are, for example, required to wear religious dress. In addition the restriction could be discriminatory on the grounds of sex in that, for example in the case of religious dress only women are required to wear headscarves or only men are required to wear turbans.

The right to non-discrimination is also entrenched in specific conventions such as the Convention on the Elimination of Discrimination against Women (CEDAW).<sup>73</sup> In CEDAW gender equality is viewed in terms of substantive equality and not in terms of formal equality.<sup>74</sup> Substantive equality is a departure of formal equality in terms of which likes are treated alike, while substantive equality is concerned that laws and practice do not diminish women's access to societal goods that in return may perpetuate discrimination. It is contended that the application of substantive equality with regards to ensuring non-discrimination in relation to the right to manifest religious belief is particularly relevant.

---

decision because of an event that may never occur. The reasoning of the court appears to be favouring the dominant religion in Austria while at the same time discriminating against other religions, such as the Jehovah's witnesses. Another area where state or majority religions regularly receive privileged treatment that may discriminate against members of other religions is the requirement of a public oath. Similarly the refusal of minority religions the right to conscientious objection from military service may be indicative of the favouring of state or majority religions.

<sup>73</sup> See section 4.5 above.

<sup>74</sup> M Shivdas, & S Coleman *Without Prejudice: CEDAW and the Determination of Women's Rights* (2010) 5 Regarding the different between substantive and formal equality see generally M Rosenfed 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal' (1986) 74 *California Law Review* 1687.

The requirement for non-discrimination becomes even more precarious in light of the fact that states are influenced by the values of the dominant or majority religion and often may attempt to perpetuate these values and privileges even in the time of increasing religious diversity and multiculturalism. It is further apparent that these permissible grounds of limitation may be deployed to give effect to other less legitimate concerns, such as for example the maintenance of privilege for the majority religion or the discrimination against religious minorities.

### **4.3.3 The rights of religious minorities**

The right to freedom of religion in terms of the provisions contained in article 18 of the ICCPR provide solely for the protection of the individuals' right to freely belief and to manifest her religious belief. As indicated previously<sup>75</sup> it is premised that the right to freedom of religion, for many believers, does not only refer to their relationship with a religious deity, but that belief is central to all their activities as well as their capacity to relate in a meaningful manner to 'their sense of themselves, their community and their universe'.<sup>76</sup> Therefore the individual makes sense of herself through her community; and the right to freedom of religion must also be appreciated in the light of the religious communities to which religious adherents belong. The ICCPR does not provide for group rights but does make provision for the protection terms of the rights of religious minorities, as provided for in article 27 of the ICCPR.

In addition the ICCPR Human Rights Committee accepts the position that an official state religion is not *per se* a violation of article 18, but emphasises that such an official state religion 'shall not result in the impairment of the enjoyment of any of the rights under the ICCPR, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers'.<sup>77</sup>

---

<sup>75</sup> See section 3.7.

<sup>76</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 36.

<sup>77</sup> ICCPR Human Rights Committee General Comment 22 paragraph 9.

The rights of religious minorities are protected in terms of article 27 of the ICCPR which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 determines that persons belonging to these minority groups shall not be deprived of their right to enjoy their own culture, acknowledge as well as practice their own religion, or use their own language.<sup>78</sup> The actions of the majority indeed have the potential to negatively affect religious and ethno-religious groups.<sup>79</sup> However, regardless of the protection entrenched in article 27 no successful claims have been brought by members of a minority under this provision. This may be due to the narrow interpretation of what constitutes an ‘ethnic, religious, or linguistic minority’ as well as the fact that minority rights may only be claimed in the collective context.<sup>80</sup>

Regarding the rights of religious minorities, the ICCPR Human Rights Committee has issued General Comment 23. To this day article 27 of the ICCPR remains the only

---

<sup>78</sup> Dickson (note 44 above) 341, 341.

<sup>79</sup> N Lerner ‘Proselytism, Change of Religion, and International Human Rights’ (1998) 12 *Emory International Law Review* 477, 534.

<sup>80</sup> B Meyler ‘Religion and Morality in The Public Square: The Limits Of Group Rights: Religious Institutions And Religious Minorities in International Law’ (2007) 22 *St. John's Journal of Legal Commentary* 535,548. Regarding the scrutiny of a limitation imposed on article 27 rights, see the Siracusa Principles (United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985) Principle 10 lays down the following criteria to determine the ‘necessity’ of a limitation on article 27. First, the limitation must be based on one of the grounds justifying limitations recognised by the relevant article of the ICCPR. Second, it must respond to a pressing public or social need. Thirdly, it must pursue a legitimate aim, and lastly must be proportionate to that aim. In addition, Principle 11 requires that any assessment to determine the necessity of a limitation shall be made on objective considerations and in contemplation of the least restrictive means of achieving the purpose.

universally applicable norm concerning minority identity. At the time of its drafting a cautious view of minority identity was taken, and it was formulated as a negative right in terms of which the state undertakes to refrain from interfering with the existence of minimum attributes of minority identity, namely to enjoy their own culture or to profess and practice their own religion.

This minimalistic and negative approach to toleration of minorities has been adapted with a move from toleration to promotion of the rights of minorities. The ICCPR Human Rights Committee, has considerably broadened the obligation contained in article 27:

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State Party.

6.2 Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the group ...<sup>81</sup>

In this manner the ICCPR Human Rights Committee has placed a proactive obligation on state parties to ensure the maintenance of religious identities. What is required is a positive form of toleration in which the state is obligated to stimulate an environment in which believers may fully express their religious identities and the state is committed to proactively supporting their religious development. This supportive environment

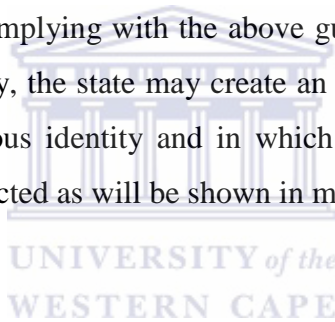
---

<sup>81</sup> ICCPR Human Rights Committee, ICCPR General Comment 23 paragraphs 1 and 6.

requires that religious believers may effectively and fully participate in the democratic decision making processes.<sup>82</sup>

The adoption of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>83</sup> has improved the recognition of the rights contained in article 27.<sup>84</sup> This 1992 Declaration is one of the core guidelines with regard to the protection of the right of minorities<sup>85</sup> and recognises the rights of minorities and includes the protection of their existence and identity as well the promotion of group religious identity.<sup>86</sup> However, as the rights are only acknowledged in the form of a declaration, the unwillingness of the organised international community to recognise group rights is apparent.<sup>87</sup>

It is contended that through complying with the above guidelines that require promotion of the group's religious identity, the state may create an environment in which believers may fully express their religious identity and in which the right to manifest religious belief is most extensively protected as will be shown in more detail in 8.4 and 8.5.



---

<sup>82</sup>M Weller 'Article 15' in M Weller (ed) *The Rights of Minorities: A Commentary of the European Framework Convention for the Protection of National Minorities (Oxford Commentaries on International Law)* (2005) 429, 432.

<sup>83</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Proclaimed by the General Assembly of the United Nations, resolution 47/135 of 18 December 1992 (hereinafter the 1992 Minorities Declaration).

<sup>84</sup> Dickson (note 44 above) 341.

<sup>85</sup> N Lerner (note 79 above) 534.

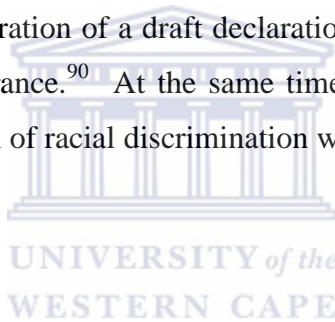
<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

#### **4.4 Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration)**

In addition to the International Bill of Rights, the 1981 Declaration<sup>88</sup> is the only other international instrument focused exclusively on matters of religion or belief. The 1981 Declaration, although not binding, is currently the most important global instrument concerning the protection of the right to freedom of religion and consequently for the right to manifest religious belief, as this instrument creates an unquestionable moral obligation, provide practical guidance to states and lays down norms of conduct.<sup>89</sup>

It is interesting to note that the controversial nature of the right to freedom of religion was apparent even before the adoption of the ICCPR. During 1960 the UNGA passed a resolution calling for the preparation of a draft declaration and a draft convention on the elimination of religious intolerance.<sup>90</sup> At the same time a draft declaration<sup>91</sup> and draft convention<sup>92</sup> on the elimination of racial discrimination were advanced. However, it took



---

<sup>88</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) proclaimed by GA Res.36/55 of 25 November 1981, UN Doc. A/36/51 (1982).

<sup>89</sup> For a comprehensive discussion of the 1981 Declaration, see N Lerner 'Religious Human Rights under the United Nations' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 114-127.

<sup>90</sup> In 1960 Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities A Krishnaswami of India initiated work on a study relating to discrimination in the matter of religious rights and practices. Following the Study of Discrimination in the Matter of Religious Rights and Practices, (E/CN.4/Sub.2/200/Rev.1), the UNGA in 1962 adopted a resolution requesting the Economic and Social Council of the United Nations (ECOSOC) to require the Commission to prepare a draft declaration and a draft convention on the elimination of racial discrimination, as well as a draft declaration and a draft convention on the elimination of all forms of religious intolerance.

<sup>91</sup> UN Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by the UNGA resolution 1904 (XVIII) of 20 November 1963.

<sup>92</sup> International Convention of the Elimination of All Forms of Racial Discrimination (1965) (New York, 21 December 1965) entered into force on 4 January 1969, 660 UNTS 195.

19 years before the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion could be adopted.<sup>93</sup>

The 1981 Declaration acknowledges in particular the importance of religion or belief as one of the fundamental elements in the conception of a person's life and confirms the essential need to promote understanding, tolerance and respect in matters relating to freedom of religion and belief. In addition, the preamble acknowledges the contribution that the right to freedom of religion should make in the elimination of ideologies or practices of colonialism and racial discrimination.

Article 1 of the 1981 Declaration provides for the right to freedom of religion as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

This protection of the right to freedom of religion is similar to article 18 of the UDHR. However, the right to change a religion is not specifically provided for. The 1981 Declaration follows the same approach as the ICCPR in drawing a distinction between the *forum internum* and *forum externum* rights. The external manifestations include the worship, observance, practice and teaching. The right to manifest religious belief too is similar to the limitations as provided for in article 18(3) of the ICCPR. The right to freedom of religion may be limited if such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, as well as the fundamental rights of others. In particular the ambiguity of the concept 'morals' and 'fundamental rights of others' as a basis for limitation is yet again problematic due to the close nexus to

---

<sup>93</sup> N Lerner *Religion, secular beliefs and human rights: 25 years after the 1981 Declaration* (2006) 47.

freedom of religion or belief.<sup>94</sup> Firstly, the limitation based on public morals may be exploited to confront the principles on which the 1981 Declaration is based through attacks on the expression of beliefs and practices that diverge from the norm or dominant.<sup>95</sup> The limitation based on fundamental rights and freedoms of others is found to be problematic because the phrase ‘fundamental rights’ appears only in paragraph 1(3) which arguably narrows the range of human rights that will serve as a legitimate bases for restrictions to include only those human rights considered to be ‘fundamental’.<sup>96</sup> Nevertheless, it has been argued that the term ‘fundamental’ in implying a hierarchical relationship between fundamental rights and other rights can be deceptive.<sup>97</sup> The terms ‘fundamental rights’ and ‘human rights’ are also used interchangeably in both international and regional human rights instruments.<sup>98</sup>

It has been suggested that certain manifestations of religion or belief are ‘so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether’.<sup>99</sup> Rituals such as self-immolation, self mutilation, as well as human sacrifice, prostitution and slavery may be limited without amounting to discrimination as the offenders are ‘founded in the superior interests of society’.<sup>100</sup> Restriction of practices such as human sacrifice should be based upon the rights and freedom of others, rather than ‘superior interest of society’ because, ‘superior interest of society’ wrongfully assumes that diverse groups in society follow one value system.<sup>101</sup>

---

<sup>94</sup> DJ Sullivan ‘Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 *American Journal of International law* 487, 496.

<sup>95</sup> See generally N Lerner *Religion, Secular beliefs and Human Rights: 25 years after the 1981 Declaration* (2006).

<sup>96</sup> Sullivan (note 94 above) 487, 497.

<sup>97</sup> *Ibid* 497.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* 511.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid*.



The protection afforded to the right to freedom of religion in article 1 is enhanced by the provisions of article 2 dealing with non-discrimination.<sup>102</sup> In addition to prohibiting discrimination based on the grounds of religion or belief, article 2 goes a step further to adopt the language of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>103</sup> In terms of CERD ‘intolerance and discrimination based on religion or belief’ is generally defined as ‘any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis’.<sup>104</sup> This is said to include intentional or unintentional and public or private acts of discrimination.<sup>105</sup> While article 2(2) speaks of both ‘intolerance and discrimination’, article 4(2) alludes to of a difference between the two terms in the call for legislative action to proscribe discrimination while urging states to take all ‘appropriate measures’ to fight intolerance.<sup>106</sup> Intolerance is recognised as the attitudes that may motivate the violation of religious freedom or of discrimination, but is not a particular type of such violations.<sup>107</sup>

The 1981 Declaration expressly broadens the duties of the state parties in a significant manner.<sup>108</sup> When reading articles 2(1),<sup>109</sup> articles 4<sup>110</sup> and 7<sup>111</sup> concurrently, it is evident

---

<sup>102</sup> Article 2 states that: ‘1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purpose of the present Declaration, the expression “intolerance and discrimination based on religion or belief”, means any distinction, exclusion, restriction, or preference based on religion or belief and having as its purpose or effect the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis’.

<sup>103</sup> The International Convention on the Elimination of All Forms of Racial Discrimination adopted by UNGA resolution 2106 A (XX) of 21 December 1965 and entered into force on 4 January 1969. Discussed in more detail in section 4.5.

<sup>104</sup> Nathan (note 67 above) 47.

<sup>105</sup> *Ibid.*

<sup>106</sup> Sullivan (note 94 above) 503.

<sup>107</sup> *Ibid* 505.

<sup>108</sup> B Dickson (note 44 above) 344.

that national laws aimed at protecting an individual against religious discrimination even when practiced by another person must be enacted.<sup>112</sup> This shows a bold move to ensure that countries prohibit discrimination not only the hands of the state but also from a private individuals as well.<sup>113</sup> This step was not taken in either CERD or CEDAW.<sup>114</sup>

In addition in States that have both accepted the 1981 Declaration and have ratified the ICCPR, the Declaration has a binding effect as article 3 of the Declaration reads that discrimination on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the UN Charter, UDHR, the ICCPR and the ICESCR.<sup>115</sup>

#### 4.5 Other international instruments

Notwithstanding these seminal instruments, the right to freedom of religion is further protected in terms of the provisions of other international instruments, which although directed towards the protection of other specific rights, refer to religious rights. To list

---

<sup>109</sup> Article 2(1) of the 1981 Declaration states that: ‘No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief’.

<sup>110</sup> Article 4(1) and (2) of the 1981 Declaration states that: ‘(1) All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

(2) All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter’.

<sup>111</sup> Article 7 of the 1981 Declaration states that: ‘The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice’.

<sup>112</sup> Dickson (note 44 above) 344.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid* 345.

but a few: The Convention on the Prevention and Punishment of Genocide<sup>116</sup> which defines genocide as prohibited conduct committed with ‘the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such’.<sup>117</sup> CERD refers to discrimination based on ethnic origin in article 1(1) and defines racial discrimination inclusive of discrimination based on ethnic origin, which can include a religious element.<sup>118</sup> The interrelation between religion and ethnicity was also drawn in section 1.3. Though most texts on race made no specific mention to specific religious rights, CERD provides guidelines to the rules on discrimination with religion being inclusive as a ground on which discrimination is prohibited.<sup>119</sup> Article 4 deals with the prohibition of racial discrimination, incitement and hatred and has gone a step further than article 20(2) of the ICCPR to prohibit incitement to discrimination, hostility or hatred on religious grounds.<sup>120</sup>

As mentioned previously, important for women are the provisions of CEDAW and its Optional Protocol.<sup>121</sup> The Optional Protocol allows individuals whose countries are party to CEDAW and the protocol, who claim their rights under CEDAW have been violated, and who have exhausted all local remedies, to submit written communications to the UN Committee on the Elimination of All Forms of Discrimination against Women to enforce their rights.

---

<sup>116</sup> The Convention on the Prevention and Punishment of Genocide, approved and proposed for signature, ratification or accession by UNGA, resolution 260 A (III) of 9 December 1948. Entered into force on 12 January 1951.

<sup>117</sup> Article II of the Convention on the Prevention and Punishment of Genocide.

<sup>118</sup> Article 1(1) of CERD reads as follows: ‘In this Convention the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. CERD was the first human rights instrument to establish an international monitoring system and commits states to change laws and policies that perpetuate racial discrimination.

<sup>119</sup> Lerner (note 79 above) 540.

<sup>120</sup> *Ibid.*

<sup>121</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Significant for children and their religious upbringing is the Convention on the Rights of the Child<sup>122</sup> (CRC) which considers that the child should be fully prepared to life and individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the UN, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.<sup>123</sup>

For the purposes of the CRC a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.<sup>124</sup> Importantly article 2 guarantees non-discrimination on a list of grounds, including non-discrimination on the ground of religious freedom.<sup>125</sup> The right to freedom of religion is guaranteed in article 14.<sup>126</sup> The article provides that ‘states shall respect the right of the child to freedom of thought, conscience, and religion, as well as the rights and duties of the parents or legal guardians to provide protection to the child in the exercise of his or

---

<sup>122</sup> Convention on the Rights of the Child, adopted for signature, ratification and accession by UNGA resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990. (CRC) G.A. Res. 25, U.N. Doc. A/RES/44/25 (1989).

<sup>123</sup> See generally S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999); also G Van Bueren *The International law on the Rights of the Child* (1995).

<sup>124</sup> Article 1 of the CRC.

<sup>125</sup> Article 2(1) and (2) of the CRC reads that: ‘(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members’.

<sup>126</sup> Article 14(1) – (3) of the CRC reads that: ‘(1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.

(2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

(3) Freedom to manifest one’s religion or beliefs may be subject to only such limitations as are prescribed by law and are necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others’.

her rights'.<sup>127</sup> However, the right of the parent to provide direction is curtailed in relation to the recognition of this right in other instruments in that the CRC appears to recognise to a greater extent the ability of the child to make his or her own fundamental decisions and choices.<sup>128</sup> Regarding the religious rights of minority children, article 30 provides for the protection of the ethnic, religious or linguistic child or a child of an indigenous origin to enjoy in community with other his or her own culture, to profess his or her own religion, or to use his or her own language. In addition to the above rights, children have a right to education as well in terms of article 28.<sup>129</sup> This right to education includes the right of adults to educate their children in accordance with the dictates of their belief<sup>130</sup> as well as the rights of the child to enjoy her own culture, to profess and practise her own religion, or to use her own language.<sup>131</sup>

The International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families<sup>132</sup> is inspired by the provisions of article 27 of the ICCPR.<sup>133</sup> Persons belonging to minorities have the right to enjoy their own culture and 'to profess

---

<sup>127</sup> Lerner (note 79 above) 537.

<sup>128</sup> Article 12 of the CRC.

<sup>129</sup> The CRC has been ratified by all states but for the United States of America and Somalia. The foundation of the CRC is that the 'best interest' of the child should be the 'primary consideration' in all matters concerning a child. In June 2004, the UN Committee on the Rights of the Child (UN Doc CRC/C/15/Add 240 paragraph 25-26 (30 June 2004)) specifically discussed the French restriction on the headscarf *-hijab* in terms of the French Law of 2004, observing the concern as follows: 'However, in the light of Article 14 and 29 of the Convention, the Committee is concerned by the alleged rise in discrimination, including that based on religion. The Committee is also concerned that the new legislation (Law No 2004 – 228 of 15 March 2004) on wearing religious symbols and clothing in public schools may be counterproductive, be neglecting the principle of the best interest of the child and the right of the child to access to education, and not achieve the expected results'.

<sup>130</sup> Article 18(4) of the ICCPR.

<sup>131</sup> Article 27 of the ICCPR.

<sup>132</sup> Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families G.A. Res. 158, U.N. Doc. A/RES/45/158 (1990). The Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities is also inspired by the provisions of article 27

<sup>133</sup> Article 27 of the ICCPR reads that: 'Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'.

and practice their own religion ... 'without interference or any form of discrimination' as provided for in article 2. This Convention contains a non-discrimination provision<sup>134</sup> which specifically mentions 'religion or conviction' as one of the possible grounds for discrimination.

The right to freedom of religion as provided for in article 12 reads as follows:

(1) Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.

(2) Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

This article also mentions the issue regarding the limitation on the right to freedom of religion by stating that the freedom 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, and the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions'.<sup>135</sup>

The above discussion constitutes a brief overview of other international instruments directed towards the protection of other specific rights and vulnerable groups that may indirectly have an impact on the right to freedom of religion. It is argued that in the light of the fact that these instruments are directed towards other specific rights they merely serve as an indication of the interrelated nature of human rights in general and the right to freedom of religion in particular. The protection afforded in terms of the core legal text, the ICCPR, regarding the protection of the right to manifest religious belief, remains the most effective. For this reason the above brief overview of other international

---

<sup>134</sup> Article 7 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>135</sup> Lerner (note 79 above) 477, 535.

instruments, which may have an impact on the right to freedom of religion is considered adequate.

#### **4.6 Other UN resolutions and related activities**

The core legal instruments aimed at the protection of the right to freedom of religion (the ICCPR, and the 1981 Declaration) have not been able to bring to an end the harm caused to humankind as a result of the disregard of the right to freedom of thought, conscience, religion or belief, as clearly shown previously.<sup>136</sup> Therefore the UN continues to emphasise the need to ensure comprehensive protection for the right to freedom of religion through various activities as illustrated by the discussion below.

The continued inability to eliminate religious intolerance was confirmed in the condemnation expressed by the 1993 Vienna World Conference on Human Rights<sup>137</sup> in response to the alarming report of Special Rapporteur on Religious Intolerance Angelo Vidal d' Almeida Riberio.<sup>138</sup> Following this call to governments to take measures to comply with their international obligations to counter intolerance based on religion or belief, the UNGA adopted a Resolution on the Elimination of All Forms of Religious Intolerance.<sup>139</sup> This Resolution affirms the fact that the existing principles of non-

---

<sup>136</sup> See section 1.1.

<sup>137</sup> The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 states in paragraph 5 that: 'All human rights are universal, indivisible and interrelated.... While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of their political, economical or cultural systems, to promote and protect all human rights and fundamental freedoms'. While paragraph 22 calls upon governments to take measure to comply with their international obligations to counter intolerance based on religion or belief.

<sup>138</sup> The Special Rapporteur on Religious Intolerance for the period 1986 – 1993. The title of the Special Rapporteur is as from 2000 the Special Rapporteur on Freedom of Religion or Belief. The role of the Special Rapporteur is discussed in more detail in section 4.7.2 below.

<sup>139</sup> 'Elimination of all Forms of Religious Intolerance' A/RES/48/128, December 1993.

discrimination and equality as well as the entrenched right to freedom of thought, conscience, religion or belief have not resulted in the extensive protection of the right to freedom of religion. The Resolution is a further effort to promote and protect the right to freedom of thought, conscience, religion and belief and to eliminate all forms of hatred and intolerance and discrimination based on religion or belief.

This continued inability to reduce religious intolerance and eradicate discrimination was once again the focus of attention in September 2001, when the international community met in Durban, South Africa for the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. The Durban Declaration and Programme of Action<sup>140</sup> dealt with racism in many forms, but included sections on religious intolerance. The importance of religion, spirituality and belief was acknowledged and the contribution of religion to the inherent dignity of individuals affirmed in the declaration that:

We recognize that religion, spirituality and belief play a central role in the lives of millions of women and men, and in the way they live and treat other persons. Religion, spirituality and belief may and can contribute to the promotion of the inherent dignity and worth of the human person and to the eradication of racism, racial discrimination, xenophobia and related intolerance.

The continued existence of political and legal structures that do not incorporate multi-ethnic, pluricultural and plurilingual characteristics was questioned.<sup>141</sup> Religious intolerance, and in particular the existence anti-Semitism and Islamophobia, were recognised.<sup>142</sup> Attempts to restrict the expression of religious identity amongst women of

---

<sup>140</sup> Durban Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, SA, from 31 August to 8 September 2001 (Hereinafter called the Durban Declaration).

<sup>141</sup> Paragraph 22 of the Durban Declaration reads: 'We express our concern that in some States political and legal structures or institutions, some of which were inherited and persist today, do not correspond to the multi-ethnic, pluricultural and plurilingual characteristics of the population and, in many cases, constitute an important factor of discrimination in the exclusion of indigenous peoples'.

<sup>142</sup> Paragraphs 59, 60 and 61 of the Durban Declaration.



certain faiths was condemned<sup>143</sup> and states were urged to ‘promote respect for the values of diversity, pluralism, tolerance, mutual respect, cultural sensitivity, integration and inclusiveness’<sup>144</sup> and to develop multiracial and multicultural societies in which people of different socially constructed races, colours, descent, national or ethnic origins, religions and languages may live together harmoniously.<sup>145</sup>

In the follow-up to the Durban Declaration the UNGA adopted Resolution 61/149<sup>146</sup> in 2006 in which the Special Rapporteur on Contemporary Forms of Racism, acknowledged yet again the increase in anti-Semitism, Christianophobia and Islamophobia in various parts of the world.

The call to acknowledge diversity and nurture tolerance, allowing for people of different religions to live together in harmony was once again accentuated at the 64th UNGA meeting.<sup>147</sup> At this UNGA meeting the then Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, expressed concern that, on the one hand, many believers are prevented from identifying themselves through the display of religious symbols (such as head coverings) and, on the other, that people in different countries are required to publicly display those religious symbols. She noted that some restrictions and violations were more prevalent in particular regions or countries, and that among them were restrictions posed on different forms of religious expression.

---

<sup>143</sup> Paragraph 71 of the Durban Declaration reads: ‘We deplore attempts to oblige women belonging to certain faiths and religious minorities to forego their cultural and religious identity, or to restrict their legitimate expression, or to discriminate against them with regard to opportunities for education and employment’.

<sup>144</sup> Paragraph 126 of the Durban Declaration.

<sup>145</sup> Paragraph 171 of the Durban Declaration.

<sup>146</sup> Resolution 61/149 *Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action A/RES/61/149* - 81st plenary meeting - 19 December 2006.

<sup>147</sup> 64<sup>th</sup> UNGA Third Committee 26th & 27th Meetings (AM & PM) Third Committee hears Presentations 23 October 2009 UNGA GA/SHC/3958.

In light of the above concerns it is apparent that the right to freedom of religion is constantly threatened by incidences of discrimination and intolerance. This discrimination and intolerance is particularly visible when it comes to limiting or prohibition of the right to manifest religious belief through the display of religious dress, such as the Islamic headscarf-*hijab*. Therefore an examination of the monitoring mechanisms of the international legal instruments is warranted and will be discussed next.

## **4.7 Monitoring mechanisms**

### **4.7.1 The ICCPR Human Rights Committee**

A common method of treaty monitoring within the UN is the creation of a standing committee or so-called treaty body<sup>148</sup> to monitor states parties' performance, and to which state parties are required to submit periodic reports on compliance. The ICCPR Human Rights Committee<sup>149</sup> is an independent body charged with monitoring the implementation of the ICCPR.

---

<sup>148</sup> The UN human rights monitoring arrangement consists of charter based bodies, whose creation is mandated by the Charter of the UN, such as the Human Rights Council (formerly the Commission on Human Rights). For a general overview of the charter based bodies see Steiner (note 5 above) 737 onwards. It can be said that the most important contribution of the charter-based bodies, has been the ever increasing body of standards designed to flesh out the meaning of the norms encapsulated in the UDHR. In addition to the so-called charter based bodies, are also treaty bodies, such as the ICCPR Human Rights Committee founded under the ICCPR.

<sup>149</sup> The ICCPR Human Rights Committee is established in terms of article 28. The ICCPR Human Rights Committee is one of several treaty bodies functioning under the various UN human rights treaties. The other bodies include amongst others: The Committee against Torture; the Committee on Economic, Social and Cultural Rights; the Committee on Elimination of Discrimination against Women; the Committee on the Elimination of Racial Discrimination; the Committee on the Rights of the Child; and the Committee on the Rights of Persons with Disabilities.

One of the tasks of the ICCPR Human Rights Committee is to accept individual communications in terms of the Optional Protocol.<sup>150</sup> The Optional Protocol on the ICCPR allows individuals from countries which are party to the ICCPR and the protocol who claim that their rights have been violated, and who have exhausted all local remedies, to submit written communication to the ICCPR Human Rights Committee. The ICCPR Human Rights Committee may then investigate, and mediate these complaints.<sup>151</sup> These individual communications are aimed at establishing whether States Parties have breached its treaty obligations and is not aimed at providing relief to individuals. The possibility for individual complaints at international level therefore does in no way mirror a judicial process or remedy under domestic legal systems.

Another important role of the ICCPR Human Rights Committee is the examination of state reports as set out in article 40 of the ICCPR. States have a mandatory obligation to submit reports on the measures they have adopted to give effect to the rights contained in the ICCPR within one year of their ratification of the ICCPR and thereafter whenever the Committee so requests. Since 1992 the ICCPR Human Rights Committee has made available collective opinions through concluding observations, which may include recommendations on the review of domestic legislation. This process requires countries to consult with the ICCPR Human Rights Committee and have their human rights

---

<sup>150</sup> Danchin reports that in the period from 1976 to 1995 there were fourteen communications alleging violations of article 18, coming from the following five states: Finland, the Netherlands, Canada, Germany and Colombia. The ICCPR Human Rights Committee declared nine of these inadmissible and in none of the remaining five did the Committee find a violation of article 18. Danchin therefore concludes that the ICCPR Human Rights Committee's interpretation of article 18 has been restrictive. However since 1995 the position has changed in that there has been a marked increase in communications. These and other communications will be discussed in more detail in section 6.2. See generally PG Danchin 'US Unilateralism and International Protection of Religious Freedom: The Multilateral Alternative' (2002 - 2003) 41 *Columbia Journal of Transnational Law* 33, 93 onwards.

<sup>151</sup> As at 1 June 2010, 113 of the 165 states adhering to the ICCPR had ratified this optional provision. The goals of the procedure are said to (a) enable the Committee to identify steps that States should take to comply with their international legal obligations in the context of concrete individual situations; (b) to offer individual relief to victims of human right violations; and (c) to stimulate general legal, policy and programme change.

problems exposed. The reporting procedure may be useful in encouraging countries to identify their problems and to devise methods of dealing with these. It must be mentioned that states have a tendency to provide the best available account of the situation of their country. In addition, a state may simply assert that cited domestic legislation meets its obligations. The ICCPR Rights Committee has emphasised that states should focus on the ‘practical application’ of the ICCPR within their jurisdiction.<sup>152</sup> In addition the ICCPR Human Rights Committee may provide interpretative comments on provisions in the ICCPR.<sup>153</sup> At the ICCPR Human Rights Committee, where an emphasis is placed on fact finding and reporting, clearly fulfils an important supervisory role over the compliance by individual states of the provisions of the ICCPR. However, in light of states reluctance to draw attention to their shortcomings the role of the Special Rapporteur on Freedom of Religion or Belief is called for.

#### **4.7.2 The Special Rapporteur on Freedom of Religion or Belief**

The then Commission on Human Rights (now called the Human Rights Council)<sup>154</sup> has since its inception been actively involved in efforts to promote and protect the right to freedom of religion or belief. At first the Commission was involved in the formulation of the text of what was to become article 18 of the ICCPR, which was followed by the elaboration of this right in the adoption of the 1981 Declaration. Of particular importance was the decision of the Commission in 1986<sup>155</sup> to appoint a Special

---

<sup>152</sup> The full text of amended guidelines for state reports (which are not binding) is included in UN Doc. A/56/40 vol.1 (2001), Annex.IIIA.

<sup>153</sup> Regarding the protection of the right to freedom of religion the ICCPR Human Rights Committee has issued General Comment 22. See discussion on General Comment 22 in section 4.3 above.

<sup>154</sup> In 2006 the longstanding UN Human Rights Commission was replaced by a new Human Rights Council. The Human Rights Council consists of 47 members, elected directly and individually by the UNGA with membership based on equitable geographic distribution. Council members serve terms of three years, with a limitation of no more than two consecutive terms. See generally O Hoehne ‘Special Procedures for the New Human Rights Council – A Need for Strategic Positioning’ (2007) 4 (1) *Essex Human Rights Review* 48.

<sup>155</sup> By way of Resolution 1986/20 of 10 March 1986.

Rapporteur on Religious Intolerance, now referred to as the Special Rapporteur on Freedom of Religion or Belief.<sup>156</sup> Special Rapporteurs are tasked primarily at examining either particular themes or the activities of particular states.<sup>157</sup> The Special Rapporteur on Freedom of Religion or Belief is tasked with reporting annually on the mandate to implement the 1981 Declaration. The Human Rights Council meets annually to hear reports from the Special Rapporteur on Freedom of Religion or Belief and to make recommendations if necessary to implement the 1981 Declaration.

The task of the Special Rapporteur is to ‘examine incidents and governmental action inconsistent with the provisions of the 1981 Declaration, and to recommend remedial measures for such situations’.<sup>158</sup> The responses of the states concerned, together with the communications are included in the annual reports submitted to the Human Rights Council. Another practice of the Special Rapporteur is the so called *in situ* visits with the consent of the state concerned, which has been in practice since 1994.<sup>159</sup> In addition

---

<sup>156</sup> In March – April 2001, by Resolution 2000/33, the Commission on Human Rights changed the title of the mandate of the Special Rapporteur on Religious Intolerance to the Special Rapporteur on Freedom of Religion and Belief that came into effect on 20 April 2000. Since 1986 the Commission has heard annual reports by three Special Rapporteurs: Mr Angelo d’Almeida Ribeiro (Portugal) for 1986–93; Mr Abdelfattah Amor (Tunisia) from 1993-2004 and Ms Asma Jahangir (Pakistan) from 2004 till June 2010. As from 1 August 2010 Mr. Heiner Bielefeldt assumed the responsibility of Special Rapporteur.

<sup>157</sup> For a discussion of Special Rapporteurs and their relationship with the Commission on Human Rights see T van Boven, ‘The United Nations Commission on Human Rights and Freedom of Religion or Belief’ in T Lindholm WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief. A Deskbook* (2004) 173, 174-5, 177-9 and 183-5.

<sup>158</sup> CHR Res. 1986/20, 42 UN ESCOR (no2) at 66, UN Doc. E/CN.4/1986/65 (1986).

<sup>159</sup> The following state visits have taken place: China (November 1994), Pakistan (June 1995), Iran (December 1995), Greece (June 1996), Sudan (September 1996), India (December 1996), Australia (February 1997), Germany (September 1997), USA (January 1998), Vietnam (October 1998), Turkey (December 1999), Bangladesh (May 2000), Argentina (April 2001), Algeria (September 2002), Georgia (August/September 2003), Romania (September 2003), Nigeria (February/March 2005), Sri Lanka (May 2005), France (September 2005), Azerbaijan (February/March 2006), Maldives (August 2006), Tajikistan (February/March 2007), United Kingdom (June 2007), Angola (November 2007), Israel and the Occupied Palestinian Territory (January 2008), India (March 2008), Turkmenistan (September 2008), The former Yugoslav Republic of Macedonia (April 2009), the Republic of Serbia, including a visit to Kosovo

countries who have received *in situ* visits should be encouraged to comment in more detail on the reports following such visits.<sup>160</sup> Since 1994 the Special Rapporteur has also been tasked with submitting interim reports to the UNGA. It is contended that the limited accountability of states to the Special Rapporteur results in the function of the Special Rapporteur being limited to dialogue with countries under enquiry.

The role of the Special Rapporteur is crucial for the protection of the right to freedom of religion or belief, is so far as this person may deal with issues relating to freedom of religion and non-discrimination, even in states which have not ratified the relevant treaties.<sup>161</sup> It has been suggested that the role of the Special Rapporteur ought to be enhanced and that the Human Rights Council should pay more consideration to the reports of the Special Rapporteur at its session.<sup>162</sup>

The previous Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, in her last report to the Human Rights Council<sup>163</sup> emphasised that prevention is the key for creating an atmosphere of religious tolerance. The structure of the state, its method of governance and commitment to fundamental human rights are central in creating religious harmony. In the 21<sup>st</sup> century, an increase of intolerance and discrimination on grounds of religion or belief is stimulating a search to find solutions to these problems. However, until freedom of religion achieves treaty-based convention status this solution

---

(April/May 2009) and Lao People's Democratic Republic (November 2009). Available from <http://www2.ohchr.org/english/issues/religion/visits.htm> > last accessed on 5 May 2010

<sup>160</sup> UN Economic and Social Council, Commission on Human Rights, *Report by the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, 16 February 2000, UN Doc. E/CN.4/2000/112, 56<sup>th</sup> Session, paragraph, 30 (2000).

<sup>161</sup> T van Boven (see note 157) 187.

<sup>162</sup> *Ibid* 173, 187.

<sup>163</sup> Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir A/HRC/13/40 - General Assembly 21 December 2009.

will be elusive within the international domain and the UN human rights system will be incomplete.<sup>164</sup>

Consequently the protection of the right to manifest religious belief is reliant upon other systems as well. Other than being party to one of the aforementioned international human right instruments, states may be party to a number of regional human right instruments.<sup>165</sup> Regional arrangements supplement the UN system by promoting and protecting human rights on specific continents that have been acceded to. Regional human rights instruments, in some cases, are a bridge between international and national human rights instruments on freedom of religion or belief.

#### **4.8 Regional level**

Regional measures compliment the UN system by promoting and protecting human rights in particular parts of the world. In this section the three principal regions, Europe, the Americas, and Africa, which have their own declarations and conventions for the protection of human rights will be discussed.

---

<sup>164</sup> The past and present controversy around religion made the reaching of a specific UN Convention pertaining to the protection of the right to freedom of religion unattainable. Consequently the UNGA adopted a Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief. Implementation of the 1981 Declaration is reviewed by the Special Rapporteur. For further suggestions on the strengthening of the role of the Special Rapporteur see C Evans 'Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief' (2006) 1 *Religion and Human Rights* 75-96.

<sup>165</sup> The 28<sup>th</sup> Report to the Commission to study the Organization of Peace as referred to in Steiner (note 5 above) 925, lists the following advantages of regional human rights regime in favour of the international regime: (1) the existence of geographical, historical and cultural bonds, (2) the regional organisation may often be met by less resistance than an international body, (3) publicity of human rights may be wider and more effective , and (4) a general compromise is less probable.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights and the African Charter on Human and Peoples Rights ensure the promotion and protection of human rights in Europe, the Americas and Africa, respectively. This chapter also examines the regional integration of the European Union, and studies the initiatives of the Council of Europe Framework Convention for the Protection of National Minorities and the Organisation for Security and Co-operation in Europe (OSCE), regarding the protection of the right to freedom of religion. These regional systems and the respective provisions protecting the right to freedom of religion in terms of these regional instruments will be dealt with next.

#### **4.8.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms**

In 1950, the then newly formed Council of Europe<sup>166</sup> created the ECHR<sup>167</sup> including standard civil and political rights similar to those contained in the UDHR. Over the years, the ECHR has been supplemented by a series of protocols that serve as amendments to the ECHR for members who are signatories to each protocol. Social

---

<sup>166</sup> The Council of Europe was established in 1949 by a group of ten states, primarily to promote democracy, the rule of law and greater unity among the nations of Western Europe. Until 1990 the Council of Europe had 23 members and today has 47 members, namely: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic, Republic of Macedonia, Turkey, Ukraine and the United Kingdom. Available at <<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10458.htm>>

last accessed on 08 May 2010.

<sup>167</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the Council of Europe on 4 November 1950 in Rome, and entered into force on 3 September 1953. Regarding the implementation of the ECHR see generally C Ovey & RCA White *The European Convention on Human Rights* (2002); P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights*, (1998); M Boyle, DJ Harris & C Warbrick *Law of the European Convention on Human Rights* (1995).



rights, however, were excluded and addressed in a separate document, called the European Social Charter.<sup>168</sup> The ECHR provides for legally enforceable rights via the European Court of Human Rights (ECtHR). Both individual petitions<sup>169</sup> and interstate complaints are provided for.

The right to freedom of thought, conscience and religion is recognised in article 9 of the ECHR which reads:

1. Everyone has the right to freedom of thought, conscience and religion, this right included the right to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 enshrines the principle of equality and prohibits discrimination based on religious grounds.<sup>170</sup> The right of parents to choose the religious or ideological orientation of their children's education is protected in article 2 of the 1<sup>st</sup> Optional Protocol.<sup>171</sup>

---

<sup>168</sup> The European Social Charter was adopted by the Council of Europe on 18 October 1961, in Turin, Italy and entered into force on 26 February 1965. The European Social Charter reflects the socio-economic rights of those state parties of the Council of Europe which have ratified the European Social Charter.

<sup>169</sup> Article 34 of the ECHR.

<sup>170</sup> Article 14 of the ECHR ensures that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

<sup>171</sup> When the ECHR was adopted in 1950 there were several proposals on which final agreement could not be reached. It was therefore agreed to adopt Protocols containing additional provisions. To date fifteen protocols have been opened for signature.

The jurisprudence of the ECtHR on matters pertaining to the right to freedom of religion is underdeveloped.<sup>172</sup> It was only with the historical case of *Kokkinakis v Greece*<sup>173</sup> in which the ECtHR held that a state's conduct violated article 9.

Within the European framework, the practice of the ECtHR as well as the former European Commission on Human Rights provides the structure for evaluating European standards in terms of the ECHR. In 1998, the Commission was abolished and the role of the Court expanded.<sup>174</sup> Citizens from the participating countries with human rights

---

<sup>172</sup> The first matter to be brought to the ECtHR relating to religious freedom was in 1993. In the following ten years the ECtHR declared only four admissible cases relating to article 9 challenges in which only two cases were found to violate article 9. In this regard see J Gunn 'Adjudicating Rights of Conscience Under the European Convention on Human Rights' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective* (1996) 305, 309- 310.

<sup>173</sup> *Kokkinakis v Greece* 17 EHRR 397 (1994) (ECtHR 260 A, 25 May 1993). The case involved the criminal conviction of a Jehovah's Witness for proselytism.

<sup>174</sup> Van Dijk and van Hoof described that the ECtHR acts as a 'constitutional court' interpreting the ECHR and is located in Strasbourg, France where it began its activities in 1952. Since 1 November 1998 individuals have the right of direct access to the court. Before 1998, individuals were permitted to file an application before the European Commission of Human Rights, alleging an infringement. The Commission decided on the issue of admissibility of the complaint to the European Court. Since the abolishment of the European Commission of Human Rights in 1998 in terms of Protocol 11, the European Commission no longer acts as a filter, deciding which cases deserved an examination by the ECtHR and the court may receive applications from individual/s. The ECtHR assumed the European Commission's previous function in determining issues of admissibility and merit. Furthermore the new ECtHR assumed the European Commission's earlier function of providing advisory opinions as well as the Commission's role of amicably settling claims. In addition, the function to make binding decisions relating to the issue of substantive breach of Convention provisions, which was held by the Committee of Ministers of the Council of Europe, was abolished. The European Court now determines issues of admissibility and merit through Committees comprising of three judges. Each application is examined by a committee of three judges and by unanimous vote the committee may declare an application 'manifestly ill-founded'. If a matter is found 'admissible' by court a chamber of seven judges will decide on admissibility, as well as the merits of the case. If court does not reach a unanimous decision regarding admissibility, the question of admissibility will be decided through chambers. Moreover chambers determine separately the merits of the claim. The Grand Chambers hear serious issues of interpretation and acts as an ultimate forum of appeal in exceptional circumstances. In this regard see generally P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights*, (1998)

complaints who are unable to find a remedy in their national courts may petition the ECtHR. Complaints by governments about human rights violations in another participating country are also permitted. The individual petitions system is extremely widely used and has resulted in fundamental reforms within the contracting states. However, the success of the ECtHR presently also poses the biggest challenge to the court in that an ever increasing workload may in due course result in its downfall.<sup>175</sup>

The procedures of the ECtHR are not considered further. However the jurisprudence of the ECtHR regarding the right to manifest religious belief will be fully explored in the following chapter. The ECHR is only but one manifestation of how European state parties strive for cooperation amongst themselves. Another example of cooperation is the European Union (EU).

#### 4.8.2 The European Union

Even though the founders of the EU had a vision of an integrated Europe, the modest beginning of the EU was primarily focused on the achievement of peace.<sup>176</sup> Overtime the

---

<sup>175</sup> Originally, the individual petition mechanism was optional and not widely used. All complaints were first considered by the European Commission, which then expressed its opinion on the merits of the case, and in the event of the contracting state having accepted the individual petitioning mechanism the Commission would refer the matter to the ECtHR. With its enlargement major reforms were required. The entire system was streamlined by Protocol No. 11. The right of individual petitioning has become compulsory and the Commission has ceased to exist, and individuals have direct access to the ECtHR. For an overview of the potential challenges posed by this overwhelming caseload see Steiner (note 5 above) 1001 onwards. Regarding the procedures followed by the ECtHR see generally Steiner (note 5 above) 943 onwards.

<sup>176</sup> The European Coal and Steel Community (ECSC) Treaty or Paris Treaty (1950) aimed to de-arm Germany by internationalising its military and military-industrial complex. The ECSC signed by the six founding members (Belgium, the Netherlands, Luxembourg, France, Italy and West Germany) became operational in 1951 and signified the reconciliation between France and Germany, two countries which had been at war or preparing for war from 1870. In this regard see generally PP Craig & G De Búrca *European Union law: text, cases, and materials* (2008).

integration among the member states of the EU expanded to economic cooperation<sup>177</sup> which further evolved into political cooperation.<sup>178</sup> The EU presently consists of 27 member states.<sup>179</sup> Craig and De Búrca describe that economic and political integration of the EU brought about legal integration as well. The legal Europeanisation is embodied in the body of law, the *acquis communautaire* that European institutions have created since 1957. The *acquis* is the result of legislative decisions, legal rulings, and political practices.

#### **4.8.2.1 The role of religion in EU law (*acquis communautaire*)**

The original intent of the EU was not primarily focused on individual human rights and especially not on the protection of religious freedom. However, following the movement towards the establishment of an internal market - one of the fundamental freedoms - the freedom of movement of people, in the field of labour law resulted in the passing of non-discrimination directives by the EU institutions. The incorporation of a social dimension within the framework of the EU occurred much more recently, with the inclusion of a Social Chapter in the Treaty establishing the European Union (TEU).<sup>180</sup> The Social Chapter refers to those parts of the treaty which deal with the equal treatment of men and

---

<sup>177</sup> Following the reconciliation of France and Germany through the ECSC, the next step towards integration was taken in 1952, with an unsuccessful attempt to create a European Defence Community (EDC). In 1957 impetus towards integration was once again successful in the establishment of the European Economic Community (EEC). With the completion of the internal market the EEC simply became the European Community (EC). See generally Craig & De Búrca (note 176 above).

<sup>178</sup> The provisions of the Treaty of the European Union (1992) (TEU) established a European Citizenship. See generally Craig & De Búrca (note 176 above).

<sup>179</sup> The original six member states (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) were joined in 1972 by Britain, Denmark, and Ireland. The second round of the EEC's enlargement occurred in Southern Europe in the 1980s, with the entry of Greece in 1981 and of Spain and Portugal in 1986. A third round of European enlargement came in the 1990s with the EU accession of Sweden, Finland, and Austria. The fourth and largest round was the EU's enlargement toward the East, accomplished in 2004 with the joining of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Cyprus and Malta. The most recent enlargement was with the joining of Bulgaria and Romania in 2007. See generally Craig & De Búrca (note 176 above).

<sup>180</sup> Also known as the Maastricht Treaty. This treaty was signed on 7 February 1992.

women in provisions such as article 141 of the TEU<sup>181</sup> and the regulation of working time under the Working Time Directive as well as the regulating of discrimination in terms of anti-discrimination directives.<sup>182</sup>

The TEU has been substantially amended by the Treaty of Amsterdam,<sup>183</sup> and further amended by the Treaty of Nice,<sup>184</sup> that has been replaced by the Treaty of Lisbon.<sup>185</sup> The Treaty of Lisbon, in addition to the Social Chapter of the EU, recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights<sup>186</sup> and makes the Charter legally binding. In addition the Lisbon Treaty provided for the accession of the EU to the ECHR.<sup>187</sup> It can therefore be said that economic Europe (the EU) has now joined human rights Europe (the ECHR).

---

<sup>181</sup> Now contained in Article 157 of the Lisbon Treaty.

Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>> last accessed on 5 November 2010.

<sup>182</sup> The anti-discrimination directives, applicable in the field of employment and occupation as well as the area of the provision of goods and services in the public and private sector. For example, directive 2000/43/EC concerns the equal treatment and non-discrimination of people of ethnic or racial origin. Directive 2000/78/EC is concerned with the establishment of a general framework for equal treatment in employment and occupation, prohibiting discrimination with respect to age, disability, orientation and religion. In addition, regarding another fundamental freedom, the freedom of movement of goods, several instruments on foodstuffs deal with 'legislative or administrative decisions or customs' of member states 'relating to ... religious rites' as referred to in the Preamble of Directive 2001/88/EC.

<sup>183</sup> Signed on 2 October 1997, and entered into force on 1 May 1999.

<sup>184</sup> Signed on 26 February 2001 and came into force on 1 February 2003.

<sup>185</sup> Signed on 13 December 2007, and entered into force on 1 December 2009.

<sup>186</sup> There are some reservations to the application of the Charter by the United Kingdom and Poland. See Protocol No. 7 on the application of the Charter of Fundamental Rights to the UK and Poland available at <<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf>> last accessed on 5 November 2010.

<sup>187</sup> For an in-depth discussion of the role and place of the Charter in the EU as well as the EU accession to the European Convention on Human Rights see P Ingolf 'Integrating the Charter of Fundamental Right into the Constitution of the European Union: Practical and Theoretical Propositions' (2003 – 2004) 10(5) *Columbia Journal of European Law* 48. See also P Alston & JH Weiler 'An Ever Closer Union in Need of

#### 4.8.2.2 The EU Charter of Fundamental Rights 2000

The preamble to the Charter of Fundamental Rights refers to spiritual heritage in the following manner:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.

The protection of freedom of thought, conscience, and religion is provided for in Charter of Fundamental Rights in the same manner as in article 9 of the ECHR. Article 10 of the Charter of Fundamental Rights reads as follows:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

In addition to the specific provision relating to the protection of the right to freedom of religion, the Charter of Fundamental Rights refers to freedom of religion and the right to human dignity in several places. Article 1 of the Charter determines that ‘human dignity is inviolable. It must be respected and protected’. The Charter therefore imposes an active obligation for dignity to be protected. Article 22 states that ‘the Union shall respect cultural, religious, and linguistic diversity’. In the interpretation of article 22 references must be made to article 1 on dignity as well as to articles 20 and 21 on equality and non discrimination. Article 20, states that ‘everyone is equal before law’, while the article 21 on non discrimination, provides that ‘any discrimination based on any ground such as sex, race colour, ethnic or social origin, genetic features, language, religion or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’. The right of parents to ensure that education is in

---

a Human Rights Policy: The European Union and Human Rights (1999) *Jean Monnet Working Paper* 99/1 25. Available at <[www.jeanmonnetprogram.org/papers/00/990101.rtf/](http://www.jeanmonnetprogram.org/papers/00/990101.rtf/)> last accessed on 10 May 2010>.

conformity with their religious convictions, together with the principle on non-discrimination on grounds of religion or belief<sup>188</sup> and further calls for respect for religious diversity.<sup>189</sup> Moreover, all the provisions in the Charter enjoy the same legal value as the treaties in terms of the provisions of the Lisbon Treaty.

Therefore, it can be argued that, the fundamental principles of European law pertaining to religion include the acceptance of regionalism, neutrality and equality, and in this manner the virtues of unity and diversity are sought.<sup>190</sup> As the legal status of the Charter of Fundamental Rights has only recently been secured, with the ratification of the Lisbon Treaty on 1 December 2009 any discussion regarding the impact of the Charter on the right to freedom of religion will be merely speculative.

#### 4.8.2.3 The Lisbon Treaty

The manner in which and whether reference should be made to a deity in the Lisbon Treaty was the cause of tremendous disagreement amongst member states of the EU.



---

<sup>188</sup> Article 21 of the Charter of Fundamental Rights reads: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, shall be prohibited’.

<sup>189</sup> Article 22 of the Charter of Fundamental Rights. The Equal Opportunities Programme seeks to facilitate and celebrate diversity, and highlights ‘the positive contribution that people, irrespective of religion or belief, can make to society as a whole’. Directive 2004/83/EC, article 10(b). The 7<sup>th</sup> Framework Programme directive, in the context of European citizenship, recognises that ‘religions’, along with cultural heritage, institutions and legal systems, history, language and values, are a ‘building element’ of European multicultural identity and heritage.

<sup>190</sup> In this regard see generally N Doe ‘Towards a “Common Law” on Religion in the European Union’ (2009) 37(1/2) *Religion, State & Society*, 14 – 166, as well as D Philpott & TS Shah ‘Faith, freedom, and federation: the role of religious ideas and institutions in European political convergence’ in TA Byrnes & PJ Katzenstein (eds) *Religion in an Expanding Europe* (2006) 34.

The importance attached to religion differs largely amongst the 27 member states.<sup>191</sup> In the end a compromise resulted which was included in the preamble to the Lisbon Treaty as follows:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

The preamble, in contrast to strictly secular public orders of many of the member states of the EU, affords recognition of a religious element in the constitutional values and public morality of the EU, while at the same time balancing this recognition by including a reference to cultural and humanist influences.<sup>192</sup> This approach is indicative of a so-called 'value pluralism' approach in which differing approaches are resolved through balancing rather than hierarchically according priority to one norm over another.<sup>193</sup> The EU became a party to the ECHR with the entry into force of the Lisbon Treaty, as article 2 of the Lisbon Treaty provides that:

---

<sup>191</sup> The relationships between state and religion that exist amongst the member states of the EU, ranges from a strict form of separatism or *laïcité*, like in France, to the existence of an endorsed state religion, like in Poland.

<sup>192</sup> See generally C Taylor *A Secular Age* (2007). In contrast with Taylor, Weiler argues that the failure to mention God or Christianity in the preamble imposes an 'EU-enforced *laïcité* on European public life'. According to Weiler this enforced *laïcité* endorses the right to freedom from religion which he considers a less desirable approach than freedom of religion. In this regard see the discussion in AJ Menendez 'Review of a Christian Europe' (2005) 30(1) *European Law Review* 133.

<sup>193</sup> J Bengoetxea, N McCormick and L Moral Soriano 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in G de Burca and JH Weiler (eds) *The European Court of Justice* (2001) 64, 65. In this instance the authors were discussing the clash between the goals of market freedoms and environmental protection. However, in reflecting this choice, the EU does implicitly associate itself with only certain traditions, the religious and secular influences in Europe. In this manner member states are restricted to use their legal systems to reflect religious and moral perspectives in a way which is inconsistent with notions of equality and individual autonomy. For example Romania and Turkey were required by the EU not to criminalise homosexuality and adultery respectively as conditions of membership. In this regard see R McCrea 'Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam and the Partial Secularity of the European Union' (2008) *Yearbook of European Law* 195.



The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competencies as defined in the Treaties.

The provisions of the EU regarding religious freedom referred to above must however be distinguished from the provisions of the ECHR. The provisions of EU law are supreme and for this reason member states of the EU have to comply with these provisions within their national legal system. Conflict between municipal law of member states and the provisions of EU law will not be tolerated.<sup>194</sup> Each member state has the duty to bring its municipal law into conformity with the provisions of EU law. On the other hand, provisions of the ECHR have been interpreted by the ECtHR in accordance with a 'margin of appreciation'<sup>195</sup> which allows for differing levels of protection in the various individual European signatory states. The ECtHR has indicated that restrictions on religious freedom 'call for very strict scrutiny by the court'.<sup>196</sup> Once again it is important to be mindful that the European Charter of Fundamental Rights has only recently become applicable and the impact thereof has not yet been tested by the courts. Therefore the ECtHR at present plays a more active role in the protection of fundamental rights.

#### **4.8.2.4 Interrelation between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR)**

The Luxembourg-based ECJ is an EU institution, whereas the Strasbourg-based ECtHR is an ECHR institution and these institutions function differently. The main purpose of

---

<sup>194</sup> Court of Justice of the European Communities (ECJ), Judgment of 5 February 1963, *N. V. Algemene Transport- en Expeditie Onderneming van Gend & Loos/Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)*, Case 26/62, in Reports of Cases before the Court. 1963, S. 1.

<sup>195</sup> So as to 'balance general societal interests against the interests of the individuals or group adversely affected by the State's action', the ECtHR standard of review is guided by its 'margin of appreciation' principle. Under this principle, national governments are given some freedom in the manner in that they implement ECHR rights. The more essential the right the more strict the scrutiny of review applied by the ECtHR. In this regard see generally Parker (note 66 above) 95.

<sup>196</sup> Parker (note 66 above) 100.

the ECtHR is to verify if a violation of the provisions of the ECHR has occurred. The ECtHR accordingly, may only be approached if the remedies provided by a national court have been exhausted. Therefore every time the ECtHR sanctions a state, the ECtHR in effect is rejecting the national court's decision while at the same time relying upon the national court to apply the decision and the provisions of the ECHR.

The ECJ on the other hand, provides for direct individual access to the ECJ and national courts can, and sometimes must, follow the preliminary ruling procedure. This procedure provides that the national courts may refer a matter to the ECJ for advice on the interpretation or validity of EU law. Therefore this procedure allows for a more coherent application of EU law. In addition the ECJ can assist national courts in cases that may be politically too sensitive to be decided by the national courts alone.

As pointed out above,<sup>197</sup> the provisions of European law are supreme over national law<sup>198</sup> and supreme over national constitutions.<sup>199</sup> The provision of direct effect and supremacy requires that the European legal order respects the fundamental human rights of citizens as provided for in the national legal order. Therefore, the ECJ has progressively become a protector of fundamental human rights.<sup>200</sup>

---

<sup>197</sup> See section 4.8.2.1.

<sup>198</sup> As decided in the matter of Court of Justice of the European Communities (ECJ), Judgment of 16 July 1964, *Flaminio Costa v ENEL*, Case 6/64, in Reports of Cases before the Court. 1964, S. 585.

<sup>199</sup> See Court of Justice of the European Communities (ECJ), Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, Case 11/70, in *Reports of Cases before the Court*. 1970.

<sup>200</sup> See discussion in section 4.8.8.2 above. Provisions on fundamental rights have been inserted into various EU treaties. For example, article 6(2) of the TEU states that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of EU law'. In addition, the EU Charter of Fundamental Rights and directives related to non-discrimination have been issued.

The provisions of the ECHR are interpreted in accordance with a ‘margin of appreciation’ in terms of which the ECtHR allows for deference to a state party. The ECtHR is therefore willing to permit derogations by a state party from the rights contained in the ECHR ‘in accordance with a State Party’s own scale of values and in the form selected by it’.<sup>201</sup>

From the above discussion it is apparent that both the ECJ and the ECtHR belong to distinct organisational frameworks: the ECJ original assignment is to uphold economic integration between member states, while the mission of the ECtHR is to protect human rights within participatory states.<sup>202</sup> However, through cooperation both these above national institutions have been paving the way for ‘economic Europe’ to accede to ‘human rights Europe’.<sup>203</sup>

This process of accession has been brought to fulfilment with the incorporation of the provisions of the EU’s Charter of Fundamental Rights into European law in the Lisbon Treaty which further allows for the accession of the EU to the ECHR as referred to in the ECHR’s new protocol 14.<sup>204</sup> Accession to the ECHR will subject the EU to similar external control as has been exercised over the state parties by the ECtHR. It is not foreseen that either court will replace the other, but rather that the courts through

---

<sup>201</sup> As stated by Advocate General Van Gerven in *Grogan* (Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd (SPUC) v Grogan* [1991] ECR I-4685 para Judgment of the Court of 4 October 1991. Regarding the application of the ‘margin of appreciation’ see generally generally TA O’Donnell ‘The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights.’ (1982) 4 (4) *Human Rights Quarterly*, 474.

<sup>202</sup> See discussion in section 4.8.2 and 4.8.1 respectively.

<sup>203</sup> L Scheeck ‘Solving Europe’s Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance’ (2005) 15 *Questions de recherche / Research in question* 1, 9. Available at <<http://www.ceri-sciences-po.org/publica/qdr.htm>> last accessed on 10 May 2010.

<sup>204</sup> The Lisbon Treaty provides for accession whereas the previous treaties, the Amsterdam and the Nice treaties ignored the question of accession to the ECHR based on the ECJ opinion 2/94 which deemed that the Community does not have the competence to accede to the ECHR.

‘respecting and referring to each other’s work ... uphold their own and the other court’s position within their overlapping and enlarging organisations’.<sup>205</sup>

The procedures of the ECJ are not considered in any further detail. The impact of the European Charter on Fundamental Rights has not to date resulted in any jurisprudence and the existing jurisprudence of the ECJ mainly focuses on non-discrimination in the workplace. The limited jurisprudence regarding the right to manifest religious belief will be analysed in the following chapter.

### **4.8.3 Organisation for Security and Cooperation in Europe (OSCE)**

Other than cooperation regarding the protecting of fundamental human rights in terms of the ECHR and participation in the EU, another manifestation of how European states strive for cooperation amongst themselves is the OSCE. OSCE is a political body, which prior to 1 January 1995, was named the Conference on Security and Cooperation in Europe (CSCE)<sup>206</sup> and is instrumental in broadening regional co-operation in Europe.<sup>207</sup> In terms of the founding document of OSCE (the Helsinki Final Act)<sup>208</sup> the participating states agreed to respect human rights and fundamental freedoms, including the freedom

---

<sup>205</sup> Scheeck (note 203 above) 39.

<sup>206</sup> This study will use the term OSCE to refer to both the prior and the current body. OSCE is the world's largest regional security organisation. It brings cooperative security to a region of 56 states drawn from Europe, Central Asia, Canada and America. The OSCE conducts a wide range of activities related to all three dimensions of security, namely the human, politico-military and economic-environmental dimensions. Available at <[http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/osce.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/osce.pdf)> last accessed on 08 May 2010.

<sup>207</sup> The work of OSCE is distinguishable from the Council of Europe as well as the European Union, in that the standards of OSCE are all non-binding. In addition, the membership of OSCE is far broader than either of the latter two institutions.

Available at <[http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/osce.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/osce.pdf)> last accessed on 08 May 2010.

<sup>208</sup> Conference on Security and Cooperation in Europe: Final Act (Helsinki Accord), 1 Aug 1975, reprinted in 14 I.L.M. 1292 (1975) (hereinafter Helsinki Final Act). This agreement is also sometimes called the

of thought, conscience, religion or belief, for all without distinction as to race, sex, and language or religion. Protection of the right to freedom of religion was originally included in the ten Guiding Principles of the Helsinki Final Act under Principle VII titled ‘Respect for Human Rights and Fundamental Freedoms, Including the Freedom of Thought, Conscience, Religion or Belief’. These rights are affirmed in the first and third paragraphs which states that:<sup>209</sup>

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.<sup>210</sup> Within the framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own.<sup>211</sup>

---

Helsinki Accords. The Helsinki Final Act is the concluding document of a two year intergovernmental meeting that comprised the initial Conference on Security and Cooperation in Europe. Not a legally binding document, the Helsinki Final Act was a statement by the participating states of principles and the intent to cooperate. Although it was heralded as a European Conference, the Western group insisted that all the ‘North Atlantic Treaty Organisation’ (NATO) countries be involved because of the nature of the European security system. Thus Canada and the USA have participated throughout, together with all the countries of Europe. The formation of OSCE followed continued calls made by the Soviet Union to promote peace and security in Europe and, in particular, the desire to seek ratification of the post-war borders, following the conclusion of the Warsaw Treaty of Friendship, Co-operation and Mutual Assistance. The Western states, on the other hand, recognised that this request could be turned into an opportunity to seek protection of fundamental human rights. See generally A Bloed ‘The CSCE Process from Helsinki to Vienna: An Introduction’ in A Bloed (ed) *From Helsinki To Vienna: Basic Documents Of The Helsinki Process* (1990) 1.

<sup>209</sup> Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act), 1 August 1975, *IIM* 14 (1975), 1292, 1295.

<sup>210</sup> The Soviet Union was opposed to religion being extended to other forms of conviction rather than religious ones, and tried to use translation as a means of escape. The word conviction was translated in Russian with the word *vera* which only means ‘faith’ which was a variance of the title of the Principle, where conviction was correctly translated as *ubezhdeniye*. See generally H Hazewinkel ‘Religious freedom in the CSCE/OSCE Process’ (1998) 9 *Helsinki Monitor* 9, 10.

<sup>211</sup> This third paragraph was introduced as a result of a proposal by the Holy See. Regarding the protection of the right to freedom of religion in OSCE prior to the introduction of the High Commission for National Minorities see generally HJ Hazewinkel ‘Religious freedom in the CSCE/OSCE process’ *Helsinki Monitor* (1998) 9. Regarding the furthering of the ‘human dimension’ and therefore the right to freedom of religion

The OSCE has since the adoption of the Helsinki Final Act made some impact on the protection of the right to freedom of religion and more recently regarding the protection of minority human rights. The most extensive protection of religious freedom is found in the 1989 Concluding Document of the Vienna Follow-up Meeting of OSCE (the Vienna Document), which details a list of commitments securing the freedom to profess and practice religion, and also secures the rights associated with the manifestation of religion.<sup>212</sup>

Principles 16(1) and (2) of the Vienna Concluding Document (VCD) warrant detailed attention. Principle 16(1) of the VCD requires states to take effective measures to prevent and eliminate discrimination on the ground of religion and to ensure effective equality between believers and non-believers, while principle 16(2) of the VCD requires the state to foster a climate of mutual tolerance between these two groups.<sup>213</sup> Principle 16 further refers to a limited range of manifestations, mostly associated with acts of worship. At the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (now OSCE) in 1990 these provisions were reaffirmed and brought into line with the provisions of article 9 of the ECHR in that:

[E]veryone will have the right to freedom of thought, conscience and religion. This right includes freedom to change one's religion or belief and freedom to manifest one's religion

---

at present, OSCE's Office for Democratic Institutions and Human Rights (ODIHR) in addition to monitoring elections, provides information on human rights implementation issues for the annual review of human dimension commitment.

<sup>212</sup> In addition to the protection of the right to freedom of religion OSCE actively supports its participating states in combating all forms of racism, xenophobia, anti-Semitism and discrimination. Cooperating and coordinating its activities in this field with other European and UN organisations such as the European Commission against Racism and Intolerance, the European Monitoring Centre on Racism and Xenophobia, and the UN Committee on the Elimination of Racial Discrimination. OSCE institutions promoting tolerance and non-discrimination include the Warsaw-based Office for Democratic Institutions and Human Rights (ODIHR). ODIHR collects and distributes information on hate crimes; promotes best practices in the fight against intolerance and discrimination; provides assistance in drafting and reviewing legislation on crimes fuelled by intolerance and discrimination.

Available at <<http://www.osce.org/activities/13539.html>> last accessed on 8 October 2010.

<sup>213</sup> Vienna Concluding Document, 19 January 1989, ILM 28 (1989), 527, 534.

or belief, either alone or in community with others, in public or in private, through worship, teaching, practice and observance. The exercise of these rights may be subject only to such restrictions as are prescribed by law and are consistent with international standards.<sup>214</sup>

The Vienna Document encourages respect for religious differences among various religious communities.<sup>215</sup> Van Boven claims that provisions contained in the Vienna Document were influenced by Krishnaswami's work.<sup>216</sup> Krishnaswami was well aware that the standard requirements of equal treatment and the prohibition of discrimination would not have the desired effect in matters concerning freedom of thought, conscience and religion. To ensure equal treatment of all religions a different approach was needed, as the application of formal equality would not necessarily ensure equal treatment between adherents of different religions. In this regard Krishnaswami noted that:

[S]ince each religion or belief makes different demands on its followers, a mechanical application of the principle of equality which does not take into account the various demands will often lead to injustice and in some cases even to discrimination.<sup>217</sup>

Krishnaswami observes that as the demands of various religions are different, even state neutrality does not exclude inequality between different religions.<sup>218</sup> Krishnaswami further appreciated that these different demands could include the wear of special religiously motivated dress in which event he stated that:

[I]t is desirable that persons whose faith prescribes such apparel should not be unreasonable prevented from wearing it.<sup>219</sup>

---

<sup>214</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), Section II (9.4), ILM 29 (1990), 1305,1311.

<sup>215</sup> Davis (note 24 above) 227.

<sup>216</sup> T van Boven 'Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs' (1991) 13(4) *Human Rights Quarterly* 437, 439.

<sup>217</sup> A Krishnaswami 'Study of Discrimination in the Matter of Religious Rights and Practices: Report of Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1979) 11 *New York University Journal on International Law and Politics* 227, 230. (Krishnaswami Study).

<sup>218</sup> *Ibid* 263.

<sup>219</sup> *Ibid* 248.

Furthermore each case must be considered on its own merits, and that a rule of general application would not ensure equal treatment and non-discrimination.

Paragraph 36 of the OSCE's Copenhagen Document (1990) states that:

Every participating State will promote in a climate of mutual respect, understanding, co-operation and solidarity among all persons living on its territory, without distinction as to ethnic or national origin or religion, and will encourage the solution of problems through dialogue based on the principles of the rule of law.

From the above paragraph it is clear that protection of the right to freedom of religion and therefore the right to manifest religious belief is also provided for in terms of the equality provisions of the Copenhagen Document.

The Charter of Paris for a New Europe (1990),<sup>220</sup> celebrates the historical changes taking place in Europe after the reunification between Eastern and Western Europe. The restructuring of the former Eastern Europe led to a rise in inter-ethnic conflict and accordingly concerns regarding minority issues became more pronounced. A post for a High Commissioner for National Minorities (HCNM) was created in 1992.<sup>221</sup> Many aspects of the HCNM's mandate are problematic. In particular the need for a definition of the term 'national minorities' has been challenging. The OSCE has never defined the term 'national minority'. The HCNM has suggested that a national minority has the following characteristics: 'a group with linguistic, ethnic or cultural characteristics which distinguish it from the majority ... which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity'.<sup>222</sup> The characteristic of a

---

<sup>220</sup> Conference on Security and Cooperation in Europe: Charter of Paris for a New Europe, 21 Nov. 1990.

<sup>221</sup> The High Commissioner on National Minorities (HCNM) mandate was established at the Helsinki Summit Meeting in 1992.

<sup>222</sup> Keynote address to the Organisation for Security and Cooperation in Europe Human Dimension Seminar on National Minorities, reprinted in 1 Official. Democratic Institutions Human. Rights. Bulletin. 22 (1993).



national minority may also be defined in relation to the provisions of article 27 of the ICCPR.<sup>223</sup>

The use of the term ‘national minorities’ to refer only to citizens of a given state may be problematic as immigrants without citizen status may be in need of protection as well. However, the HCNM has indicated that the preferred meaning is that the term is used to denote a non-dominant population (ethnic, religious or linguistic group) that is a numerical minority.<sup>224</sup>

Of particular importance regarding the religious rights of minorities is the following provision of the Copenhagen Document:

Persons belonging to national minorities have the right, inter alia, to use their own language, to maintain their own educational and religious institutions, to practice their own religion ...<sup>225</sup>

The Copenhagen Document furthermore added the rights to change one’s religion or belief,<sup>226</sup> and in particular, freedom of religion took its place among other rights of persons belonging to national minorities.<sup>227</sup>

The Helsinki Final Act, the Copenhagen Document as well as most of OSCE documents are only politically binding. Although not legally binding they have been used as

---

<sup>223</sup> Article 27 of the ICCPR states that: ‘In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language’.

<sup>224</sup> See generally ICCPR Human Rights Committee General Comment 23 (50), 911 5.1-5.2, Hum. Rts. Com., 15th Sess., UN Doc. CCPR/C/21/Rev.1/Add.5, (1994).

<sup>225</sup> Copenhagen Document at 32 See generally Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 June 1990, 9 9 30-40.7, reprinted in 29 I.L.M. 1305, 1318-20 (1990).

<sup>226</sup> Principle 9(4) of the 1990 Document of the Copenhagen Meeting referring to the freedom to change one’s religion or belief.

<sup>227</sup> Regarding the protection of the rights of minorities in the OSCE framework see generally J Wright ‘The OSCE and the Protection of Minority Rights’ (1996) 18(1) *Human Rights Quarterly* 190.

guidelines for interpretation of national laws and practices.<sup>228</sup> Despite the non-binding nature of the OSCE documents it is important to remember that the OSCE is not a human rights organisation but an interstate process. On a regional level, in contrast with OSCE, the ECHR system has been much more successful in the protection of individual human rights through the individual complaint procedure. On the international level, the UN too has played a more prominent role through for example the accessibility of the human rights bodies to non-governmental organisations (NGOs).

However, although OSCE does not create legal obligations and enforcement is sketchy, one should not dismiss the impact that OSCE has had in Europe.<sup>229</sup> The OSCE has been instrumental in numerous fields, the role of the OSCE regarding the protection of minorities is of particular importance. The commitments on minorities in the Copenhagen Document<sup>230</sup> are still considered to be more advanced than provisions on minorities made by the UN and Council of Europe. In this regard the following comment serves as a valuable *caveat*:

The issue of Religious Freedom and Tolerance must be a priority issue of first rank within OSCE activities. Neglect of religious human rights results in fostering tensions which are all prone to ignite overt conflict.<sup>231</sup>

Not only does OSCE play an important role regarding the protection of minorities, but it has in addition generated detailed recommendations. Of these include the Lund Recommendations on the Effective Participation of National Minorities in Public Life of

---

<sup>228</sup> For a comprehensive overview of the operation of OSCE see generally R Brett 'Human Rights and the OSCE' (1996) 18(3) *Human Rights Quarterly* 668.

<sup>229</sup> In this regard see KE Birnbaum *The Politics Of East-West Communication In Europe* (1979) 76-77. Birnbaum reflects on the cynicism of USA's Secretary of State Henry Kissinger and associates in 1975, whom indicated that the full implementation of OSCE would in their opinion 'imply nothing less than a total transformation of the prevailing political and social conditions in the Soviet Union and Eastern Europe'.

<sup>230</sup> Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 June 1990, reprinted in 29 I.L.M. 1305, 1318-20 (1990).

<sup>231</sup> In ODIHR Background reports on the OSCE Human Dimension Implementation Meeting, November 12-28, 1997 (ODIHR/GAL/13/97 24 October 1997).

1999, which have also been helpful in realising the full proactive participation of minorities through the constitutional design of the state, electoral representation and the establishment of institutions and practices aimed at ensuring diverse input.<sup>232</sup> With the above discussion the protection of the right to manifest religious belief is brought to a close. The American regional system follows below.

## **4.9 The Inter-American System**

The Organisation of American States (OAS) is the oldest regional organisation. In 1948, 21 states signed the OAS Charter, establishing the regional organisation and affirming their commitment to representative democracy, liberty, and equality before the law.<sup>233</sup> The Inter-American system consists of two key documents, the American Declaration of the Rights and Duties of Man of 1948<sup>234</sup> and the American Convention on Human Rights of 1969 (Pact of San José),<sup>235</sup> which are monitored by two main treaty bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

UNIVERSITY of the  
WESTERN CAPE

### **4.9.1 American Convention on Human Rights (Pact of San José)**

---

<sup>232</sup> Weller (note 82 above) 434.

<sup>233</sup> Annual Report of the Inter- American Commission on Human Rights of 1994, 347.

<sup>234</sup> American Declaration of the Rights and Duties of Man (American Declaration) (OAS 1948) was approved by the OAS even before the adoption of Universal Declaration. The American Declaration encompasses the entire range of human rights and duties.

<sup>235</sup> The relationship between the two documents is comparable to the UDHR and the two International Covenants. For a more detailed discussion of the Inter-American System see generally Steiner (note 5 above) 1020 onwards.

The Pact of San José<sup>236</sup> protects civil and political rights, and requires states to adopt legislative or other measures necessary to give effect to these rights.<sup>237</sup> However, the Convention does not cover social rights. Those are found in the Protocol of San Salvador (1988).<sup>238</sup>

The right to freedom of conscience and religion is protected in terms of article 12 of the Pact of San José.<sup>239</sup> It repeats the four paragraphs of article 18 of the ICCPR, and provides that ‘everyone has the right to freedom of conscience and religion. This right includes freedom to maintain or change one’s religion, and freedom to profess or disseminate one’s religion or belief, either individually or together with others, in public or in private’. The provision is also subject to restrictions on manifestations as contained in the ICCPR which are similar to those under the European Convention.

---

<sup>236</sup> The Pact of San José was adopted by the OAS on 22 November 1969 in San José, Costa Rica and entered into force on 18 July 1978. To date, 25 of the 35 OAS state parties have adopted the Pact of San José.

<sup>237</sup> Article 1 of the Pact of San José stipulates the obligation to respect rights: ‘1.1...Ensure the free and full exercise of those rights and freedoms without any discrimination for reason of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition’.

<sup>238</sup> The Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) in the area of Economic, Social and Cultural Rights in article 14(1)(a) recognises the rights of everyone to take part in a cultural life. The Protocol of San Salvador was adopted by the OAS on 17 November 1988 in San Salvador, El Salvador and entered into force on 16 November 1999.

<sup>239</sup> Article 12 of the Pact of San José reads: ‘12.1 Everyone has the right to freedom of conscience and of religion. This right included freedom to maintain or to change one’s religion or beliefs, and freedom to professor disseminate one’s religion or beliefs, either individually or together with others, in public or in private.

12.2 No one shall be subject to restrictions that might impair his freedom to maintain of change his religion or beliefs.

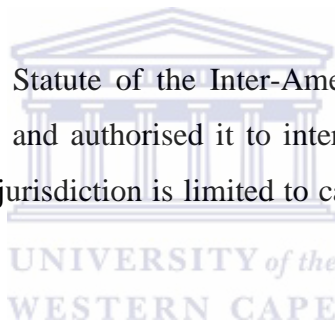
12.3 Freedom to manifest one’s religion or beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the right or freedom of others.

12.4 Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions’.

#### 4.9.2 Supervisory bodies: The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR)

Although the Inter-American System adopted a human rights declaration before the adoption of either the UDHR or the ECHR, the development of a supervisory structure was to take substantially longer.<sup>240</sup> The IACHR was established in 1959 and conducted its first investigation in 1961.<sup>241</sup> The IACHR's main functions include investigating individual complaints and preparing reports on countries with severe human rights problems.<sup>242</sup> In addition, the IACHR may submit cases to, or request advisory opinions from, the IACtHR. Provisions are made for persons, groups or NGOs legally recognised by a member of the OAS to submit complaints to the IACHR. Nonetheless, state parties can reserve the right not to cooperate with IACHR investigations.<sup>243</sup>

In 1979 the OAS adopted the Statute of the Inter-American Court of Human Rights, officially creating the IACtHR and authorised it to interpret and enforce the American Convention.<sup>244</sup> The IACtHRs jurisdiction is limited to cases submitted by States Parties



---

<sup>240</sup> Steiner (note 5 above) 1021.

<sup>241</sup> The IACHR is the first of two permanent bodies for promoting and protecting human rights in the Americas and consists of seven members elected by the OAS General Assembly who serve in their personal capacities.

<sup>242</sup> To this end the IACHR is authorised to: receive and investigate individual petitions regarding human rights violations; publish reports regarding human rights situations in state parties; visit state parties and investigate general human rights conditions or particular problem areas; publish studies on specific subject areas, such as indigenous rights and women's rights; and make human rights recommendations to state parties. Available at <<http://www.cidh.oas.org/what.htm>> last accessed on 08 May 2010.

<sup>243</sup> Nathan (note 67 above) 47, 55.

<sup>244</sup> The IACtHR is composed of seven judges who serve a six year term in their individual capacity. Due to the fact that judges serve in their individual capacity, the statute of the court explicitly prohibits them from holding positions that are incompatible with a judicial position, namely, positions in the executive branch of government, or as officials of international organisations. See Statute of The Inter-American Court Of Human Rights

Available at <[http://www.oas.org/xxxivga/english/reference\\_docs/Estatuto\\_CorteIDH.pdf](http://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf)> last accessed on 08 May 2010.

and the IACHR involving the interpretation or application of the Pact of San José.<sup>245</sup> The IACtHR issued its first decision in 1980. The Commission resolves only a small fraction of the matters before it each year. In 2007 the Commission published 74 reports, 65 of which dealt with admissibility alone, and submitted 14 cases to the Court.<sup>246</sup> It has been stated the IACHR and the IACtHR represent a ‘weaker central adjudicative and legislative mechanism which hampers compliance with its provisions’.<sup>247</sup> In addition Latin America’s poor record of respect for human rights adds more questions to the possibility of enforcement of the Pact of San José.<sup>248</sup> The professed religious liberties contained in the Pact of San José remain untried.<sup>249</sup> The procedures of the IACtHR are not dealt with further. In light of an evaluation of the jurisprudence of the IACtHR it is apparent that the right to freedom of religion and to manifest such religious belief have not yet been interpreted by the IACtHR.



#### **4.10 The African System: African Charter on Human and Peoples’ Rights**

The latest regional system is the African system. The preamble to the African Charter on Human and Peoples’ Rights (ACHPR)<sup>250</sup> considers the Charter of the Organisation of

---

<sup>245</sup> The USA signed the Pact of San José but did not proceed with ratification. Available at <<http://www.oas.org/juridico/english/sigs/b-32.html>> last accessed on 10 May 2010.

<sup>246</sup> See generally JL Cavallaro and SE Brewer ‘Re-evaluating Regional Human Rights Litigation In The Twenty-First Century: The Case Of The Inter-American Court’ (2008) 102 *The American Journal Of International Law* 768, 779.

<sup>247</sup> A Nathan (note 67 above) 55.

<sup>248</sup> *Ibid.*

<sup>249</sup> Nathan (note 67 above) 57.

<sup>250</sup> The African Charter on Human and Peoples’ Rights was adopted by the Organisation of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981, in Nairobi, Kenya and entered into force on 21 October 1986. For further reading on the ACHPR see generally C Heyns (ed) *Human Rights Law in Africa* (2004); F Ouguerouz *The African Charter on Human and Peoples’ Rights: A comprehensive agenda for human rights* (2003); and M Evans and R Murray (eds) *The African Charter on Human and Peoples’ Rights* (2002).

African Unity (OAU),<sup>251</sup> obligates ratifying countries to recognise the rights and duties listed and to adopt legislation or measures to bring them into effect.<sup>252</sup> The civil and political rights entrenched in the ACHPR are generally similar to those recognised in other international instruments. The enjoyment of the rights contained in the ACHPR is guaranteed without distinction of any kind, including religion.<sup>253</sup>

The ACHPR is divided into two parts. The first part sets out rights and duties<sup>254</sup> and the second part establishes safeguards for these rights and duties. Furthermore, the ACHPR

---

<sup>251</sup> The Charter of the OAU was signed on 25 May 1963 in Addis Ababa, Ethiopia, and entered into force on 13 September 1963. It is established as a regional body for African states, inspired by the anti-colonial resistance of the late 1950's. The Charter of the OAU states in its preamble that it acknowledges the freedom, equality, justice and dignity of the African peoples and is determined to promote brotherhood and solidarity, in a larger unity transcending ethnic and national differences, affirms the struggle against neo-colonialism in all its forms. In 2002 the OAU was replaced by the African Union (AU) with 53 of the 54 African states as members of the AU. The Constitutive Act of the AU reaffirmed Africa's determination 'to promote and protect human and peoples' rights.' The AU's objectives include the promotion and protection of human rights in accordance with the ACHPR and 'other relevant human rights instruments'. The Constitutive Act of the AU reaffirmed Africa's determination 'to promote and protect human and peoples' rights.' The AU's objectives include the promotion and protection of human rights in accordance with the African Charter of Human and Peoples' Rights and 'other relevant human rights instruments'. See article 4 of the AU Charter in this regard. Regarding the functioning of the African regional system see generally C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108(3) *Penn State Law Review* 679.

<sup>252</sup> Article 1 of the ACHPR states that: 'The state parties of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.

<sup>253</sup> Article 2 of the ACHPR states that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.

<sup>254</sup> Like the Pact of San José, the ACHPR does not simply identify rights but also explicitly imposes duties upon individuals (articles 27-29). These individual duties include provisions to counter claims that human rights promote excessive individualism, consist of duties to family, society, state, and the international community.

specifically includes the rights of peoples as group rights.<sup>255</sup> From these inclusions it is clear that the ACHPR provides for an alternative approach to Western liberal rights theory, in terms of which rights are not only seen as individual rights. Rights are considered to not only impose a duty on a state not to infringe but to also impose duties on the individual as well.<sup>256</sup> Article 27 of the ACHPR refers to duties towards one's family and society, and the state and other legally recognised communities, such as the international community. The ACHPR clearly provides for two types of duties, being direct and indirect, respectively. Article 29(4) provides for a direct duty to preserve and strengthen social and national solidarity. Article 27(2) provides for an indirect duty, in so far as it states that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. In terms of African tradition the individual is considered a moral being, endowed with rights but also bounded by duties, uniting his/ her needs with the needs of others.<sup>257</sup>

Article 8 provides for freedom of religion in the following manner:

Freedom of conscience the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Respect and tolerance is promoted in article 28 in that:

[E]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Limitations of the rights may be problematic as no general limitation clause is contained in the provisions of the ACHPR. Specific limitation provisions are contained with regard

---

<sup>255</sup> Examples of such rights include the right of a group to freely dispose of its natural resources in the exclusive interest of its members (article 21), and the right of a colonised or oppressed group to free them from domination (article 20).

<sup>256</sup> M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 25 *Vanderbilt Journal of International Law* 339, 334.

<sup>257</sup> *Ibid* 339, 334.



to specific rights. The right to freedom of religion contains such a specific limitation in that the right may only be limited in the interest of ‘law and order’. In interpreting the provisions of the ACHPR the African Commission on Human and Peoples’ Rights (The Commission) has made extensive reference to international law. Therefore the Commission has understood that limitations must comply with international human rights standards.<sup>258</sup>

The right to education and the importance of cultural life are recognised in article 17. In addition to the ACHPR the AU adopted further instruments, of particular relevance are the instruments specifically addressing the rights of women<sup>259</sup> and children, respectively.<sup>260</sup>

#### **4.10.1 Supervisory bodies: The African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights**

The African Commission<sup>261</sup> was created to ensure the protection of human and peoples’ rights in Africa. It is established in terms of article 30, and deals with communications from both States Parties and individuals. Individual communications can be considered where there is a ‘serious or massive violation’ at stake. The Commission has dealt with

---

<sup>258</sup> See *Media Rights Agenda & Others v Nigeria* Communication 105/93, 128/94, 130/94 and 152/96 at 66: ‘To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradicting national law’.

<sup>259</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa was adopted in 2003 and entered into force in 2005.

<sup>260</sup> The African Charter on the Rights and Welfare of the Child adopted in 1990 and entered into force during 1999.

<sup>261</sup> The Commission meets twice a year and consists of 11 commissioners who serve six year terms in their personal capacities. The functions of the Commission are the promotion of human rights, the protection of these rights, interpretation of the ACHPR, and the performance of ‘any other tasks’ requested by the AU (article 45). Furthermore, states are required to submit regular reports to the Commission on their human rights problems and efforts to address them (article 62).

most violations if the admissibility criteria had been met.<sup>262</sup> To date only five matters concerning the right to freedom of conscience has been received, against the then Zaire, Sudan, Egypt, Nigeria and South Africa. The matter against South Africa related to the right to manifest religious belief.<sup>263</sup> The Protocol to the African Charter on Human and Peoples' Rights establishes an African Court on Human and Peoples' Rights,<sup>264</sup> to date the African Court is not yet functional.

In addition to communications addressed to the Commission, States Parties are obliged<sup>265</sup> to submit reports every two years on compliance with the provisions of the Charter. The Commission may adopt resolutions and has appointed special rapporteurs. Relevant is the appointment of the Working Group of Experts on Indigenous People of Communities.<sup>266</sup>

#### 4.11 Conclusion

From the analysis of the international and regional instruments regulating the right to freedom of religion it is evident that 'everyone' has the right to religious liberty. Furthermore the right is broadly defined, in part because the concept religion is inherently indefinable. In addition the use of definitions *per se* may limit the application of the

---

<sup>262</sup> Heyns (note 251 above) 679, 694.

<sup>263</sup> *Garreth Anver Prince / South Africa* 255/2002 EC.CL/167 (VI) Regarding the effectiveness of the Commission in ensuring state compliance with the decisions it has made see generally F Viljoen & L Louw 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994-2004' (2007) 101(1) *The American Journal of International Law* 1.

<sup>264</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in 1998 and entered into force on 1 January 2004. At the time of writing the process was underway to establish the Court. The AU Summit has taken a decision in July 2004 to merge the African Human Rights Court with the African Court of Justice. Only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of 'direct' access to the Court where the state has made a special declaration.

<sup>265</sup> Reporting however has been slow and half of the States Parties have not submitted reports.

<sup>266</sup> Heyns (note 251 above) 697.

right. Therefore the right is defined as the right to ‘freedom of thought, conscience and religion’ in all the UN documents and the European and Inter-American regional systems, while the African Charter provides for freedom of conscience and free practice of religion.

The right to freedom of thought, conscience and religion, the so called *forum internum*, goes beyond long established religions, as it covers theistic, non-theistic and atheistic beliefs as well. Freedom of thought and conscience are entitled to equal protection. The individual and communal nature, as well as the private and public dimension of the right to manifest one’s religion is acknowledged in all the international instruments and the European and Inter-American regional systems.

Included in the *forum internum* is the right to manifest religion or belief in community with other in worship, observance, practice and teaching, the so called *forum externum*. The ICCPR Human Rights Committee in General Comment 22(4) has defined the *forum externum*, to ‘encompass a broad range of acts’. The right to manifest religious belief may only be limited if the limitation is ‘prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’ The ECHR however adds a further requirement in that the limitation must be necessary in a democratic society. The ACHPR prescribes that a limitation must be subject to law and order.

## Chapter 5

### A postmodern (post secular) framework to enhance protection of the right to manifest religious belief in a diverse society

#### 5.1 Introduction

As shown previously,<sup>1</sup> religious conflict persists and the right to freedom of religion and is often vulnerable. The aim of this chapter is to evaluate the effectiveness of the manner in which the right is currently protected. To this end the appropriateness of the principle frameworks in terms of which the protection of the right to freedom of religion is secured will be examined and suitable suggestions put forward as to how the effectiveness of these frameworks may be enhanced. The arrangement of the relationship between the state and religion will be critiqued first. This will be followed by an evaluation of the configuration of the international human rights regime.

Regarding the different constitutional arrangements structuring the relationship between the state and religion, one ought to be mindful that this configuration did not occur in abstract, but in response to some form of domination.<sup>2</sup> The relationship therefore reflects this history and presents itself in various ways. For instance, the state arrangement may reveal strong identification with religion or some degree of identification with religion, or present itself as a secular state with either a passive or an assertive approach towards religion, or even as a *laic* state on the other end of the spectrum.<sup>3</sup>

---

<sup>1</sup> See section 1.1.

<sup>2</sup> A Sachs *Protecting Human Rights in a New South Africa* (1990) 41.

<sup>3</sup> See section 3.5.

For example, in France, the Law on the Separation of Church and State of 1905 ended the rule of the Roman Catholic Church and centuries of violent conflict.<sup>4</sup> In the United States of America (USA), the First Amendment managed the diversity of a new nation by reinforcing separation between religion and the state. In South Africa (SA), the Constitution strives to inspire the various religious denominations into reconciliation and the building of a united nation.<sup>5</sup> All of these approaches may have been suitable at the time of their implementation, but it cannot be assumed that they will remain appropriate in light of new challenges.<sup>6</sup>

This chapter proceeds from the understanding that the relationship between the state and religion ought to represent a certain degree of *de facto* differentiation.<sup>7</sup> As concluded in section 3.8, separation between the state and religion is necessary to ensure the protection of the right to freedom of religion or belief. However, as indicated previously,<sup>8</sup> strict separation between state and religion does not *per se* ensure the greatest protection of the right to freedom of religion. This is particularly true in states in which separation represents 'freedom from religion'.<sup>9</sup> Therefore, suggestions are put forward regarding the manner in which this separation should be arranged, so as to best facilitate the right to manifest religious belief. It is contended that religious diversity needs to be managed in ways other than secularism and privatisation.<sup>10</sup>

---

<sup>4</sup> See section 7.2.1.1 above.

<sup>5</sup> D Chidester *Global Citizenship, Cultural Citizenship and World Religions in Religion Education* (2002) 15-16. See also section 8.4 above.

<sup>6</sup> These new challenges may include the impact of globalisation, immigration and the new world order. In this regard see also Chidester *ibid.*

<sup>7</sup> See section 3.6.

<sup>8</sup> See discussion in section 3.7.

<sup>9</sup> See section 4.8.

<sup>10</sup> In this regard see generally RIJ Hackett 'Rethinking the Role of Religion in Changing Public Spheres: Some Comparative Perspectives' (2005) *Brigham Young Law Review* 659; R Audi & N

In addition to proposals being put forward regarding the reconceptualisation of secularism, this chapter further evaluates the manner in which the individual human rights regime is constructed in the international legal context. Here too, it is evident that the international framework in terms of which the right to freedom of religion is regulated was formulated in response to historical conflict and abuse of human rights. The international framework for that reason emphasises the individual nature of fundamental rights.<sup>11</sup> This too may have appeared suitable at the time of implementation, but it cannot be assumed that this approach will remain appropriate in light of new challenges, such as increasing ethnic diversity.

It is evident that the largely homogenous societies of the past, for example France, are becoming increasingly diverse.<sup>12</sup> This diversity is coupled with a rising identity consciousness,<sup>13</sup> which requires representation in a state that may display an existing dominant culture, a common language, a national identity and a dominant religion.<sup>14</sup>

---

Wolterstorff *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (1997).

<sup>11</sup> K Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (2010) 101.

<sup>12</sup> Immigrants in France make up roughly 10 percent of the total population. United Nations Department of Economics and Social Affairs 'International Migration 2006' United Nations Department of Economics and Social Affairs, available at

<[http://www.un.org/esa/population/publications/2006\\_Migration\\_Chart/](http://www.un.org/esa/population/publications/2006_Migration_Chart/)> last accessed on 5 June 2009.

<sup>13</sup> SA Dersso *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 10.

<sup>14</sup> Dersso (note 13 above) 9. This is confirmed by the statement of Parkipuny to the United Nations (UN) Working Group of Indigenous Populations (UNWGIP) in which he states that in post-colonial Africa, the 'state monopoly of national identities' opened the door for prejudice and infringements of the rights of peoples with cultures that are different from those of the dominant national population. In this regard see M. Parkipuny 'The indigenous peoples' rights question in Africa', statement to the 6th session of the United Nations Working Group on Indigenous Populations in Geneva, Switzerland, on 3 August 1989, available at <<http://cwis.org/fwdp/Africa/parkipuny.txt>> last accessed on 22 May 2010. as included in KN. Bojosi 'The African commission working group of experts on the rights of indigenous

Often the institutional dominant culture may suppress the minority cultures and minority members within the diverse community may face discrimination. This discrimination brings new challenges to the manner in which human rights are protected.

The principle of secularism and the individual nature of human rights are generally relics of the age of modernity.<sup>15</sup> It is argued that a postmodern approach will best respond to the demands of present day society in which globalisation has drawn attention to difference and diversity.

### 5.1.1 Postmodern approach

Suggestions regarding the structuring of the relationship between the state and religion, as well as the manner in which the right to freedom of religion ought to be interpreted will be framed in terms of the postmodern approach. It is argued that this approach will facilitate the enhanced protection of the right to manifest religious belief.

The main reason for this premise is that postmodernity tends to emphasise the local rather than the general, the excluded rather than the included and the distinctive rather than the general.<sup>16</sup> In doing so, postmodern theory acknowledges diversity of religious beliefs and opinions and considers phrasing secularist humanism to be but one of these diverse beliefs and accordingly not the overarching approach in terms of which religious diversity ought to be dealt with. Postmodern theory aims to

---

communities/populations: some reflections on its work so far' in SA Dersso *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 98.

<sup>15</sup> In this regard see the discussion in section 3.2.

<sup>16</sup> R Gill *Moral leadership in a postmodern age* (1997) 155.

reconceptualise a form of pluralistic justice which takes into account the excluded and marginalised 'other'.<sup>17</sup>

It must be noted that '[t]he expression "postmodern" has however developed into a container concept'<sup>18</sup> in terms of which different content can be put forward dependant on the aim of the sender. The concept postmodernism is therefore used here in contrast with the concept modernism to illustrate the accommodation of religious and cultural values in the pursuit of enhanced protection of the fundamental right to freedom of religion.

It is argued for the reconceptualisation of the modern state and the relationship between the state and religion. This reconceptualisation recognises that the state does not consist of individuals but includes a community of communities.<sup>19</sup> It is further argued for the re-interpretation of the individual nature of human rights in terms of which the collective nature of human rights is also acknowledged. However, it ought to be borne in mind that every multicultural society will need to devise its own appropriate structure to suit history, cultural traditions, range and depth of diversity.<sup>20</sup>

The reconceptualisation cannot begin without questioning the impact of the dominant theory of secularism and the assumption of a single and universally valid model for statehood and fundamental human rights.<sup>21</sup> This chapter therefore proceeds by putting

---

<sup>17</sup> Z Arslan 'Taking Rights Less Seriously: Postmodernism and Human Rights' (1999) 5 *Res Publica* 195, 207.

<sup>18</sup> W Günther 'Postmodernism' (1997) 86 *International Review of Mission* 343, 425.

<sup>19</sup> P Bhikhu *Rethinking Multiculturalism: Cultural Diversity and Political Theory* 2<sup>nd</sup> ed (2006) 185.

<sup>20</sup> In SA explicit recognition of religious and cultural minorities and the celebration of the country's diverse heritage has been successful to an extent in accommodating religious and cultural diversity. In this regard see generally JW de Gruchy & S Martin *Religion and the Reconstruction of Civil Society* (1995); D Chidester *Religion in Public Education: Options for a New South Africa* (1994).

<sup>21</sup> Bhikhu (note 19 above) 195.



forward various normative arguments, both philosophical and constitutional, that argue for the advanced protection of the right to freedom of religion. Key arguments against religious based discrimination include respect for equality and dignity. Ultimately, this chapter concludes that respect for dignity and diversity provides the strongest argument against religious discrimination and prejudice. A brief critique of the theory of secularism is presented next.

## **5.2 The inherent difficulty with the concept of secularism**

The foundational principle of secularism is that the state is to remain neutral among religions and therefore the public sphere should be neutral towards religion.<sup>22</sup> A neutral state is premised to be the best approach at ensuring the equal protection of difference. Every person is deemed entitled to all the rights and freedoms as well as equal protection of the law without distinction of any kind, including religion. The argument can therefore be made that human rights should be ‘religiously impartial’.<sup>23</sup> However, the concept of secularism is interpreted in many ways<sup>24</sup> and may even at times not reflect religious neutrality, but rather domination.

### **5.2.1 Critique of secularism**

The manner in which secularism has been structured, as shown previously, is generally rooted in the patriarchal structure of Christianity.<sup>25</sup> As a result, the concept of secularism too complies with the *Aquinas dictum* ‘[t]hings known are in the knower

---

<sup>22</sup> The concept of secularism was discussed in section 3.2.

<sup>23</sup> D Little ‘Studying “Religious Human Rights” Methodological Foundations’ in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 45 -77 at p 55.

<sup>24</sup> See discussion in section 3.4.

<sup>25</sup> See section 3.3.2.

according to the mode of the knower'.<sup>26</sup> Therefore, the notion of public morality or public interest in a secular state may resemble a particular point of view of public morality or public interest. For example, arguments against prohibiting 'immoral' sexual behaviour, like prostitution and same-sex sexual acts are indicative of a particular mode of knowing. It is therefore essential that existing legal rules are scrutinised for ethnocentric and religious bias, to determine if they are acceptable in a pluralistic society.<sup>27</sup>

The value of secularism in ensuring equal protection of diverse interests is consequently questionable. In this regard, Bader argues that:

Something is inherently wrong with the conception of a melting pot that tries to achieve a new public, political culture by ignoring strong ethnic and national cultures and identities or relegating them to the "private" realm. Formal "color-blindness" does not work and cannot work.<sup>28</sup>

This ineptness of secularism as a means of ensuring neutrality and the equal protection of difference is further emphasised, for example, in light of past intolerance against the public manifestations of religion.<sup>29</sup> Adhar and Leigh talk about a 'mirage of perfect neutrality'<sup>30</sup> and argue that there always is an 'establishment of state orthodoxy'.<sup>31</sup>

---

<sup>26</sup> PR Eddy 'Religious Pluralism and the Divine: Another Look at John Hick's Neo-Kantian Proposal' (1994) *Religious Studies* 30 (4) 467, 474. This point of view is supported by discourse ethics which views 'the moral point of view as embodied in an intersubjective practice of argumentation which enjoins those involved to an idealizing enlargement of their interpretive perspectives'. In this regard see J Habermas 'Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92 (3) *The Journal of Philosophy* 109, 117.

<sup>27</sup> Habermas (note 26 above) 120.

<sup>28</sup> V Bader 'The Cultural Conditions of Transnational Citizenship: On the Interpenetration of Political and Ethnic Cultures Source' (1997) 25 (6) *Political Theory* 771, 776.

<sup>29</sup> See Section 6.3.

<sup>30</sup> R Adhar & I Leigh *Religious Freedom in the Liberal State* (2005) 7.

From this point of view, it appears as if secularism has replaced the hegemony of religion with hegemony of anti-religion. Therefore secularism has not ensured the existence of a neutral public sphere.

The question is therefore posed whether religious diversity can be accommodated through the principle of secularism and the separation of religion from the realm of the political. It is premised that religious diversity cannot be accommodated through this separation and that religious voices ought to be audible in the public domain.<sup>32</sup> The need for religious voices to be heard is aptly shown when the collective nature of religion is fully appreciated. The collective nature of religion is discussed next.

#### **5.2.1.1 The collective nature of religion**

Smith's interpretation of religion is helpful in understanding the collective nature of religion. He suggests that every religion is a combination of two components: a historical 'cumulative tradition' and the personal 'faith' of those within that tradition.<sup>33</sup> It is suggested that when appreciating this composite nature of religion a reconceptual understanding of religion is possible. In terms of this understanding, a strict divide between public and private as dictated by some interpretations of secularism is not possible. The composite nature of religion is aware of the fact that religion displays an individual interest. Religion however also has a communal aspect in terms of which an individual's religion forms part of the broader social context of culture and ethnicity to which the individual belongs.<sup>34</sup> In applying this communal

---

<sup>31</sup> *Ibid.*

<sup>32</sup> See generally SL Carter *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1994).

<sup>33</sup> WC Smith *The Meaning and End of Religion: a New Approach to the Religious Traditions of Mankind* (1964) 137.

<sup>34</sup> *Ibid* 140.

consideration, the harm of discrimination is suffered not only by the individual but also by the specific community to which that religious individual belongs. Therefore, religious voices have to be endorsed in the public domain.

In response to this claim that religious voices should not be excluded from the public domain it may be argued that the accommodation of religion threatens the separation between state and religion. This doctrine protects our institutions from religious domination and religion from government oppression. For that reason, it remains important that a balance be struck between freedom of religion, on the one hand, and the need to guard institutions from religious dominance, on the other hand. The basis of this balance cannot be the demand that adherents to religious faiths are required to divide themselves into a private and public self. The diverse state needs to find ways in which the separation is maintained, while simultaneously treating collective religious beliefs with respect. This balance will be representative of the fact that the principle task of separation between state and religion is to secure religious liberty and not to protect the secular world from religious influence.<sup>35</sup>

### **5.2.1.2 Impact on marginalised religions**

As indicated above, the harm of discrimination is suffered not only by the individual but also by the community as well, due to the collective nature of religion. This harm is even more significant in marginalised or vulnerable communities. Therefore, to relegate religion to the private domain has the most severe negative effect on unpopular or outsider religions. For example, in the USA, when Native Americans objected to the Forest Service plans to allow logging and road building in a national forest traditionally used for by the tribes for sacred rituals, the Supreme Court held that ‘Government simply could not operate if it were required to satisfy every citizen’s

---

<sup>35</sup> Carter (note 32 above) 107.

religious needs and desires'.<sup>36</sup> The right to manifest religious belief through the adherence of sacred rituals are consequently without meaning for this outsider religion.<sup>37</sup>

Sachs J aptly captures the impact on marginalised religions in the following quotation in the *Prince v President, Cape Law Society* case:

[W]hat we are bold to call neutrality means in practice that big religions win and small religions lose . . . [T]he cathedral is not safe [from having a road built across its land] because it is a religious building – it is safe because it is a building valued by a politically powerful constituent group . . . Neutrality is a blueprint for the accidental destruction of religions that lack power.<sup>38</sup>

From the discussion above, it is apparent that the claim that secularism neither favours nor discriminates is fictitious. Quite the opposite is clear: that neutrality in general has contributed to the perpetuation of the imposition of a colonial view on many other cultures and that neutrality is only a disguised imposition of majority preferences.<sup>39</sup> The influence of power reminds us of the role of colonialism and other forms of exploitation of the weak.<sup>40</sup> A so-called secular and neutral approach is therefore not

---

<sup>36</sup> *Lyng v Northwest Indian Cemetery Protective Association*, 485 U S 439 (1988) at 452.

<sup>37</sup> L Carter 'Religious Freedom as if Religion Matters: A Tribute to Justice Brennan' (1999) 87 *California Law Review* 1059, 1063.

<sup>38</sup> *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince*) 158.

<sup>39</sup> V Sacks 'Multiculturalism, Constitutionalism and The South African Constitution' (1997) Winter *South African Public Law* 627, 675.

<sup>40</sup> See generally TF Driver 'The case for pluralism' in J Hick & PF Knitter *The myth of Christian uniqueness: toward a pluralistic theology of religions* (1987). See also DJ Louw 'Towards a decolonized assessment of the religious other' (1990) 18 (4) *South African Journal of Philosophy* 390.

neutral in relation to cultural identities because of the power relations in the particular state.<sup>41</sup>

Kuitert is of the opinion that given the diversity of religious beliefs and cultures it is impossible to find one normative authority that is equitable for all.<sup>42</sup> In an attempt to elevate a universal morality through adherence to the principle of secularism, the enlightenment recedes back to the pre-enlightenment where the authority is once again vested in the hands of the state or church.<sup>43</sup>

The following interpretation of secularism as put forward in the judgment of McKenzie J in the unanimous decision of the British Columbia Court of Appeal in the matter of *Chamberlain v Surrey School Board*, encapsulates the concept of secularism aptly as such:

In my opinion, “strictly secular” in the School Act can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. That meaning of strictly secular is thus pluralist or inclusive in the widest sense.<sup>44</sup>

Here too, the necessity for religious voices to be heard in the public domain is considered part of a secular approach. It is argued that this interpretation of the concept of secularism is the most suited to ensuring the protection of the right to freedom of religion and in particular the right to manifest religious belief in a diverse

---

<sup>41</sup> In this regard see generally W Kymlicka, *The Rights of Minority Cultures* (1995) 10.

<sup>42</sup> In this regard see HM Kuitert ‘Een moral van het jaar nul? Ethiek-beoefening onderweg naar 2000’ in: *Zijn de dagen van God geteld? Feestbundel voor Ton van der Worp* (1995) 11, 53-54, as quoted in NN Koopman *Dade of Deugde? Implikasies vir die Suid-Afrikaanse kerke van 'n moderne postmoderne debat or moraliteit* PhD Thesis University of the Western Cape (2000) 49.

<sup>43</sup> In this regard see Koopman (note 42 above) 49.

<sup>44</sup> *Chamberlain v Surrey School Board* (2000), 80 BCLR (3d) 181 (C.A.) reversing (1998), 60 BCLR (3d) 311 (S.C.) per McKenzie JA 33.

society. For these reasons it has been suggested that secularism must be reconceptualised not as a principle of absolute separation between the state and religion, but as a principle of even-handed treatment by the state of all religions.<sup>45</sup> It is from this postmodern approach, that the principle of secularism is viewed next.

### **5.2.2 Postmodern response to secularism: The return of religion to the public sphere**

The ethnic diverse community brings new challenges to the traditional manner in which the relationship between the state and religion is structured and the protection afforded to fundamental human rights in general and the right to freedom of religion. It has been argued that the very nature of religion takes no notice of the public-private divide. Religious people often see life as a whole and aspire to manifest their beliefs in their private and public lives. In addition, the separation of the secular state too is a product of history and reflective of this historical domination.<sup>46</sup> In this regard, feminists and critical race theorists have emphasised the patriarchal bias of liberal culture and called for its reassessment.<sup>47</sup> A similar appeal is made on behalf of religious and cultural groups regarding the reassessment of the secular state and the strict separation between the public and the private sphere.<sup>48</sup>

---

<sup>45</sup> C Laborde 'Secular Philosophy & Muslim Headscarves In Schools' (2005) 13(3) *The Journal of Political Philosophy* 305, 329.

<sup>46</sup> See discussion in section 8.2.

<sup>47</sup> See generally N Bohler-Muller *Developing a New Jurisprudence of Gender Equality in South Africa* LLD thesis, University of Pretoria (2005); see also L Sanford 'Religious Language and the Public Square, Reviewed work: Love and Power: The Role of Religion and Morality in American Politics by Michael J Perry' (1992) *Harvard Law Review* 2061, 2601.

<sup>48</sup> In this regard see generally PL Berger & PS Huntington, *Many Globalizations: Cultural Diversity in the Contemporary World* (2002).

In response to the claims of silencing and exclusion from religious believers, Habermas states that '[t]he boundaries between the private and public autonomy of citizens are in flux'.<sup>49</sup> Habermas therefore argues that although secular society is grounded in democratic legitimisation, the political realm should nevertheless not ignore the realm of the religious.<sup>50</sup> Secularists are mistaken when they ask believers to leave their religion at the door before entering into the public square. Rieffer too argues that religion should not be barred from the public square, as the right to freedom of religion is a social freedom and includes the right to influence the policies and laws by which a free people will be governed.<sup>51</sup> It is premised that for many believers religion is not an 'extra' component but the 'base' component of their identity. In light of this concept, it is generally implausible for a believer to pronounce a secular reason as religious belief will influence her opinion on state policy on welfare and abortion for example.<sup>52</sup> Political dialogue should therefore not exclude arguments from religious believers but rather welcome them so that the political realm may reclaim the confidence of a diverse nation.<sup>53</sup>

Religion therefore should be reintroduced to the public discourse so that it may play a role in decision-making processes. Habermas argues that citizens are required to

---

<sup>49</sup> Habermas (note 26 above) 128.

<sup>50</sup> J Habermas 'Pre-political Foundations of the Democratic Constitutional State' in J Habermas & J Ratzinger (eds) *The Dialectics of Secularization: On Reason and Religion* (2006) 19, 42.

<sup>51</sup> BA Rieffer 'Religion, Politics and Human Rights Understanding the Role of Christianity in the Promotion of Human Rights' (2006) 6 *Human Rights and Human Welfare* 31, 32. See also H Arendt *The Human Condition* (1958). Arendt defines the public space as a world inhabited by humans and therefore reflective of the social status of human nature.

<sup>52</sup> N Wolterstorff 'Abraham Kuyper (1837-1920)' in J Witte Jr. & FS Alexander (eds) *The Teachings of Modern Christianity on Law, Politics, and Human Nature* (2006) 295-96, 309.

<sup>53</sup> W Galston 'Defending Liberalism' (1982) 76 (3) *The American Political Science Review*, 621, 629.



translate their religious based claims into secular reasons.<sup>54</sup> Rawls uses the notion of translation to describe the ways in which rational arguments of religious people are made accessible to a secular audience.<sup>55</sup> This demand for accessibility is critiqued in the following manner:

[O]nly citizens committed to religious beliefs are required to split up their identities, as it were, into their public and private elements. They are the ones who have to translate their religious beliefs into a secular language before their arguments have any chance of gaining majority support.<sup>56</sup>

Calhoun claims that bridging the distance between religious and non-religious arguments cannot be achieved through translation alone.<sup>57</sup> He suggests that translation should be seen as a metaphor for the process of becoming able to understand the arguments of another. Calhoun continues by stating that we are indeed more able to understand the arguments of others when we understand more of the intellectual and personal commitments and cultural frames. Habermas refers to this as a 'complimentary learning process'.<sup>58</sup> Calhoun continues in acknowledging that often mutual understanding cannot be achieved without change in the parties, individually as well as collectively in that 'mutual engagement across the national or cultural or religious frontiers changes the pre-existing nations, cultures and religions'.<sup>59</sup>

In contrast with Rawls and, to a lesser extent Habermas, it is argued that the approach of Carter is preferable in that he maintains that:

---

<sup>54</sup> See generally Habermas (note 26 above); J Habermas 'Religion in the Public Sphere'(2006) 14 (1) *European Journal of Philosophy* 1.

<sup>55</sup> J Rawls *Political Liberalism* (1993) 212.

<sup>56</sup> J Habermas *The Future of Human Nature* (2003) 109.

<sup>57</sup> C Calhoun 'Secularism, Citizenship and the Public Sphere' (2008) 7 *Hedgehog Review* 1118.

<sup>58</sup> J Habermas, 'Die Dialektik der Säkularisierung,' *Blätter für deutsche und international Politik*, available at < <http://blaetter.de/artikel.php?p=2802>> last accessed on 11 December 2010.

<sup>59</sup> Calhoun (note 57 above) 18.

[A] requirement that the religiously devout choose a form of dialogue that liberalism accepts, but that liberalism develops a politics that accepts whatever form of dialogue a member of the public offers. ... What is needed, then, is a willingness to listen, not because the speaker has the right voice but because the speaker has the right to speak.<sup>60</sup>

For these reasons it is argued that public policy ought to be influenced by more than just so-called public reason and that religious voices also have a role to play in the crafting of public policy.<sup>61</sup> This argument is supported by Cooke who claims that to do otherwise builds an inequality into the system that weakens the bonds of solidarity between all citizens.<sup>62</sup>

One way in which voice of religious diversity can be accommodated in the public realm is through following an approach similar to the approach suggested by Brems.<sup>63</sup> She argues for inclusive universality in terms of which cultural claims can be brought into the realm of human rights law. This argument is supported by the fact that examples of inclusive universality can be found in existing international human rights context. For example, the margin of appreciation doctrine as applied by the European Court on Human Rights (ECtHR) is an example of the recognition of national difference. In addition, reference to progressive realisation as contained in the

---

<sup>60</sup> Carter (note 32 above) 230.

<sup>61</sup> FJ Mootz III 'Faith and Politics in the Post-Secular Age: The Promise of President Obama' (2009) Research Paper 10-05, 32, available at: <<http://ssrn.com/abstract=1433545>> last accessed on 19 May 2010.

<sup>62</sup> M Cooke 'A Secular State for a Postsecular Society? Postmetaphysical Political Theory and the Place of Religion' (2007) 14 (2) *Constellations* 224, 233. See also generally M. Cooke, 'Five Arguments for Deliberative Democracy' (2000) 45 (5) *Political Studies* 947; Audi & Wolterstorff (note 10 above) 108-9.

<sup>63</sup> In this regard see generally E Brems 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam' (2004) 5 *Human Rights Review* 5, 12.

International Covenant on Economic, Social, and Cultural Rights (ICESCR) in terms of which an obligation to ‘take steps’ toward the realisation of full human rights protection also serves as a case in point.<sup>64</sup> It is suggested that just as these differences have been accepted the voice of religious and cultural difference can be accepted in the public domain.

Other examples of how dialogue between the cultural claims of diverse societies and the international human rights regime have altered both these societies,<sup>65</sup> include the recognition of the collective nature of human rights and the acknowledgment of the aspect that human rights does not just recognise rights, but that all rights are also infused with obligations as well.<sup>66</sup> Both these examples of altered appreciation of the role of human rights are relevant in relation to the right to freedom of religion as shown.

The notion of the acceptability of religious dialogue is also defended by Hicks who states that this possibility of a pluralistic approach towards religion is possible in light of the fact that ‘religious allegiance depends in the great majority of cases on the accident of birth’.<sup>67</sup> He explains the impact of cumulative tradition on individual faith as follows:

If I had been born in India I would probably be a Hindu; if in Egypt, probably a Muslim; if in Ceylon, probably a Buddhist; but I was born in England and am, predictably, a Christian.<sup>68</sup>

---

<sup>64</sup> ICESCR article 2 as commented on in terms of Committee on Economic, Social, and Cultural Rights, General Comment Number 3, E/1991/23.

<sup>65</sup> Brems (note 63 above) 13.

<sup>66</sup> Brems (note 63 above) 15.

<sup>66</sup> Brems *Human Rights: Universality and Diversity* (2001) 431.

<sup>67</sup> J Hick *An Interpretation of Religion: Human Responses to the Transcendent* (1989) 231-32.

<sup>68</sup> *Ibid.* It is in relation to different ways of being human, developed within civilisation and cultures of the earth, that the ‘Real’, apprehended through the concept of God, is experienced specifically as the

Therefore our being born in a particular part of the world *per se* is the only basis for the privilege of knowing the only religious truth.<sup>69</sup> Through awareness of this knowledge it is possible that we may become more appreciative of the fact that there is consequently no single universal human experience but rather a range of possible different ways of living a human life.<sup>70</sup>

It is suggested that a suitable forum for religious dialogue is in the sphere of citizenship. The religious meaning of being human in all its diversity should be allowed into the political domain creating dynamics of inclusion.<sup>71</sup> Public participation ought to allow for the appreciation of issues from the point of view of those with differing religious convictions and cultural backgrounds.<sup>72</sup> Public participation is generally facilitated through the role of citizenship. It is argued that this process of facilitation as well as the role of citizenship should be reconceptualised to adapt to social and cultural diversity.

In the past citizenship has been based on a divide between the public and private spheres. The postmodern democratic state should be based on a concept of citizenship that incorporates difference. Citizenship can no longer be based exclusively on the foundation of shared identity but should rather be based on principles of human rights

---

God of Israel, or as the Holy Trinity, or as Shiva, or as Allah, or as Vishnu. See Hick (note 67 above) 245.

<sup>69</sup> J Hick 'The Epistemological Challenge of Religious Pluralism' (1997) 14 *Faith and Philosophy* 277, 287; see also generally W Alston 'Religious Diversity and the Perceptual Knowledge of God' (1988) 5 *Faith and Philosophy* 433. See also HH The Dalai Lama *Towards the true kinship of faith. How the world's religions can come together* (2010).

<sup>70</sup> See generally J Hick 'The Philosophy of World Religions' (1984) 37 *Scottish Journal of Theology* 229.

<sup>71</sup> Chidester (note 5 above) 15.

<sup>72</sup> W Kymlicka 'Liberalism and Communitarianism' (1998) 18 *Canadian Journal of Philosophy* 181, 188.

that do not impose a particular dominant culture on minorities. Habermas has referred to this as the culture of ‘constitutional patriotism’.<sup>73</sup> Constitutional patriotism can however only emerge when the dominant culture has been dissolved.<sup>74</sup> One way of allowing religious voices into the public domain is through a comprehensive understanding of the principles of democratic citizenship.

### 5.2.2.1 Democratic citizenship

From the inception of the concept of the nation state following the Peace of Westphalia,<sup>75</sup> the concept of citizenship has shared on aspect: that the framework for citizenship is the sovereign state that provides a distinct source of identity. Immigration and globalisation have however altered the homogeneous nature and identity of the sovereign state.<sup>76</sup> As a result, the concept of citizenship must adapt to this changed reality. The majority culture can no longer serve as the foundation of a shared identity. The concept of a shared identity must be replaced by principles of human rights agreed upon by all and not imposed by a particular majority culture on minorities. Young envisages a model of differentiated citizenship in which citizens partake from their own ‘situated positions’ and attempt to construct a dialogue across difference.<sup>77</sup>

---

<sup>73</sup> J Habermas *Inclusion of the Other: Studies in Political Theory* (1998) 118.

<sup>74</sup> *Ibid.* It can be argued that in SA this dissolution was brought about by the peaceful change to a democratic SA, however the dissolution can equally be brought about through revolutionary means.

<sup>75</sup> See section 2.3.3.

<sup>76</sup> See generally D Leydet, ‘Citizenship’ in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy*. (2009), available at <<http://plato.stanford.edu/archives/spr2009/entries/citizenship/>> last accessed on 10 May 2010.

<sup>77</sup> IM Young ‘Polity and Group Difference: A Critique of the Ideal of Universal Citizenship’ (1989) 99 *Ethics* 258, 267.

Macpherson has explained that democracy is not only about electing leaders but that 'the egalitarian principle inherent in democracy requires not only 'one man, one vote,' [but also] one man, one equal right to live as fully humanly as he may wish'.<sup>78</sup> The way in which democracy is structured therefore needs to be revisited so that individuals are able to form part of the decisions that affect their lives. In addition, the ability of the marginalised to influence the democratic processes needs to be addressed to ensure that the less powerful are not subjected to domination. Glendon maintains that all citizens should be encouraged to be part of public dialogue. This participation can be by way of for example partaking in constitutional litigation or involvement in civil society debates.<sup>79</sup> Other advocates for political recognition for differently-situated group identities within democratic societies include Phillips,<sup>80</sup> Mouffe and Young.<sup>81</sup> These advocates of a 'politics of difference' concur that groups do not only wish to be recognised in an equal manner to all others in society, they strive for recognition as a person of a particular sort, with a particular kind of identity.<sup>82</sup> The approach of Mouffe forms the basis of the discussion below.

Mouffe calls for a deepening of democracy through a radicalisation of the modern democratic tradition. She argues that modern democratic societies must be held

---

<sup>78</sup> CB Macpherson *Democratic Theory* (1973) 51.

<sup>79</sup> MA Glendon *Rights Talk: The Impoverishment of Political Discourse* (1991). See also R Audi 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 (4) *San Diego Law Review* 30.

<sup>80</sup> See generally A Phillips *Democracy and Difference* (1993).

<sup>81</sup> Young calls this conception of the political sphere 'communicative democracy', in which a public world of shared understandings is constructed from our differently-situated experiences by the means of dialogue. In this regard see generally Young (note 77 above) 267.

<sup>82</sup> J Hoover 'Do the Politics of Difference Need to be Freed of a Liberalism?' (2001) 8 (2) *Constellations* 201, 205

accountable to the ideals that all human beings are free and equal.<sup>83</sup> Accordingly, democracy must be extended and the importance of the community needs to be given emphasis, as a citizen cannot be viewed independent from her position in a political community.<sup>84</sup> The concept of citizenship does not only exist in homogenous societies. On the contrary, citizenship is to be found in societies consisting of different ethnic and cultural identities.<sup>85</sup> While it is important to allow for pluralism in areas such as culture, religion and morality, it must be acknowledged that citizenship requires commitment to the principals of modern democracy and that one's identity as a citizen exists independent from one's ethnic, religious or racial identity.<sup>86</sup>

This inclusive politics, in which all citizens engage, should encapsulate the Macpherson maxim 'one man, one equal right to live as fully humanly as he may wish' as discussed above.<sup>87</sup> To achieve this egalitarian understanding of public participation the process of participation should be reconceptualised to adapt to social and cultural diversity. One way in which participation is generally enhanced is through the process of deliberative democracy.

---

<sup>83</sup> C Mouffe 'Preface: Democratic Politics Today' in C Mouffe (ed) *Dimensions of Radical Democracy Pluralism, Citizenship, Community* (1992) 1.

<sup>84</sup> *Ibid* 4.

<sup>85</sup> *Ibid* 8. The Manifesto for a new Europe supports the claims of Mouffe in that a new inclusive politics in Europe is called for. This Manifesto acknowledges that diversity is the essence of Europe and that the best approach to manage this diversity is dialogue and negotiation. *A Manifesto for a New Europe*, available at <<http://www.guardian.co.uk>> last accessed on 14 July 2010.

<sup>86</sup> For Arendt the public sphere refers to a sphere where citizens interact through the medium of speech and persuasion, disclose their unique identities but decide through collective deliberation about matters of common concern.

<sup>87</sup> Macpherson (note 78 above) 51.

### 5.2.2.2 Deliberative democracy through value pluralism<sup>88</sup>

Democratic politics is linked to the existence of a social space where people act collectively as citizens to democratically resolve issues concerning their life in the political community. Democracy requires that people come together, as citizens, to determine the affairs of the community.<sup>89</sup> This process is never complete and is a process of constant renegotiation in which citizens defend and articulate competing conceptions of political legitimacy.<sup>90</sup> The indeterminate nature of this constant renegotiation is well captured in the following confirmation:

Living with contradictions in our postmodern world is not a fate. It is rather an opportunity to appreciate the contrasts that constitute the full picture of the reality we experience, in other words, and aesthetic mode of coping with the dilemma of contradiction.<sup>91</sup>

However, democracy does not seek to transform private virtues into public virtues. Democratic citizenship requires that citizens relate towards one another in mutual respect, seeking achievement of the principles of 'positive liberty', democracy and

---

<sup>88</sup> The following definition of pluralism as provided in the glossary to the Taylor/Bouchard Commission Consultation Document is supported. It reads as follows: 'A system or philosophy, which, in the name of respect for diversity, acknowledges the existence of different political opinions, moral and religious beliefs, and cultural and social behaviour'. The Consultation Document for the Commission is available at

<<http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf>> last accessed on 10 May 2009.

<sup>89</sup> G Quinot 'Snapshot or participatory democracy? Political engagement as a fundamental human right' (2009) 25 (2) *South African Journal on Human Rights* 392.

<sup>90</sup> M Passerin d'Entrèves 'Hannah Arendt and the Idea of Citizenship' in C Mouffe (ed) *Dimensions of Radical Democracy Pluralism, Citizenship, Community* (1992) 145, 158.

<sup>91</sup> LM du Plessis 'The South African Constitution as a Monument and Memorial, and the Commemoration of the Dead' in R Christensen & B Pieroth (eds) *Rechtstheorie in rechtspraktischer Absicht* (2008) 189, 205.



self-government, and not simply the principles of 'negative liberty' or non-interference.<sup>92</sup>

However, the opening of the democratic discourse to interact with religious and cultural difference requires the application of democratic models in which such interaction can occur, for example is deliberative democracy.<sup>93</sup> The model of deliberative democracy can be made use of as a means to facilitate such interaction. The main object of deliberative democracy is that decisions should be reached through a process of deliberation amongst free and equal citizens. The more equal, impartial and open the process, the less likely the participants will be coerced. Benhabib describes the process in the following way:

According to the deliberative model of democracy, it is a necessary condition for attaining legitimacy and rationality with regard to collective decision making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals.<sup>94</sup>

However, deliberative democracy in a secular society generally renounces religious, moral or philosophical views. Secularism maintains that as separation exists between

---

<sup>92</sup> M Dietz 'Context is All: Feminism and Theories of Citizenhip' in C Mouffe (ed) *Dimensions of Radical Democracy Pluralism, Citizenship, Community* (1992) 63, 75.

<sup>93</sup> Other models such as consociational democracy, an agreement between the leaders of each group to share government, involving coalition, segmental autonomy, proportionality, and minority veto exist. However, the frame for this discussion focuses on deliberative democracy as a form of participatory democracy. In this regard see generally ME Warren 'Can Participatory Democracy Produce Better Selves? Psychological Dimensions of Habermas's Discursive Model of Democracy' (1993) 14 (2) *Political Psychology* 209; see also J Habermas 'Faith and Reason' in J Habermas (ed) *The Future of Human Nature* (2003); J Waldron 'Religious Contributions in Public Deliberations' (1993) 30 *San Diego Law Review* 817.

<sup>94</sup> S Benhabib *Towards a Deliberative Model of Democratic Legitimacy* (1996) 69.

the realm of the private, where plurality of ideas coexists, and the realm of the public, and that consensus can only be established in the realm of the public.

Mouffe states that through the privatisation of life, social stability has not resulted.<sup>95</sup> In fact, extreme forms of individualism have become more prevalent. She claims that the increase in various religious, moral and ethnic fundamentalisms is a direct consequence of the democratic deficit, which characterises most liberal democratic societies.<sup>96</sup> Mediating conflicting interests through privatisation leaves aside the role played by collective forms of identification. Traditional deliberative democracy tends to overlook the inherent tension that exists between democracy and liberalism.<sup>97</sup>

In response, value pluralism is committed to affirming the heterogeneity of values and places no hierarchical ranking to this diversity of values.<sup>98</sup> The public space is restructured in a way which welcomes all citizens despite their diverse identities, allowing those who were left outside to enter, bringing with them their particularities. A reconceptualised deliberative democracy necessitates an appreciation that social relations are tantamount to power relations, and what is needed is an approach that places the question of power as the focal point.<sup>99</sup> The very nature of these power relations are that they exclude in that:

---

<sup>95</sup> C Mouffe *Deliberative Democracy or Agnostic Pluralism* (2000) *Political Science Series* 72, 11.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> WA Galston 'Value Pluralism and Liberal Political Theory' (1999) 93(4) *The American Political Science Review* 769, 680.

<sup>99</sup> Mouffe (note 95 above) 12. See generally also N Carpentier & B Cammaerts 'Hegemony, democracy, agonism and journalism: an interview with Chantal Mouffe' (2006) 7 (6) *Journalism Studies* 964.

There is always something that has been excluded, so there is no consensus without exclusion. There is no possibility of complete inclusion, because in order to create a hegemonic order, there is always something that needs to be oppressed.<sup>100</sup>

This exclusion actually leads to more destruction, as peoples' need for collective identity will never disappear since it is integral part of human existence.<sup>101</sup> Collective identification by its very nature supposes the existence of 'we' which likewise presupposes a 'they'.<sup>102</sup> Democratic citizenship should therefore be appreciative of the importance of the collective identity<sup>103</sup> as well as the fact that the adversarial relationship between 'us' and 'them' is a necessary component of a well functioning political realm.<sup>104</sup> This distinction between 'us' and 'them' is particularly pronounced in the case of religion as the commitment to religion *per se* is exclusive in that:

A person ascribes to one religion at a time and doing so entails rejecting fundamental elements of other religions. I cannot say, for instance, that I am a Jew but believe that Christ is the Messiah.<sup>105</sup>

Mouffe declares that a tension exists between the principle of individual rights and democratic self-government that cannot be eradicated.<sup>106</sup> She argues for the negotiation of this tension through solutions, which are never fixed. Mouffe however

---

<sup>100</sup> Carpentier & Cammaerts (note 99 above) 969.

<sup>101</sup> PG Danchin 'Who Is the "Human" in Human Rights? The Claims of Culture and Religion' (2009) 24 *Maryland Journal of International Law* 94, 99.

<sup>102</sup> CW Ruitenbergh 'Educating Political Adversaries' (2009) 28 *Studies in Philosophy and Education* 269, 272.

<sup>103</sup> *Ibid* 273.

<sup>104</sup> *Ibid* 274.

<sup>105</sup> RC Sinopoli 'Liberalism and Contested Conceptions of the Good: The Limits of Neutrality' (1993) 55 (3) *The Journal of Politics* 644, 656.

<sup>106</sup> See generally C Mouffe *The Democratic Paradox* (2000); see also C Mouffe, *The Return of the Political* (1993); and C Mouffe *On the Political* (2005).

does not argue for acceptance of total pluralism, but rather calls for an acknowledgment of the political nature of the limits placed on liberalism. This is preferable to these limits being presented as rational.<sup>107</sup> Her main critique is that this 'rationality' relies on a separation of the realm of the public, where consensus can be established through a shared conception of justice, and the realm of the private, where a plurality of different and irreconcilable views exists.<sup>108</sup> It is impossible to circumscribe a domain that would not be subject to a pluralism of values and where consensus without exclusion could exist. It is submitted that Mouffe is correct in her point of view. Mouffe further claims that the main task for democracy is not to avoid different views but to convert antagonism into agonism, enemies into adversaries, fighting into critical engagement.<sup>109</sup>

Gardbaum supports Mouffe in that he maintains that:

[I]t is expected that autonomous citizens will affirm different and incompatible ... conceptions of the public and private good. Such divergence should be viewed as the desired and characteristic result of a vibrant democratic society in which people pursue their own ideas and ways of life. Accordingly, the fact of reasonable pluralism is not so much a "problem" in need of accommodation or regulation ... as it is the characteristic symptom and result of a genuinely free society. ... In short, liberalism does not merely accommodate or tolerate difference, but embraces and celebrates it.<sup>110</sup>

The conditions required to enable the development of one's identity, include the existence of a truly pluralist democratic society, which is usually seen as a society in

---

<sup>107</sup> See generally Mouffe (2000) (note 95 above) 1.

<sup>108</sup> See generally Mouffe (note 106 above).

<sup>109</sup> For a critique of Mouffe that is not supported here see generally JS Dryzek 'Alternatives to Agonism and Analgesia' (2005) 33 (2) *Political Theory* 218.

<sup>110</sup> S Gardbaum 'Liberalism, Autonomy, and Moral Conflict' (1996) 48(2) *Stanford Law Review* 385, 407-8.

where divergent values and identities are able to coexist in a peaceful manner.<sup>111</sup> Accordingly, 'value pluralism'<sup>112</sup> is conducive to an environment in which respect and tolerance coupled with dialogue assists in the shaping of the social and political design.

### **5.3 The flawed theoretical foundation of human rights as individual negative rights**

Douzinas argues convincingly that the creation of natural rights was the result of an act of rebellion against priests and rulers.<sup>113</sup> At first, these natural rights were inalienable, independent of government and expressed as the eternal rights of the universal 'man'.<sup>114</sup> Soon this was altered and the origin of these rights were no longer found in nature and man, but located within the 'nation-state'.<sup>115</sup> The historical legislator of the French and American nation attached the rights of man to the source of sovereignty of the state and the holder of rights to the 'citizen'.<sup>116</sup> In addition the holder of the 'rights of man' was:

---

<sup>111</sup> TH Malloy 'Title and Preamble' in M Weller (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* (2005) 49, 64.

<sup>112</sup> Value pluralism was first endorsed by I Berlin in 'The Pursuit of the Ideal' in I Berlin *The Proper Study of Mankind* (1997). See also J Raz *The Morality of Freedom* (1988); WA Galston *Liberal Pluralism: The Implication of Value Pluralism for Political Theory and Practice* (2002).

<sup>113</sup> C Douzina 'The end(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 446, 448.

<sup>114</sup> *Ibid* 448.

<sup>115</sup> See generally Danchin (note 101 above) 99.

<sup>116</sup> Declaration of the Rights of Man and Citizen (1789) [translation of *Declaration de droits de l'homme et du citoyen*].

[A] man all too man - a well-off, heterosexual, white male - who condensed the abstract dignity of humanity and the real prerogatives of belonging to the community of the powerful.<sup>117</sup>

Douzinas states that despite the origin of human rights being in response to domination and that in as much as human rights were designed to liberate people from oppression the opposite is often achieved in that:

[R]ights are highly artificial constructs, a historical accident of the European intellectual and political history. The concept of rights belongs to the symbolic order of language and law, which determines their scope and reach.<sup>118</sup>

In this regard, the applicability of human rights is determined through conflict and the battlefield is the manner in which words, such as 'difference' and 'equality' or 'similarity' and 'freedom' are interpreted. These encounters fundamentally affect peoples' lives.<sup>119</sup> Klare supports this point of view when he emphasises that choices have to be made when limiting human rights and these choices bear social and political consequences as the rights discourse does not provide for neutral decisions.<sup>120</sup>

The historical origin of human rights is not only applicable in France and the USA but has applicability everywhere. Regarding the application in SA, Davis, in a similar vein, has acknowledged the impact of political reasoning when interpreting the rights contained in the Constitution as follows:

[C]onstitutionalism is about moral and political reasoning. When judges go about the business of constitutional adjudication, they are involved in a form of politics. The very material with which they work is uncontested. Indeed, the meaning to be given

---

<sup>117</sup> Douzina (note 113 above) 455.

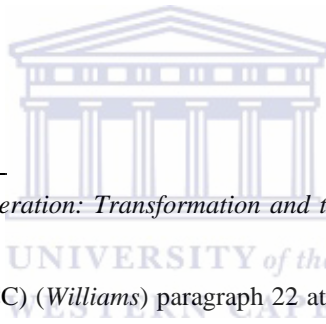
<sup>118</sup> Douzina (note 113 above) 456.

<sup>119</sup> *Ibid.*

<sup>120</sup> K Klare 'Legal Theory and Democratic Reconstruction' (1991) 25 *University of British Columbia Law Review* 69, 97.

to the content of the Constitution is part of a continuous process of construction. Meaning is shaped by a system of social, political and ideological relations within which it is formed, so that meaning is always in being and becoming.<sup>121</sup>

Langa J identifies with Davis and Douzinas in that he recognises that the interpretation of the fundamental rights in the Constitution involves the making of value judgments.<sup>122</sup> These judgments occur in the light of the values which underlie the Constitution in an open and democratic society based on freedom and equality and must be reflective of the values we find inherent in, or worthy of, pursuing in this society.<sup>123</sup> The duty imposed in section 39(1) (a)<sup>124</sup> and 7(1)<sup>125</sup> compel the courts to make value choices and to make those values explicit through clear and transparent articulation.<sup>126</sup>



---

<sup>121</sup> D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 47.

<sup>122</sup> *S v Williams* 1995 3 SA 632 (CC) (*Williams*) paragraph 22 at 639F, as per Langa J. In addition see Kennedy who describes rights as mediators between two domains, namely the *value judgments*, described as matters of preference, and *factual judgments*, believed to be representative of the so-called objective judgments. In this regard see D Kennedy *A critique of adjudication* (1997) 305. Kennedy continues to explain the concept of value judgments through the following example, with regards to the scope of the right of freedom of expression in the context of a neo-nazi demonstration in a neighbourhood inhabited by people who survived the Holocaust. Germany would probably ban the demonstration, while the USA system would be permissive towards this demonstration.

<sup>123</sup> *Williams* (note 122 above) paragraph 50 648C-D, as per Langa J.

<sup>124</sup> Section 39 (1) of the Constitution of SA provides: ‘When interpreting the Bill of Rights, a court, tribunal or forum -(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.

<sup>125</sup> Section 7(1) of the Constitution of SA provides: ‘This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’.

<sup>126</sup> AE Van Blerk *Jurisprudence: An Introduction* (1996) 25.

In light of the above it is important that the right to freedom of religion is not only construed as an individual right, but that the collective nature of the right is also appreciated. In addition, the right should be reconceptualised in that the right does not only impose a negative duty on the state not to infringe but that the state has a positive duty to also promote and protect the right.

### **5.3.1 Postmodern response: positive obligation to promote the collective right**

Kymlicka claims that in most states a distinction is drawn between the political and cultural community, with the political community usually consisting of individuals with individual rights.<sup>127</sup> Liberalism places great emphasis on individual autonomy and the concept that each should be able to devise her own plan of a good life.<sup>128</sup> Habermas is appreciative of the emphasis liberalism places on individual autonomy in selecting the good life. However he claims that in selecting one's own life, one morally ought to grant others with all their idiosyncrasies the same choice, and should not insist on universalising one's own identity.<sup>129</sup> However, in selecting this good life one selects from a range of options often determined by cultural heritage. Therefore, each individual's identity is bound to the cultural community in which she finds herself.<sup>130</sup> Rawlsian<sup>131</sup> and Dworkinian<sup>132</sup> conceptions of justice are based on the notion that each individual's interest in the political community matters equally.<sup>133</sup>

---

<sup>127</sup> See W Kymlicka *Liberalism, Community and Culture* (1989) 135.

<sup>128</sup> See generally J Rawls *A Theory of Justice* (1972).

<sup>129</sup> Arslan (note 17 above) 213.

<sup>130</sup> See generally J Tomasi 'Kymlicka, Liberalism, and Respect for Cultural Minorities' (1995) 105(3) *Ethics* 580.

<sup>131</sup> See generally J Rawls 'Justice as fairness: Political not metaphysical' (1985) 14(3) *Philosophy and Public Affairs* 223; Rawls (note 55 above).

<sup>132</sup> See generally R Dworkin *A Matter of Principle* (1985).

<sup>133</sup> Kymlicka (note 127 above) 182.



Kymlicka however argues that Rawls and Dworkin do not discuss cultural membership because they assume cultural homogeneity, which regards the political and cultural as coextensive.<sup>134</sup> While Kymlicka argues that some groups may need special protection, in that:

The world today is increasingly multicultural and pluralistic. The focus of rights is shifting from the individual to the group. Groups are increasingly demanding recognition of their own interests, which they assert as pluralistic values that the democratic state must protect. Such groups define the pluralism of the state and act as a counterbalance to the developing power of the modern state. The individual's right to belong to the group is increasingly being challenged as a right of conscience.<sup>135</sup>

Advances have been made in acknowledging the importance of culture and the collective nature of rights, as well as the duty to promote these collective rights. The collective nature of the right to religion was affirmed in the decision of *MEC for Education, KwaZulu-Natal & Others v Pillay* in the following manner by O'Regan J:

[T]hat when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group. Where one is dealing with associative practices, therefore, it seems that religion and culture should be treated similarly.<sup>136</sup>

The Constitutional Court of SA acknowledged the intersection between culture and religion, and that wearing a nose stud may indeed be both an expression of culture and of religion:

[P]articularly so in this case where the evidence suggests that the borders between culture and religion are malleable and that religious belief informs cultural practice and cultural practice attains religious significance. As noted above, that will not

---

<sup>134</sup> See generally Tomasi (note 130 above) 580.

<sup>135</sup> SS Juss 'Freedom of conscience rights: lessons for Great Britain' (1997) 39 (4) *Journal of Church and State* 749, 749.

<sup>136</sup> *MEC for Education, KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC) paragraph 145.

always be the case: culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways. But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture.<sup>137</sup>

Through interpreting the right as both an individual and a cultural right, or collective right, the protection afforded to the right to manifest belief was indeed enhanced. In addition, the positive duty to accommodate through the adoption of special measures further entrenches the protection of the right. It is suggested that the above interpretation truly enhances the right to manifest belief.

#### **5.4 The inequitable notion of toleration**

The initial phase of the protection of the right to freedom of religion was in terms of the concept of toleration.<sup>138</sup> Later, toleration and promotion of the right to freedom of religion were incorporated into models of minority protection of the right to freedom of religion.<sup>139</sup> In addition to pledging to refrain from discrimination, states undertook to recognise and respect diversity, as incorporated in the so-called minority treaties.<sup>140</sup>

---

<sup>137</sup> *Ibid* paragraph 60.

<sup>138</sup> In this regard see the Peace of Augsburg (1555), the Edict of Nantes (1598), the Toleration Act issued by the King of England in 1689 as well as the Peace of Westphalia (1648). See discussion in section 2.3.3.

<sup>139</sup> See discussion in section 4.3.3 and 4.8.3.

<sup>140</sup> See discussion in section 4.3.3 and 4.8.3.

The introduction of toleration can be compared to toleration in the narrow sense, from the Latin *tolerantia*, meaning to endure or bear.<sup>141</sup> Generally toleration refers to the conditional acceptance with beliefs, actions or practices that one considers being wrong but still ‘tolerable’ to the extent that they should not be prohibited or constrained. Toleration therefore refers to the act of leaving someone alone, a so-called ‘non-act’ of moral disapproval.<sup>142</sup> This disapproval is aptly captured in the following statement that ‘[o]ne cannot tolerate something one likes’.<sup>143</sup>

The distinction between tolerance and intolerance may at times be vague. Danchin ascribes the tradition of religious intolerance to the existence of an intricate web of social, ethnic, cultural, political and economic factors. Often pivotal is the unwillingness to accept the right of others to be different, which is also indicative of a lack of respect for the beliefs of others as well as a sense of superiority.<sup>144</sup> Toleration at its core requires the individual to put up with the beliefs of others, and in doing so lessens the need to respect others. Lockean toleration<sup>145</sup> does not require parties



---

<sup>141</sup> Translation available at <<http://www.latin-dictionary.org/L/1/tolerantia>> last accessed on 5 July 2010. Malloy identifies that tolerance and toleration are often used interchangeably, although it is possible to distinguish between the two notions: Tolerance refers to the physical notion whilst toleration refers to the mental notion. In this regard see Malloy (note 111 above) 67.

<sup>142</sup> S Mendus *Toleration and the Limits of Liberalism* (1989); see also D Cornell *The Philosophy of the Limit* (1992).

<sup>143</sup> A Gouws & LM du Plessis ‘The Relationship Between Political Tolerance And Religion: The Case of South Africa’ (2000) 14 *Emory International Law Review* 657,663.

<sup>144</sup> PG Danchi ‘US Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative’ (2002) 41 *Columbia Journal of Transnational Law* 33, 43.

<sup>145</sup> J Locke *A Letter Concerning Toleration* (1990).

differing in religious ideologies to foster and sustain mutual respect and cooperation amongst themselves.<sup>146</sup>

This Lockean concept of toleration as disapproval has developed into the concept of toleration in the broader sense. This refers to a form of acceptance of the other's right to existence that incorporates a sense of respect.<sup>147</sup> The tolerating parties respect one another in a reciprocal sense, despite their differences in their beliefs about the good way of life.<sup>148</sup> This broader, Kymlickean approach towards toleration is supported. The reciprocal basis of this broader notion of toleration further incorporates aspects of equality. Toleration includes both the notion of toleration as disapproval and the notion of toleration as respect. Similarly the concept of respect toleration incorporates different notions of equality, both formal equality and qualitative equality. Formal equality operates on a strict separation between the political and the private realm, in

---

<sup>146</sup> T Lindholm 'Philosophical and Religious Justifications of Freedom of Religion or Belief' in *Facilitating Freedom of Religion or Belief: A Deskbook* in T Lindholm, WC Durham & BG Tahzib-Lie (eds) (2004) 45.

<sup>147</sup> See generally M Walzer *On Toleration* (1997); see also M Minnow 'Putting Up and Putting Down: Tolerance Reconsidered' (1990) 28 *Osgoode Hall Law Journal* 441. This definition of tolerance as respect is also supported by Declaration of Principles on Tolerance Proclaimed and signed by the Member States of UNESCO on 16 November 1995,

available at <<http://www.unesco.org/cpp/uk/declarations/tolerance.pdf>> last accessed on 10 May 2010.

The meaning of tolerance is defined in Article 1.1 in the Declaration to indicate: 'Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication, and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace'.

<sup>148</sup> For a discussion on toleration see generally AR Murphy 'Tolerance, Toleration, and the Liberal Tradition' (1997) 29 (4) *Polity* 593; J Newman 'The Idea of Religious Tolerance' (1978) 15 (3) *American Philosophical Quarterly* 187; J Habermas 'Religious Tolerance—The Pacemaker for Cultural Rights' (2004) 79 *Philosophy* 5.

terms of which religious difference is confined to the private realm. Qualitative equality acknowledges that formal equality favours religions which accommodate a public/private divide. This broader, qualitative approach towards toleration as encapsulated in qualitative respect toleration is supported.

#### **5.4.1 The development of the notion of toleration**

A discussion of the development of the concept of toleration follows next. First the Lockean model of toleration as disapproval is briefly discussed. This is followed with an overview of respect toleration and qualitative respect toleration.

##### *From toleration (disapproval) to respect toleration*

In diverse societies, toleration is one way in which peace can be maintained. Locke states with regards to political stability and religious diversity that:

[H]ow much greater will the security of the government, where all subjects, of whatever church they be, without any distinction upon account of religion, enjoying the same favour of the prince, and the same benefit of the laws, shall become the common support and guard of it; and where none will have any occasion to fear the severity of laws, but those who do injuries to their neighbours, and offend against the civil peace.<sup>149</sup>

According to Locke, regimes that respect divergent beliefs will win the support from those it respects, resulting in greater stability than when favouring a dominant group. John Stuart Mill extends the application of toleration to all forms of difference,

---

<sup>149</sup> Locke (note 145 above) 68-9.

including cultural difference.<sup>150</sup> A limitation on the scope of rights is to be found in Mill's harm principle:

The only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.....<sup>151</sup>

The harm principle by its very nature implicates conceptions of good, thereby legitimising some central moral values, requiring a decision on which activities should be categorised as harm. Therefore, harm as a normative concept has a specific meaning.<sup>152</sup> The normative concept of harm is unmistakably illustrated in the 1957 British parliamentary inquiry on the illegality of homosexual offences and prostitution in Britain, conducted under the chairmanship of Sir John Wolfenden. In making recommendations the Wolfenden Committee took as its guiding principle Mill's harm principle, examined homosexuality and prostitution in terms of whether they cause harm to others and only if they did cause harm to others was the legislation justified. Accordingly the Wolfenden Committee declared that the law should not involve itself in questions of private morality.<sup>153</sup>

Lord Devlin fiercely disagreed with the Wolfenden Committee's recommendations and maintained that immoral acts should be illegal, as society is based on a common morality and if one aspect of society's morality is endangered then the whole of society is threatened. Lord Devlin argued that '[t]here is disintegration when no

---

<sup>150</sup> See generally JS Mill *On Liberty* (1989)

<sup>151</sup> *Ibid* 13.

<sup>152</sup> Raz (note 112 above) 414.

<sup>153</sup> Wolfenden Report *Report of the Commission on Homosexual Offences and Prostitution* (1957).

common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration'.<sup>154</sup>

The content of Lord Devlin's common morality is the morality of the reasonable man, which he described as follows:

He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may largely be a matter of feeling. It is the viewpoint of the man in the street... the man in the Clapham omnibus. He might also be called the right-minded man. For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.<sup>155</sup>

Lord Devlin's common morality raises concerns as to how minorities, who may be at odds with society's common morality, will be protected.

Current philosophical thought on toleration, as put forward by amongst others Kymlicka, suggest that toleration as respect is more appropriate. In terms of this understanding, each individual has the autonomy to choose her own conception of the good life.<sup>156</sup> Derrida puts forward the notion of 'unconditional hospitality' which means to let the other in, without judging them, as friends.<sup>157</sup> The notion of acknowledgment through respect is more in line with emphasis on non-discrimination and deliberative democracy's accent on mutual recognition.

#### *From respect toleration to promotion*

---

<sup>154</sup> P Devlin *The Enforcement of Morals* (1965) 13.

<sup>155</sup> *Ibid* 15.

<sup>156</sup> W Kymlicka *Multicultural Citizenship* (1995).

<sup>157</sup> J Foster 'Hospitality The Apostle John, Jacques Derrida, and Us' (2007) 9 *Reformed Perspectives Magazine* 1,8 available at

[thirdmill.org/newfiles/jas\\_foster/jas\\_foster.hospitality.doc](http://thirdmill.org/newfiles/jas_foster/jas_foster.hospitality.doc) last accessed on 29 November 2010.

The approach towards toleration has further evolved, with a move from toleration to promotion. When a state is composed of people of different cultural, linguistic and religious origin the issue of minorities arises.<sup>158</sup> The ICCPR Human Rights Committee has considerably broadened the obligation regarding minorities as contained in article 27 of the ICCPR<sup>159</sup> in the following manner:

6.1 Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are therefore required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State Party.

6.2 Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their

---

<sup>158</sup> SA Dersso 'The socio-historical and political process leading to the emergence and development of norms on minorities' in SA Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 43, 50. See also Kymlicka for a discussion of toleration of group rights in W Kymlicka 'Two Models of Pluralism and Tolerance (1992) 13 *Analyse & Kritik* 33. Kymlicka acknowledges that comprehensive liberalism has its limits in the recognition of groups that have not yet endorsed liberal principles of autonomy – for example groups who supports a prohibition on conversion.

<sup>159</sup> To this day article 27 of the ICCPR remains the only universally applicable norm concerning minority identity. At the time of its drafting a cautious view of minority identity was taken. A negative right in terms of which the state undertakes to refrain from interfering with the existence of minimum attributes of minority identity, namely to enjoy their own culture or to profess and practice their own religion.



culture and language and to practice their religion, in community with other members of the group.<sup>160</sup>

The ICCPR Human Rights Committee has placed a proactive obligation on state parties to ensure the maintenance of, amongst others, religious identities. This proactive obligation supports the reconceptualisation of individual human rights as positive rights as discussed above.<sup>161</sup> What is required is a positive form of toleration in which the state is obligated to stimulate an environment in which believers may fully express their religious identities and the state is committed to proactively supporting their religious development. A pluralistic democracy has to permit the coexistence of a variety of cultures and viewpoints in that:

Minority group identity requires not only tolerance, but also a positive attitude towards cultural pluralism on the part of the State and the larger society. Not only acceptance, but also respect for the distinctive characteristics and contribution of minorities in the life of the national society as a whole, is required. Protection of their identity means not only that the State should abstain from policies which have the purpose or effect of assimilating minorities into the dominant culture, but also that it should protect them against activities by third parties which have an assimilatory effect.<sup>162</sup>

The protection of fundamental rights is therefore in principle of particular relevance to minorities. The reason therefore is most appropriately captured by the following statement of Yacoob:

---

<sup>160</sup> UN ICCPR Human Rights Committee, ICCPR 'General Comment 23' in article. 27: 'The Rights of Minorities', 50<sup>th</sup> Session 1214<sup>th</sup> meeting 1994, A/49/40, I (1994) 107, paragraph 1, 6.

<sup>161</sup> See section 5.3.

<sup>162</sup> General Comment 28 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. In this regard see generally A Eide Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2991/2.

[C]onstitutions are designed to protect minority rights; that the constitutional provisions of freedom of religion are there to protect minority religions because majority religions protect themselves.<sup>163</sup>

The fundamental message of state neutrality is one of religious equality. Toleration merely allows someone to exist. Furthermore tolerance without respect is simply a message of one being put up with, which may even be withdrawn. Toleration is therefore not treating someone equally. However to truly ensure non-discrimination and to accommodate diversity, it is important that norms are formulated that not only to protect, but also to promote and celebrate diversity.<sup>164</sup> In this regard, the approach of the South African Constitutional Court has truly been exemplary as discussed in the matter of *Pillay*<sup>165</sup> in which the court held that diversity needed to be celebrated

#### **5.4.2 Postmodern response to toleration: Celebration – one step further**

Toleration is indicative of what is permitted by the powerful, whereas diversity requires the recognition of each and everyone's uniqueness and dignity.<sup>166</sup> The voice of difference, be it the voice of for example, indigenous people, cultural minorities, gays and lesbians, share one commonality, and that is their resistance to the claim that

---

<sup>163</sup> Judge of the Constitutional Court of South Africa: Keynote address, Witwatersrand School of Law Winter Law Programme. Moyo Restaurant, Melrose Arch, Johannesburg, 20 July 2007 as quoted in MO Mhango 'The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari' Students' (2008) 52 *Journal of African Law* 218, 242.

<sup>164</sup> Dersso (note 158 above) 72.

<sup>165</sup> See discussion in section 8.7.3.

<sup>166</sup> NN Koopman Dade of Deugde? *Implikasies vir die Suid-Afrikaanse kerke van n moderne postmoderne debat or moraliteit*. PhD Thesis University of the Western Cape (2000) 49.

there is only one acceptable approach to the recognition of rights.<sup>167</sup> Their demand is for more than toleration; their claim is for affirmation, acceptance and respect.

On an international level the individual right to freedom of religion or belief (article 18 of the ICCPR) as well as the communal right of religious persons to enjoy their own culture (article 27 of the ICCPR) requires the proactive participation of all religious communities in political, social and economic processes as well.<sup>168</sup> This proactive participation is enhanced in the Preamble to the Framework Convention for the Protection of National Minorities.<sup>169</sup> The Preamble expresses the political intentions of the Framework and with regard to pluralist societies, categorically claims that the ethnic, cultural, linguistic and religious identity of minorities should not only be respected, but that appropriate conditions, enabling them to express, preserve and develop this identity should be created.<sup>170</sup> In addition, the Preamble<sup>171</sup> calls for the creation of a climate of toleration and dialogue in terms of which social diversity is a source of enrichment and not a force of division in each society. This Framework

---

<sup>167</sup> See generally Bhikhu (note 19 above).

<sup>168</sup> M Weller 'Article 15' in M Weller (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* (2005) 429, 432.

<sup>169</sup> The Preamble to the Framework Convention for the Protection of National Minorities. Available at <<http://www.unmikonline.org/regulations/unmikgazette/02english/Eirs/Convention.pdf>> last accessed at 29 July 2010.

<sup>170</sup> Sixth paragraph of the Preamble to the Framework Convention for the Protection of National Minorities (1994) states that: 'Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.'

<sup>171</sup> Seventh paragraph of the Preamble to the Framework Convention for the Protection of National Minorities (1994) states that: 'Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society'.

Convention for the Protection of National Minorities indeed enhances the protection of the right to manifest religious belief and it is stated that similar protection on other regional and national levels would advance the protection of the right even more.

This could be achieved through, for example, the formulation of norms that not only protect against discrimination, but also promote and even celebrate diversity through the adoption of differential measures.<sup>172</sup> It is claimed that equal treatment does not exclude special treatment when such special treatment may ensure substantive equality.<sup>173</sup> In this regard, Habermas refers to the line of reasoning in recent jurisprudence in terms of which the right of Sikhs to wear kirpans and Muslim women and girls to keep their headscarves were treated as a matter of exception to general laws. Habermas argues that:

[I]nterpreting these rulings as exceptions to rules misleadingly suggests a dialectic in the idea of equality. In fact, these decisions are only drawing out the consequences from the fact that Sikhs, Muslims, and Jews enjoy the same religious freedom as the Christian majority population.<sup>174</sup>

The view of Habermas of substantive equality is supported. Substantive equality is part of the essential elements in the protection of the rights of religious minorities. Other important elements in protecting the rights of religious minorities are the right to dignity and identity.<sup>175</sup> Before proceeding to a discussion of the importance of dignity and identity, the concept of substantive equality is discussed next.

---

<sup>172</sup> In this regard, see generally K Henrard 'The Right to Equality and Non-Discrimination and the Protection of Minorities in Africa' in SA Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 207.

<sup>173</sup> *Ibid.*

<sup>174</sup> J Habermas 'Equal Treatment of Cultures and the Limits of Postmodern Liberalism' (2005) 13(1) *The Journal of Political Philosophy* 1, 14.

<sup>175</sup> Henrard (note 172 above) 213.

## 5.5 Traditional approach towards discrimination: formal equality versus the postmodern response: substantive equality

To appreciate the principle of substantive equality it needs to be compared with formal equality. Formal equality dictates that likes should be treated alike.<sup>176</sup> Substantive equality appreciates difference that may necessitate differential treatment in order to reach full equality,<sup>177</sup> in terms of which ‘unlike should be treated unlike’ to the extent of their unlikeness.<sup>178</sup> Therefore, equality not only requires that similar situations be treated in the same way, but also that different situations should be treated differently. The application of human rights in an equal manner to all human beings, must take into account specific circumstances relevant to the lives of these human beings.<sup>179</sup>

Equality arguments are used to justify the removal of any form of discrimination. However, equality is also not without complexity. In this regard, Fredman has proposed that ‘the more closely we examine [equality] the more its meaning shifts’.<sup>180</sup> Fredman identifies three possible meanings of equality: the first meaning is the meaning of formal equality, based on the notion of fairness that requires like to be

---

<sup>176</sup> S Fredman ‘Providing Equality to the Framework Convention for the Protection of National Minorities’ (2005) 21 *South African Journal of Human Rights* 163,178.

<sup>177</sup> Henrard (note 172 above) 214. See also G Moon & R Allen ‘Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and Their Implications’ (2000) 6 *European Human Rights Law Review* 580, 595-96.

<sup>178</sup> CL Smith ‘Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees’ (1992) 5 (1) *Law and Contemporary Problems* 211, 212.

<sup>179</sup> See generally Brems (note 63 above) 12; see also MJ Perry ‘A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture’ (2005) 10 *Roger Williams University Law Review* 385, 395-400

<sup>180</sup> S Fredman *Discrimination Law* (2002) 1.

treated alike. The application of equality is therefore reduced to an equation that only likes qualify for equal treatment.

The second meaning of equality is the equality of results, which requires an even-handed distribution of benefits. Equality of results aims at neutralising the effects of formal equal treatment which nevertheless still has a negative effect on the individual. Equality of results also considers the fact that the absence of a group from the negative impact may create a presumption of discrimination, unless non-discriminatory reasons can explain this absence.<sup>181</sup>

The third meaning of equality is equality of opportunity, in terms of which equality presupposes that people should be similarly treated if they are sufficiently alike. Therefore, a disfavoured group must show itself comparable to the favoured group. In this manner, equality of opportunity reinforces existing norms. The existence of a 'universal individual' to which a disfavoured must compare it, gives rise to conformist pressures.<sup>182</sup> For this reason, amongst others, equality has even been described as an 'empty vessel'.<sup>183</sup>

These concerns are addressed in general by the approach of Dworkin who claims that people should be treated equally in the sense that they are entitled to the state's equal concern and respect.<sup>184</sup> A fundamental difference between equal treatment and treatment as equals lies in the fact that equal treatment requires an evaluation of whether two people are sufficiently 'the same' that they justify similar treatment.

---

<sup>181</sup> See generally S Fredman (note 180 above).

<sup>182</sup> *Ibid.*

<sup>183</sup> P Westen 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537. For an opposing point of view see generally A D'Amato 'Is Equality a Totally Empty Idea?' (1983) 81 *Michigan Law Review* 600-3.

<sup>184</sup> R Dworkin *A Matter of Principle* (1986) 190-8.

Treatment as equals implies a more definite view of equality. Treatment as equals is not concerned with the enquiry as to whether difference in treatment is permitted, but it is concerned with ‘what reasons for deviation are consistent with equal concern and respect’.<sup>185</sup>

Kymlicka argues that equal respect for people may at times require the recognition of different conceptions of the good life and collective rights,<sup>186</sup> as different people hold different conceptions of the good.<sup>187</sup> The meaning, importance and applicability of values also differ from society to society. For example, respect for human life is a universal value, but different societies have different views on when life begins, when it ends and what respect for life entails.<sup>188</sup> Therefore, what must be equally respected is each individual’s capacity for choice.

The need for special treatment is even more acute in the light of the fact that minorities in general are part of the vulnerable and marginalised in society and therefore in general unable to employ the traditional democratic processes to ensure protection for their special needs. The need to protect the rights of the vulnerable and marginalised is acknowledged by the Constitutional Court in SA in *Prince* the following manner:

The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority.<sup>189</sup>

---

<sup>185</sup> R Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (2000) 209.

<sup>186</sup> See generally Kymlicka (note 127 above).

<sup>187</sup> R Dworkin *Liberalism and its Critics* (1984) 63.

<sup>188</sup> In this regard see generally S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002) 3-9.

<sup>189</sup> *Prince* (note 38 above) as per Sachs J paragraph 146.

Substantive equality includes the appreciation of indirect discrimination in instances in which equal treatment still has a negative effect on the individual. In these instances the need for positive measures, such as affirmative action to address the consequences of discrimination, may be needed. Each will be discussed in turn.

### **5.5.1 Substantive equality and indirect discrimination**

Substantive equality incorporates appreciation of indirect discrimination - that even an apparently neutral norm may impose intolerable obligations on a differently situated individual.<sup>190</sup> The emphasis in indirect discrimination is on remedying the effect, rather than focusing on the intention. Acknowledging that a seemingly neutral rule may affect some members of society in a disproportionate manner and prohibiting such indirect discrimination contributes to the accommodation of diversity. This accommodation of diversity was suitably illustrated in the decision of the South African Constitutional Court in the matter of *Pillay* as discussed in section 8.7.1.1. In stark contrast with this accommodation of diversity is the decision on the United States Supreme Court in the matter of *Smith*<sup>191</sup> as discussed in section 7.5.2. In contrasting these two contradicting decisions the positive results in the accommodation of diversity is clearly illustrated. In both cases, a seemingly neutral rule was not neutral at all, but perpetuated the view of the dominant culture. However, only in the matter of *Pillay* did the court question the disproportionate effect on a member of a marginalised group.<sup>192</sup>

---

<sup>190</sup> C Tobler *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under European Community law* (2005) 57.

<sup>191</sup> *Oregon Department of Human Resources v Smith* 494 U S 872 (1990)

<sup>192</sup> K Henrard (note 172 above) 224-5.



The protection of the right to freedom of religion can indeed be enhanced through acknowledging the adverse effects of neutral measures on certain categories of people. Both the Committee on the Elimination of Racial Discrimination (CERD Committee)<sup>193</sup> and the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW Committee)<sup>194</sup> have acknowledged the impact of indirect discrimination. It is argued that the same line of reasoning should be applied in matters concerning religious discrimination.

Racial discrimination has been defined as inclusive of indirect discrimination in the following manner:

In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>195</sup>

Reference to the term 'effect' clearly includes indirect discrimination. This inclusion is more prevalent in Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which expressly refers to indirect discrimination in article 1.<sup>196</sup>

The provisions of the CERD Committee is applicable to religious discrimination *per se* in that the Committee clearly acknowledges that there can be an overlap between 'race' and 'religion' and that race and religion may intersect, so that it is often not easy

---

<sup>193</sup> See discussion at section 4.5.

<sup>194</sup> See discussion at section 4.5.

<sup>195</sup> General Recommendation 14, CERD Committee, para 2.

<sup>196</sup> Article 1 of CEDAW reads: 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

to tell whether differentiations on the basis of religion amount to direct or indirect racial discrimination.<sup>197</sup>

Included amongst the elements of substantive equality is acceptance of the duty to promote equality and to adopt positive measures to ensure substantive equality. Furthermore it is important to remember that the duty to promote the rights of minorities is not only incumbent on the dominant state, but states further have a duty to adopt positive measures of protection in the horizontal relations between private parties.<sup>198</sup> One such positive measure is affirmative action.

### **5.5.2 Substantive equality and affirmative action**

The duty to promote equal treatment can be equated to the obligation to adopt affirmative measures as required by the ICCPR Human Rights Committee's General Comment 18:

The principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the covenant.<sup>199</sup>

The CEDAW Committee too emphasises the need for affirmative action measures in article 4(1) to be included as follows:

---

<sup>197</sup> This intersect is more acute since the rise of Islamophobia.

<sup>198</sup> Article 2 reminds that there is a duty to ensure all rights to all persons without distinction, which appears to indicate that there would be positive obligation to eradicate private discrimination. This is confirmed by General Comment 28. While this General Comment is specifically focused on gender discrimination it contains several statements of more general application.

<sup>199</sup> ICCPR Human Rights Committee General Comment No. 18: Non-discrimination. Available at <http://www.unhcr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> last accessed on 29 July 2010.

State parties should clearly distinguish between temporary special measures taken under article 4, paragraph 1 to accelerate the achievement of a concrete goal for women of *de facto* or substantive equality, and other general social policies adopted to improve the situation of women and the girl child. Not all measures that potentially are, or will be, favourable to women are temporary special measures. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of women and the child, designed to ensure for them a life of dignity and non-discrimination, cannot be called temporary special measures.<sup>200</sup>

It is asserted that the right to freedom of religion and in particular the right to manifest religious belief requires the treatment of adherents to religious beliefs as equals deserving of equal concern and respect. The treatment of adherents of different religions with equal concern and respect may at times necessitate differential treatment and at other times may even require special measures. However, such differential treatment as well as the existence of special measures will greatly enhance the respect for the right to freedom of religion and the right to manifest religious belief as illustrated in the decision of the South African Constitutional Court in *Pillay*.<sup>201</sup>

The above discussion brings to a close the postmodern responses to the inherent difficulty with the concept of secularism, the flawed theoretical foundation of individual negative human rights, the inequitable notion of toleration and the conflict inculcated by formal equality. What follows next is a discussion of the role of *ubuntu* an aspect of African cultural heritage that has been used by the South African Constitutional Court to enhance the right to be different.

---

<sup>200</sup> General Comment 25, CEDAW Committee, paragraph 19.

<sup>201</sup> See section 8.7.1.1.

## 5.6 The concept of *ubuntu* in South African jurisprudence

The approach of the South African Constitutional Court's to synchronise the jurisprudence of the court with the African concept of *ubuntu* as discussed in section 8.8.2 and 8.8.3, has further advanced the transformative nature of the court's jurisprudence. The right to be different, in particular, has been enhanced through the concept of *ubuntu*. It can be reasoned that *ubuntu* may find some correlation with the concept of solidarity or brotherhood as embodied in the UDHR and for that reason may even enjoy a broader application. A discussion of the role of the concept of *ubuntu* and the relevance thereof for the protection of the right to manifest cultural and religious belief follows next.

The expression of John Mbiti 'I am, because we are; and since we are, therefore I am',<sup>202</sup> more or less summarises the traditional African viewpoint of being human. This realises that one cannot fully be human without being part of a community. This point of view is in contrast with the nature of liberal thought in terms of which:

[I]ndividualism causes the human person first to be seen first of all as an individual who comes together with other individuals to create a community. Community, then, becomes something that a group of individuals creates by appropriately organizing human activities.<sup>203</sup>

The distinction and division between African points of view and western liberal thought, such as individualism, also prevailed in SA. As the Constitutional Court said in *Port Elizabeth Municipality v Various Occupiers* '[t]he spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, ... combines individual rights

---

<sup>202</sup> As quoted in N Richardson 'Community in Christian Ethics and African Culture' (1997) *Scriptura* 373, 385. See also J Mbiti 'Autonomous Nature of Human Beings' (1970) *African Religions and Philosophy* 141.

<sup>203</sup> S Fowler 'Communities, Organizations and People' (1993) (21) 4 *Pro Rege* 20, 26.

with a communitarian philosophy'.<sup>204</sup> During apartheid cultures were not only separated, but the African culture was suppressed and Western culture was accepted as the benchmark for 'civilization'.<sup>205</sup> The enactment of the South African Constitution did not erase the separateness and division between ethnic, cultural, and racial communities, cultivated by colonialism and later apartheid.<sup>206</sup> Indeed the Postamble to the Interim Constitution acknowledges this division in that it confirms:

The constitution provides a bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.<sup>207</sup>

One approach in acknowledging the diversity of the South African community is through the concept of *ubuntu*. The concept of *ubuntu* is central to African jurisprudence but received wider recognition in legal circles since the 1990s as the Interim Constitution of SA acknowledged the role of *ubuntu* in assisting with the reparation of the country in the following manner:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgressions of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed

---

<sup>204</sup> *Port Elizabeth Municipality v Various Occupiers*: 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC), paragraph 37.

<sup>205</sup> See generally BJ van der Walt. 'When Africa and Western Cultures meet: From Confrontation to Appreciation' (2006) *Institute for Contemporary Christianity* 158.

<sup>206</sup> Y Mokgoro 'The Protection of Cultural Identity in The Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?' (1997) 52 *Southern Methodist University Law Review* 1549, 1558.

<sup>207</sup> Postamble to the Interim Constitution of 1993.

on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.<sup>208</sup>

Mokgoro J has defined *ubuntu* as follows:

In an attempt to define it, *ubuntu* as a concept has generally been described as a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct. It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness, and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources. It is a fundamental belief that *Umuntu ngumuntu ngabantu/motho ke motho ka batho bangwe*, which, literally translated means 'a human being is a human being because of other human beings,' and represents a philosophy of life which views the individual's existence and well-being relative to that group of which he or she is a part.<sup>209</sup>

Although the concept of *ubuntu* was not carried forward into the 1996 Constitution, there can be no doubt as to the support it continues to receive. Mokgoro J refers to *ubuntu* as 'one shared value that runs like a golden thread across cultural lines'.<sup>210</sup> Mokgoro J equates *ubuntu* to humanity and to *menswaardigheid*, and argues that it embraces the right to human dignity. For Sebidi the emphasis is on the collective value of *ubuntu*.<sup>211</sup>

---

<sup>208</sup> The positive value of reparation is also aptly captured in *David Dikoko v Thupi Zacharia Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR (CC) as per Mokgoro J paragraph 68.

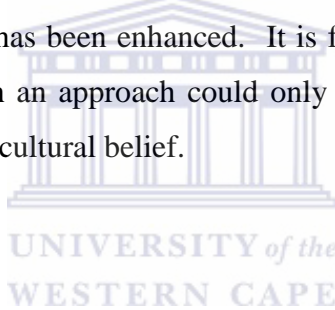
<sup>209</sup> *S v Makwanyane*, 3 SA 391 (CC 1995) paragraph 308.

<sup>210</sup> *Ibid* 308. See also Mokgoro (note 206 above) 1558-59.

<sup>211</sup> LJ Sebidi 'Towards a Definition of Ubuntu as African Humanism' in MG Khabela & Z Mzoneli (eds) *Perspectives on 'Ubuntu': A Tribute to Fedson* (1998) 63. See also D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation' (2004) 19 *South African Public Law* 667.

This bridge-building capacity of *ubuntu* is also affirmed in the matter of *Crossley and Others v National Commissioner of South African Police Service and Others*<sup>212</sup> and further acknowledged in the notion of interpreting the Constitution as a memorial to the injustice of the past as identified by du Plessis.<sup>213</sup>

In pursuit of the ideals of dignity, equality, and *ubuntu*, the transformative constitutional jurisprudence of the South African Constitutional Court has celebrated difference. This celebration has ensured that the right to freedom of religion and in particular the right to manifest religious belief has been afforded prominent levels of protection. It is premised that in following this approach the protection afforded to the right to freedom of religion has been enhanced. It is fervently suggested that a more universal application of such an approach could only have favourable results on the right to manifest religious or cultural belief.



## 5.7 Conclusion

In reconceptualising the manner in which the right to freedom of religion and in particular the right to manifest religious belief should be protected the following inferences are made.

The protection of the right to manifest religious belief interacts between the following main protagonists: the religious individual, the community of which this individual is a member and the state. All three these players have specific needs and objectives that have to be taken into consideration in ensuring the most comprehensive protection of

---

<sup>212</sup> *Crossley and Others v National Commissioner of South African Police Service and Others* [2004] 3 All SA 436 (T) discussed in section 8.8.3

<sup>213</sup> Du Plessis (note 91 above) 189 and discussed in section 8.8.3.

the right to manifest religious belief. The needs and objectives of each of these players follow.

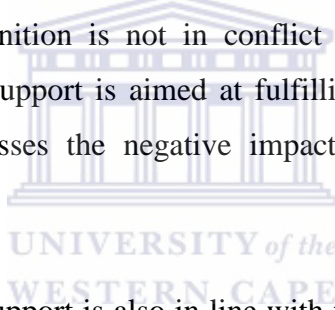
With regards to the role of the state, the following suggestions are made. First, it remains important that a balance be struck between freedom of religion, on the one hand, and the need to guard institutions from religious dominance, on the other hand. For this reason it is important that the state is neutral towards religion in general. In particular it is important that the state avoids any action that may create the impression that the state is favouring one religion above another. A true egalitarian democracy requires that all the voices are heard and not only the dominant ones

Second, the basis of this neutrality however cannot be the demand that adherents to religious faiths are required to divide themselves into a private and public self in an attempt to create a public space that is void of religious influence. Religious people often see life as a whole and aspire to manifest their beliefs in their private and public lives. In this regard, it is important to be mindful of the fact that it is not possible to require that the public space is void of gender and race attributes, as the individual cannot be separated from her gender or race. Likewise, it should not be expected of the religious adherent to divide herself into a private and public self and that the state should be able to accommodate pluralistic religious adherents in the public square.

Third, as far as the neutral disposition of the state requires that it does not favour one religion over another, the following considerations must be taken into account. Just as the state is required to treat all citizens equal, such equal treatment should take into consideration the negative effect of seemingly neutral rules that disproportionately negatively affect particular individuals or groups. In the event of such an occurrence, the state has a duty to treat this individual or group, who has been discriminated against, in line with the requirements of substantive equality. Substantive equality requires that people should be treated equally in the sense that they are entitled to the state's equal concern and respect.



This obligation is in line with the claim that the purpose of state neutrality is one of religious equality. Not merely accommodation is required to ensure non-discrimination in a diverse society. In fact, a positive form of accommodation is essential. This positive form of accommodation requires that the state is obligated to stimulate an environment in which believers may fully express their religious identities. Therefore, the state should be committed to proactively supporting all inhabitants' religious development. Such a positive environment should not be perceived as being in conflict with the requirement of state neutrality. Just as the endorsement of affirmative action measures are seen as ensuring the attainment of true equality, the proactive support of an environment in which religious adherents can achieve full religious recognition is not in conflict with the requirement of state neutrality. Such proactive support is aimed at fulfilling the ethos of transformative constitutionalism and addresses the negative impact of dominant and patriarchal religious structures.



The existence of proactive support is also in line with the requirements as imposed in terms of agreements aimed at eradicating racial and gender inequality as contained in CERD and CEDAW. This proactive support is further in line with the obligation imposed in the Framework Convention for the Protection of National Minorities as well as the provisions entrenched in the South African Constitution. These provisions stipulate that the state not only has a duty to protect fundamental human rights, but also has the duty to promote and fulfil these rights.

With regards to the role of the individual adherent and the community that the religious believer forms part of, the following suggestions are put forward: First, the right to freedom of religion is intrinsically linked to the individual sense of self-worth and identity as religion defines the very essence of a person's being. The sense of self-worth is further enhanced in the individual's sense of belonging. For this reason

the right to freedom of religion and the right to manifest religious belief are encapsulated in the individuals' sense of belonging to a religious community. The cultural significance of the right to freedom of religion is therefore an integral part of the right to freedom of religion and should be acknowledged as such. In this regard, it is important to be mindful that the individual is constituted within the context of a specific community.

Second, the centrality of religious and cultural practices to human dignity must be recognised and any infringement or limitation imposed on the right to manifest religious belief must be appreciated in light of the importance of the right for the individual, her sense of self-worth and identity. In this respect, one can be mindful of the UDHR that was far more influenced by a dignitarian approach than individualistic rights.<sup>214</sup> Individualistic rights implicitly place the highest priority on individual freedom, while dignitarian rights place more emphasis on the fact that the bearer of rights is situated within a family and a community.

The interrelation between the individual and the community must also be borne in mind. In this regard, the application of pluralistic viewpoints, such as the African viewpoint of *ubuntu* may be more valuable in allowing for an enhanced recognition of the diversity of a nation and may allow that diversity is indeed celebrated and not merely tolerated. For it is only when difference is celebrated that each individual is free of life a live of choice. A life in which the unique identity and value of the individual is fully appreciated and acknowledged.

The above suggestions to reconceptualise the manner in which the right to manifest religious freedom is protected, are all made subject to the following *caveat*. They all make provision for the religious individuals and communities to represent themselves

---

<sup>214</sup> As discussed in section 4.2.1.

and to participate in the public sphere. However this participation and representation must be managed so that it does not lead to new forms of domination and separatism of the religious other. In addition, these suggestions are made mindful of the fact that every multicultural society will need to devise its own appropriate structure to suits its history, cultural traditions, and range and depth of diversity. There can be no single solution to ensuring the extensive protection of the right to freedom of religion and in particular the right to manifest religious belief.

It is to the application of the limitation of the right to freely manifest one's religious belief that this analysis proceeds to next.



## Chapter 6

### Application of the right to manifest religious belief in the international legal context

#### 6.1 Introduction

In a previous chapter the international legal context in terms of which the protection of the right to freedom of religion is regulated was examined. As indicated previously, the right to freedom of conscience, religion, thought, belief and opinion, consists of an internal (*forum internum*) and an external (*forum externum*) component as recognised in international law.<sup>1</sup> The internal component is expressed through the external

---

<sup>1</sup> In this regard see article 18 of the Universal Declaration of Human Rights (UDHR) which was adopted by the General Assembly of the United Nations, resolution 217 (III) of 10 December 1948. UN Doc. A/3/810 (1949) as discussed in section 4.2.1 and Article 18 of the International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXII) of 16 December 1966, 999 UNTS 171 as discussed in section 4.3, and Article 1 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration), proclaimed by the General Assembly of the United Nations, resolution 36/55 of 25 November 1981, as discussed in section 4.4. See also the Human Rights Committee General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (article 18), paragraph 4, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993). Document (hereinafter General Comment 22). See also article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which was adopted by the Council of Europe on 4 November 1950 in Rome and entered into force 3 September 1953 as discussed in section 4.9; also article 12 of the American Convention on Human Rights (Pact of San José) adopted by the Organization of American States on 22 November 1969, San José, Costa Rica entered into force on 18 July 1978 as was discussed in section 4.9 and article 8 of the African Charter on Human and Peoples Rights (African Charter) adopted by the Organization of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981 in Nairobi, Kenya and that entered into force on 21 October 1986 as discussed in section 4.10.

component, namely the right to manifest one's religious belief. This right relates to honouring the prescriptions of one's faith in worship, observance, practice and teaching. The wearing of distinctive clothing has long been practiced by persons adhering to certain religions or beliefs<sup>2</sup> and therefore is considered to represent part of the external freedom to manifest religious belief.<sup>3</sup>

The right to manifest religious belief is entrenched as an individual right, a collective right as well as institutional right that is often associated with the public nature of the right to freedom of religion. The public nature of the right to manifest religious belief in 'teaching, practice, worship and observance' is also acknowledged in international law and express provision for the manifestation to occur 'in community with others' is provided for.<sup>4</sup>

These international norms as shown previously in section 4.2, 4.3 and 4.4 are intended to accommodate diverse religious circumstances and further do not prescribe the existence of any specific juridical relationship between a state and religion.<sup>5</sup> Therefore the right to religious freedom and the right to manifest religious belief can

---

<sup>2</sup> See BG Tahzib-Lie 'Dissenting Women, Religion or Belief and the State' in T Lindholm, WC Durham & BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 455, 473.

<sup>3</sup> See paragraph 4 of General Comment 22.

<sup>4</sup> Article 18 of the UDHR states that: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

<sup>5</sup> This is confirmed in Paragraph. 9 of General Comment 22 that states that : 'The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers'.

be realised in diverse domestic constitutional settings that regulate the relationship between state and religion.

These international norms further confirm that everyone has the right to manifest religious belief in worship, teaching, practice and observance. These terms describe, in a general way, types of conduct associated with religious activity and should be viewed as representative of types of conduct.<sup>6</sup> From an analysis of international jurisprudence it is apparent that the manifestation of religion through worship and teaching has been less fraught with interpretational difficulties, while the manifestation of religion through practice and observance has been more controversial.<sup>7</sup>

It is contended that this controversy can be related to the argument that the terms 'practice' and 'observance' allow the religious believer to act in accordance with the dictates and prohibitions of her own belief, irrespective of whether these practices strictly originate from institutional religion or whether these practices originate from a personal understanding of the belief.

Freedom of religion under the ECHR 'excludes any discretion on the part of the State to determine whether religious belief or the means used to express such beliefs are legitimate'.<sup>8</sup> Therefore Islamic dress, in all its various forms, may be considered a manifestation of religious belief. Other examples of religious motivated dress include

---

<sup>6</sup> C Evans *Freedom of Religion under the European Convention on Human Rights* (2001), 105 quoting Krishnaswami (1960) *Study of Discrimination in the Matter of Religious Rights and Practices* UN Document E/Cn 4/ Sub 2 /200/ Rev 1.

<sup>7</sup> For a general discussion on the differences between belief and practice see G Moens 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

<sup>8</sup> *Manoussakis and Others v Greece*, Judgment of 26 September 1996, (1996) 23 EHRR 387, 47.

Jews wearing yarmulkes, Christians wearing crucifixes, Hindus displaying a *bindi* or nose-ring<sup>9</sup> and Sikhs wearing a turban or *kirpan*.<sup>10</sup>

Observances may include, for example, the right to observe religious personal and family law, the right to undertake religious pilgrimages, the right to observe religious days<sup>11</sup> and the right to display religious symbols.<sup>12</sup> Observances may also include the right to observe religious rites,<sup>13</sup> dietary practices or the right to cultivate a religious

---

<sup>9</sup> The wearing of a nose-ring is a time-honoured family tradition; a young woman would get her nose pierced upon her physical maturity (the onset of her menstrual cycle) as an indication that she is now eligible for marriage and to honour daughters as responsible young adults and affirms her value as a woman in society. After their 16th birthday, the grandmother replaces the gold stud with a diamond. This forms part of a religious ritual to honour and bless young women. It is also a way in which the elders of the household bestow possessions, including other pieces of jewellery, upon young women. This serves not only to indicate that they value their daughters, but, in keeping with Indian tradition, that their daughters are the *Luxmi* (goddess of prosperity) and light of the house. In this regard see generally BN Banerjee *Hindu culture, custom, and ceremony* (1978).

<sup>10</sup> The *kirpan* is a curved ceremonial dagger with a blunt tip and is generally worn underneath clothing and is symbolic of the fight against evil. In this regard see generally HS Dilagira *Who are the Sikhs?* (2000).

<sup>11</sup> This study will not provide a comprehensive overview of these components of the right to freedom of religion. In this regards see G van der Schyff *The Right to Freedom of Religion in South Africa* (2001) LLM Thesis Randse Afrikaanse Universiteit, 133 onwards.

<sup>12</sup> Regarding the display of religious symbols in public locations, for example, a crucifix in classrooms. The Italian government (joined by 10 other European states) has requested to the Grand Chamber against the November 2009 ruling of the ECtHR in which the display of the crucifix in public schools in Italy was banned. *Lautsi v Italy* - 30814/06. Available at

<<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857725&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>>

last accessed 6 December 2010.

<sup>13</sup> Moreover, the 1981 Declaration further specifies the freedom to: ‘make, acquire and use to an adequate extent the necessary articles and materials related to rites or customs of a religion or belief.’ See article 6(c) of the 1981 Declaration.

appearance as prescribed by a particular religion, for example adhering to a dress code<sup>14</sup> or by growing beard or fashioning the hair in a particular manner, for example Rastafarians wearing dreadlocks.<sup>15</sup> Within the general limitation of this study on the right to manifest religious belief in observance, the emphasis is further placed on the right to observe religious rites as well as the right to cultivate a religious appearance which has recently been the subject of much debate and controversy.<sup>16</sup>

Some states have prohibited the wearing of religious clothing (or symbols) generally in public primary and secondary schools,<sup>17</sup> as well as in the universities.<sup>18</sup> The

---

<sup>14</sup> General Comment No 22 elaborates that ‘The observance or practice may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings’. See paragraph 4 General Comment No. 22.

<sup>15</sup> Rastafarians are obligated not to cut their hair which results in dreadlocks, as according to the King James version of the Bible Numbers chapter 6 1:6. In terms of the Nazarite vow, only foods in their natural state may be eaten, alcohol may not be consumed and Rastafarians may not cut their hair. See generally ZF Hooley *The Nazarite Vow* (2008).

<sup>16</sup> A comparative analysis shows regulation or prohibitions on wearing religious symbols in more than 25 countries in the world. See the comparative table on prohibitions of wearing religious symbols. Available at <<http://www.uni-trier.de/~ievr/kopftuch/ReligiousSymbols.pdf>> last accessed on 9 September 2010.

<sup>17</sup> For example, in France, the French Parliament enacted the law on secularity and conspicuous religious symbols in schools (Act of 15 March 2004 - 2004-228 of 15 March 2004) which came into effect on 2 September 2004. See Journal Official de la Republique Francaise [J.O.] 17 March 2004 at 5190 (The Law of 2004). The Law of 2004 inserted a new article L. 141-5-1 in the Education Code, which provides: ‘In State primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that the institution of disciplinary proceedings shall be preceded by dialogue with the pupil’.

<sup>18</sup> Azerbaijan, Albania, Turkey and Uzbekistan all regulate the wearing of the Islamic dress at the university level. Available at <<http://www.uni-trier.de/~ievr/kopftuch/ReligiousSymbols.pdf>> last accessed on 9 September 2010.



justifiability of this prohibition has formed the focus in several cases.<sup>19</sup> This prohibition on Islamic dress also creates an intersection of restrictions on a number of international human rights provisions. These rights can include the right to freedom of religion, racial and gender discrimination, minority rights as well as the right to education.<sup>20</sup> For example in France, the ban imposed on the Islamic headscarf in public schools raises the following questions regarding the right to education. First, does the ban interfere with the right of the female student, who wishes not to remove the Islamic headscarf, right of access to public education? Second, at the level of primary and secondary education, does the ban adequately respect the rights of parents to ensure the religious and moral education of their children in conformity with their own convictions?

As indicated above the manifestation of religion through worship and teaching is not as controversial as the manifestation of religion through practice and observance. Therefore this study is limited to an analysis of the right to manifest religious belief in practice and observance in general. In evaluating the permissibility of the limitation on the right to manifest religious belief in practice and observance, a previous chapter laid the foundation of the relevant textual provisions of the ICCPR, ECHR, Pact of

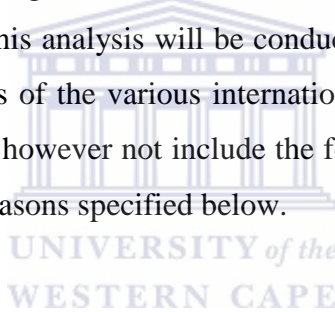
---

<sup>19</sup> See, e.g. ICCPR Human Rights Committee *Raihon Hudoyberganova v Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004) (*Hudoyberganova v Uzbekistan*). This case dealt with an application from a student whose wearing of the headscarf at university led to her harassment by university authorities. See also Committee on the Elimination of Discrimination against Women, *Rahime Kayhan v Turkey*, Communication No 8/2005, CEDAW/C/34/D/8/2005 (2006) (*Kayhan v Turkey*); *Leyla Sahin v Turkey* Application No 44774/98, Grand Chambers, Judgment of 10 November 2005, 19 BHCR 590, [2006] ELR 73 Available at <http://www.echr.coe.int/echr> last accessed on 10 August 2010. (*Sahin v Turkey*, Grand Chamber decision). Prior to the decision of the Grand Chamber is the decision of the Chamber in *Sahin v Turkey*, Fourth Section, Application No 44774/98, Judgement of 29 June 2004. (*Sahin v Turkey*, Chamber decision).

<sup>20</sup> For an extensive discussion of this intersection see D McGoldrick *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (2006) 237-287.

San José and the African Charter, including commentary interpreting those texts as well as general principles of law developed by the ICCPR Human Rights Committee and the European Court of Human Rights (ECtHR)<sup>21</sup> in deciding cases under the respective instruments.

What follows next is an analysis of certain of the ICCPR Human Rights Committee and ECtHR case law. The emphasis is on the development of principles in terms of which the justifiability of legislation restricting the right to manifest religious belief is assessed. This chapter will also analyse the approach followed within the international legal context when the permissibility of a limitation imposed on the right to manifest religion through observing religious rites as well as the right to cultivate a religious appearance is scrutinised. This analysis will be conducted to indicate similarities and differences in the approaches of the various international systems so as to draw best practices. This analysis will however not include the following aspects of the right to freedom of religion for the reasons specified below.



### **6.1.1 Further limits to the study**

The following distinctions are possible regarding the manifestation of religion through the display of religious appearance. On the one hand, there is the right of individuals to identify themselves through the display of religious appearance, a so-called positive freedom of religion, and on the other hand, there is the compulsion upon people to identify themselves through the display of religious appearance, including religious dress in public, a so-called negative freedom of religion.<sup>22</sup> It is important to appreciate

---

<sup>21</sup> See discussion in section 4.9.1.

<sup>22</sup> This distinction was drawn by the Special Rapporteur on Freedom of Religion or Belief Asma Jahangir in her annual report (2006) in which she commented on the thematic issue of the question of religious symbols. In this regard, see Civil and Political Rights, Including the Question of Religious

that the prescribed wearing of religious dress by a majority religion or state religion in certain states<sup>23</sup> is not considered to form part of the right to freedom of religion and the right to manifest religious belief. This is a direct infringement of the religious freedom of individuals who do not adhere to the majority or state religion and its specific tenets and accordingly falls outside the scope of this study. This study examines the positive freedom to manifest religion through observing and cultivating a religious appearance.

In evaluating the right to manifest religious belief through the display of religious dress and in particular the Islamic headscarf-*hijab* the focus is on the right of religious women who make a cognisant, informed and uncoerced decision to wear the Islamic headscarf. There are of course competing claims based on equality and provisions of non-discrimination which are advanced in support of arguments that restrict the right of religious women to wear the Islamic headscarf. It is further acknowledged that gender discriminatory religious norms and practices exist and that these practices do indeed violate the human rights of women and do indeed discriminate against women. Religious norms, for example may discriminate against women in the field of marriage, divorce, custody of children,<sup>24</sup> abortion,<sup>25</sup> contraception,<sup>26</sup> property rights

---

Intolerance: See the report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir E/CN.4/2006/5.

<sup>23</sup> For example as instructed in Afghanistan in this regard see S Mitra & B Kumar *Encyclopaedia of Women in South Asia: Afghanistan* (2004) 248.

<sup>24</sup> In this regard see the Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir dated 16 February 2010 regarding the application of *Sharia* law in Afghanistan A/HRC/13/40/Add.1 p4.

<sup>25</sup> See generally R Copelon & R Petscheky 'Toward an Interdependent Approach to Reproductive and Sexual Rights as Human Rights: Reflections on the ICPD and Beyond' in MA Schuler (ed) *From Basic Needs to Basic Rights: Women's Claims to Human Rights* (1995) 343.

<sup>26</sup> *Ibid.*

and inheritance. In this instance these religious norms may be in direct conflict with a range of human rights.<sup>27</sup>

Care should however be taken not to solely place emphasis upon the equality related rights against which these religious practices can be viewed. For example, the limitation of the right of religious women to wear the Islamic headscarf-*hijab* is often defended on the grounds of gender equality as this restrictive practice is only imposed on women and not on men.<sup>28</sup> However, this argument is contested inside and outside of the Islamic faith.<sup>29</sup> Also, reasons for wearing the Islamic headscarf are varied. For some, the veil may be a symbol of living in a western society without relinquishing one's Islamic identity, while for other it may express solidarity. In light of these diverse meanings a singular critique of the Islamic headscarf is not credible.<sup>30</sup>

---

<sup>27</sup> In this regard see generally J Sheen 'Women's Rights to Freedom of Religion or Belief' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 513 – 521; also AS Sardar *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal before Man* (2000); U King 'Hinduism and Women: Uses and Abuses of Religious Freedom' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 423 – 543; and KE Børresen 'Religion Confronting Women's Human Rights: The Case of Roman Catholicism' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 545 – 559.

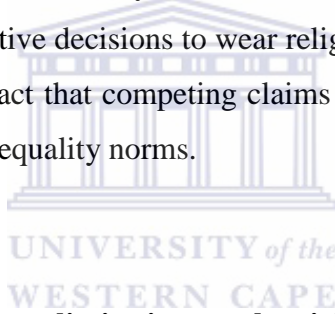
<sup>28</sup> In this regard see generally K Bennoune 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law' (2007) 45 *Columbia Journal of Transnational Law* 366. Bennoune argues that secularism is vital for the implementation and protection of women's human rights and claims that the limitations imposed on the right to manifest religious belief through display of the Islamic headscarf generally enhances gender equality.

<sup>29</sup> See NC Moruzzi 'A Problem with Headscarves: Contemporary Complexities of Political and Social Identity' (1994) 22 *Political Theory* 653, 663.

<sup>30</sup> See C Kilian 'The Other side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17 *Gender & Society* 567, 575.

The struggle for equality should not be given more emphasis than the right to religious freedom.<sup>31</sup> A considerable deference therefore should be shown to the nuanced and contested arguments within the religious communities themselves when deciding what the demands of substantive equality ought to be. The dictates of the majority state or secular liberal academics should not be the only normative argument.<sup>32</sup> In addition, the plurality of values should not be dominated by one value. There should rather be a discussion regarding the conflicts that exist between equality norms and collective religious identities.<sup>33</sup> The right of women to manifest their religious belief should not *per se* be limited in an attempt to ensure their equal treatment.

This evaluation is limited to an analysis of restrictions imposed upon cognisant, informed and uncoerced positive decisions to wear religious garments. This limitation however does not deny the fact that competing claims may exist between the right to manifest religious belief and equality norms.



## **6.2 Criteria for justifying a limitation on the right to manifest religious belief in the international legal context**

---

<sup>31</sup> Børresen (note 27 above) 555.

<sup>32</sup> For a discussion of these competing claims see P Danchin ‘Who is the “Human” in Human Rights? The Claims of Culture and Religion’ (2009) 24 *Maryland Journal of International Law* 99, 114. Danchin rejoices in the existence of conflict and contestation that these value plural debates may bring about. An example of this is evident in the SA Law Reform experience related to the recognition of Muslim Marriages. Danchin emphasises the role played by the religious particularists’ conception and that of the secular absolutist in this contestation. In his demand that considerable deference must be made to the arguments of the religious communities themselves. Danchin is in contrast with the point of Bennoune who in relation to the question of the Islamic headscarf unmistakably prescribes that the dictates of the secular absolutist should be followed.

<sup>33</sup> Danchin (note 32 above) 117.

In contrast to the right to freedom of conscience, religion or belief which is considered as an absolute freedom,<sup>34</sup> all the international legal instruments protecting the right to manifest one's religious belief allow for limitations to be imposed on the *forum externum*. The right to manifest religious belief may be limited in accordance with the specific limitation provision included in the fundamental right itself.<sup>35</sup>

Article 18(3) of the ICCPR,<sup>36</sup> article 1(3) of the 1981 Declaration,<sup>37</sup> article 9(2) of the ECHR,<sup>38</sup> article 12(3) of the Pact of San José<sup>39</sup> and article 8 of the African Charter<sup>40</sup>

---

<sup>34</sup> The limitation provisions (article 18(3) of the ICCPR, article 9(2) of the ECHR, and article 12(3) of the Pact of San José) all are not applicable to the *forum internum*. In addition, non derogation is also not permitted in terms of article 4(2) of the ICCPR and article 12(3) of the Pact of San José. The right to freedom of conscience, religion or belief also includes the right not to be subjected to coercive indoctrination. This right to be free from coercion may however be affected by other believers right to proselytise. The extent of the protection from coercion as well as the right to proselytise will ultimately be determined through an act of balancing of these rights. In addition, some believers, such as, adherents to the Islamic faith are of the opinion that the right to freedom of religion does not include the right to convert from Islam to another religion. For a more comprehensive discussion of these and other issues related to the *forum internum* see M Nowak & T Vospernik 'Permissible Restrictions on Freedom of Religion or Belief' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 146 – 172.

<sup>35</sup> See section 4.3.1, section 4.4, section 4.9.1 section 4.10.1 and section 4.11.

<sup>36</sup> Article 18(3) ICCPR states: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

<sup>37</sup> Article 1(3) of the 1981 Declaration states: 'Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.

<sup>38</sup> Article 9(2) of the ECHR states that: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

<sup>39</sup> Article 12 of the Pact of San José repeats Article 18 of the ICCPR.

respectively provide for the grounds on which the right to manifest religious belief may be limited.

In general the international and regional instruments all predominantly structure the grounds of justification of a limitation in a similar fashion. Limitations on the right to manifest religious belief are consequently justified in the UN framework as well as in the European and Inter-American regional contexts if the following requirements are met: First, the limitation must be prescribed by law of general application and may not be discriminatory.<sup>41</sup> Second, the limitation must be necessary to protect a public interest. In this regard the limitation must be ‘directly related and proportionate to the specific need on which they are predicated’ and ‘may not be imposed for discriminatory purposes or applied in a discriminatory manner’.<sup>42</sup> In addition, the ECHR requires that the limitation must be necessary in a democratic society.<sup>43</sup> This requirement has been interpreted to denote that the limitation must be proportional to a ‘pressing social need’.<sup>44</sup> Third, the limitation must serve one of the following public interest objectives: public safety; public order; health; morals or the protection of the rights and freedoms of others.<sup>45</sup> Within the African regional context the limitation must be in terms of law and order. The limitations imposed on the right to manifest

---

<sup>40</sup> Article 8 of the African Charter states that: ‘Freedom of conscience the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms’.

<sup>41</sup> See General Comment 22 paragraph 8.

<sup>42</sup> General Comment 22 at paragraph 8.

<sup>43</sup> The only international text to make reference to a democratic society is in terms of article 9 (2) of the ECHR.

<sup>44</sup> PM Taylor *Freedom of Religion: UN and European Human Rights Law and Practice*(2005) 308.

<sup>45</sup> General Comment 22 paragraph 4.

one's religious belief freely may however never impair the core aspect of the right<sup>46</sup> and no derogation of the right to freedom of religion is permitted.<sup>47</sup>

The requirements for the justification of a limitation on the right to manifest religious belief are in principle similar in the international and regional instruments. Each of these requirements have been interpreted by the various international and regional monitoring bodies, such as the communications of the ICCPR Human Rights Committee,<sup>48</sup> the jurisprudence of the ECtHR and the more limited jurisprudence of the Inter American System<sup>49</sup> and the African Commission<sup>50</sup> will be evaluated next.

---

<sup>46</sup> As emphasised by article 30 of the UDHR, which states that: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.

<sup>47</sup> Article 4(1) of the ICCPR provides for the derogation from obligations under the Covenant 'in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ... provided that such measure are not inconsistent with [State Parties'] other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin'. Article 4(2) states: 'No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

<sup>48</sup> The jurisprudence of the ICCPR Committee under article 18 of the ICCPR is sparse as individual complaints may only be accepted if states have consented to Optional Protocol 1. The United Kingdom (UK) and the United States of America (USA), for example, have not ratified the First Optional Protocol and hence individual applications from these countries are not possible.

<sup>49</sup> As discussed in HJ Steiner & P Alston *International Human Rights in Context* (2007) 1028, the Inter-American system is based on similar normative provisions and institutional structures as the ECHR. However, the conditions under which these two systems have developed are radically different. The European system has rarely had to deal with unresponsive governments while in Latin America, large scale practices involving torture, disappearances and executions have not been uncommon. The jurisprudence of the Inter-American system relates mainly to these issues.

<sup>50</sup> As discussed in section 4.11.1. From an evaluation of the jurisprudence of the African Commission it appears the right to manifest religious belief in particular has only on one occasion been interpreted by the Commission in the matter of *Prince* (Decision of African Commission on Human and Peoples'



### 6.2.1 Prescribed by law of general application

A law of general application must prescribe limitations. Therefore, only a limitation prescribed by law can validly limit the right to manifest religious belief. The ECtHR has held that the following requirements stem from the expression ‘prescribed by law’. First, the limitation must have its basis in law that is accessible to the individual enabling him to regulate his conduct accordingly. The Grand Chamber in *Leyla Sahin* clarified the requirement as follows:

[T]he expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them--if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.<sup>51</sup>

The law may originate from different sources and at different levels, ranging from constitutional provisions, national legislation, directives of regional authorities to the rules of public and private institutions. This requirement is not usually a contentious issue.<sup>52</sup> Second, the limitation must be in terms of a law of general application. This requirement relates to a basic principle of the rule of law that the law must be general in its application – it must apply to all equally and not be aimed at the conduct of a particular group of people.<sup>53</sup>

---

Rights; Prince v South Africa African Commission on Human and Peoples’ Rights, Comm No 255/2002; (2004) AHRLR 105 (ACHPR 2004).

<sup>51</sup> *Sahin v Turkey* Grand Chamber decision (note 19 above) 84.

<sup>52</sup> The word ‘law’ has been held to include statute law, unwritten law, subordinate legislation and royal decrees in *Klass v Federal Republic of Germany* (1979) 2 EHRR 214.

<sup>53</sup> *Sahin v Turkey* Grand Chamber decision (note 19 above) 65.

## 6.2.2 Necessary to protect a public interest or the fundamental rights of others

The limitation must be necessary to protect a public interest or the fundamental rights of others. In contrast to the relative simplicity of the first requirement, this requirement is more problematic in so far as the restriction must be necessary in the pursuit of a public interest; such as public safety, order, health, morals or the fundamental rights and freedoms of others.

In this regard General Comment 22 emphasises that article 18(3) of the ICCPR should be strictly interpreted and that:

[R]estrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>54</sup>

The necessity of the limitation can be evaluated in various ways.<sup>55</sup> One approach is to evaluate the proportionality of the limitation in relation to the state interest served.<sup>56</sup> The principle of proportionality contains the following three requirements: suitability, necessity, and proportionality. According to the requirement of suitability, a state has

---

<sup>54</sup> Paragraph 8 General Comment 22.

<sup>55</sup> TM Parker 'Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and ECHR' (2006) 17 *Duke Journal of Comparative and International Law* 91, 94.

<sup>56</sup> On the requirement of proportionality see T Lindholm *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Lights of Recent Case Law (Leyla Sahin v Turkey)* (2004) available at <http://www.strasbourgconference.org/papers/Lindhol%20Strasbourg.pdf> > last accessed on 10 September 2010.

to pursue a legitimate end, and the means must be suitable to achieve or at least to promote such end. The requirement of necessity implies that no alternative means should exist, which infringes the right less, but promotes the end in a similar manner. Finally, proportionality requires rational balancing. Proportionality is not a free-standing requirement<sup>57</sup> and it has at times been subsumed into the overall analysis of reasonableness.

The final requirement under article 9(2) is that the limitation on religious rights should be 'necessary'. Regarding the necessity of a limitation the European Commission of Human Rights has concluded that:

[T]he 'necessity' test cannot be applied in absolute terms, but required the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, i.e. whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case.<sup>58</sup>

UNIVERSITY of the

Regarding the requirement of necessity Witte states that:

The requirement of necessity implies that any such limitation on the manifestation of religion must be proportionate to its aim to protect any of the listed state interests. Such limitations must not be applied in a manner that would vitiate the rights guaranteed in Article 18 ... [a] law burdening the exercise of religion must be in the service of a compelling state interest and use the least restrictive alternative to achieve that interest.<sup>59</sup>

The state interest served is of particular relevance in state or otherwise controlled settings, such as prisons, the military, medical or educational facilities, as well as

---

<sup>57</sup> As for example required by the South African Constitutional Court. In this regard see generally D Brand & CH Heyns *Socio-Economic Rights in South Africa* (2005).

<sup>58</sup> *X and the Church of Scientology v Sweden*, No. 7805/77, 16 DR 68 (Dec. 1979) 73.

<sup>59</sup> J Witte Jr *Religion and the American Constitutional Experiment* (2005) 237.

certain places of employment. In these controlled settings the individual's right to manifest religious belief may be subject to restrictions which are necessitated by the need to maintain control or demonstrate state neutrality towards religion. For example uniform dress codes and grooming policies may prohibit the wearing of religious garments or may dictate that men shave their beards or cut their hair. These prohibitions and requirements may be in violation of sincerely held religious belief. Some religious believers may be forced to work on religious days or be denied time for prayers and other religious rituals and dietary regimes adhered to may not conform to specific religious norms. An attempt to secure these rights for the religious believer would require certain measures of adaption within the controlled institutional setting.

The above mentioned condition of uniformity should be approached in a similar manner as the condition of neutrality when limitations on the right to manifest religious belief are justified in a secular state.<sup>60</sup> The condition of uniformity may appear religiously neutral at first glance; however, these neutral requirements often reflect the religious practices of larger and better understood faiths and may not always reflect the practices of minority religions. This bias may result in unequal treatment and discrimination amongst different religions.

In addition to the requirement that the limitation must be necessary to serve the purpose of protecting the public safety, order, health, or morals or the fundamental rights and freedom of others, the ECHR further requires that the law should be 'necessary in a democratic society'.<sup>61</sup> Despite this apparent strict necessity test, the degree of oversight by the ECtHR may be lessened in accordance with the doctrine of the 'margin of appreciation'. The margin of appreciation acknowledges that different countries may apply varying interpretations to balance the right to freedom of religion

---

<sup>60</sup> See discussion in Section 6.3.4.

<sup>61</sup> See article 9 (2) of the ECHR.

with the need to protect a public interest. These variations are set in motion by different national legal contexts, political philosophies and shared histories. The requirement that a limitation must be necessary to protect a public interest is therefore determined in terms of the different factors. The application of the doctrine of the ‘margin of appreciation’ is discussed next.

### 6.2.2.1 Level of scrutiny – doctrine of the margin of appreciation

The ECtHR allows for a certain degree of deference to the national perspective on the public interest served. This deference is illustrated by the so-called margin of appreciation.<sup>62</sup> A variety of factors may influence the actual scope of applicability of the margin of appreciation.<sup>63</sup> The ECtHR is guided by its margin of appreciation doctrine when scrutinising a limitation.

---

<sup>62</sup> The doctrine of the margin of appreciation was first explained by the ECtHR in the *Handyside v UK* ECtHR 24 –A, 7 December 1976, paragraphs 48-9 (*Handyside v UK*). While the court acknowledged its task of ensuring compatibility with the provisions in the ECHR, the court is aware of diversity and has emphasised that generally the state is in the best position to assess the needs of a particular society. The ECtHR specifically, presume that there is a ‘margin of appreciation’ that allows, (to some extent) states to enact laws and implement policies that may differ from each other with regard to different histories and cultures. While this margin of appreciation should be respected, it should not be interpreted with such flexibility that would permit the undermining of the essence of human rights values. While laws of different States do not need to be identical, and there should be allowed some flexibility, this flexibility should all the same respect the important underlying rights. See generally G Steven *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000). See also TA O'Donnell ‘The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights’ (1982) 4(4) *Human Rights Quarterly* 474; and O Bakircioglu ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases’ (2007) 8 (7) *German Law Journal* 711.

<sup>63</sup> See DL Donoho ‘Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights’ (2001) 15 *Emory International Law Review* 391, 446.

The doctrine briefly entails that when scrutinising a limitation on freedom to manifest religious belief, a reasonable margin of appreciation is allowed. In terms of this doctrine the national authorities are considered to be in a better position to evaluate the necessity of the restrictive measures adopted. In this manner some measure of sovereignty of the state is acknowledged and states are permitted to enact laws and implement policies that may differ from each other with regard to different histories and cultures. This doctrine is used by the ECtHR and is suited to reconcile the diversity in the national states.<sup>64</sup> For example, the importance of the individual interest may not be fully accepted.

The need for consensus may therefore allow for a broader margin and more lenient scrutiny.<sup>65</sup> The margin of appreciation should however not be applied in a manner that allows for the domestic jurisdiction to escape supervision, and it is important that the ECtHR should proceed to scrutinise the justification of the infringement. The application of the margin of appreciation is therefore limited and must be reconciled with the decisions and interpretation of the ECtHR. Therefore this flexibility should not undermine the essence of human rights values.

In addition to the relativity that the margin of appreciation allows, states further interpret and apply the criteria that the limitation must be necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others in different ways. The evaluation of the necessity of interference in fulfilling a legitimate aim has developed into one of the areas in which the margin of appreciation

---

<sup>64</sup> E Brems 'Diversity in the Classroom: The Headscarf Controversy in European Schools' (2006) 31 *Peace & Change* 117, 128.

<sup>65</sup> See generally Tahzib-Lie (note 2 above) 465.

is most frequently used.<sup>66</sup> Therefore the particular interest pursued incorporates a measure of relativity that may differ from state to state. As a result it is often difficult to determine the particular interest pursued as the relativity of the justification is intensified.

### 6.2.3 Public interest protected

The limitation of the right to manifest religious belief must be necessary to protect a public interest. In identifying the public interest pursued, the jurisprudence of both the ICCPR Human Rights Committee and the ECtHR is not always clear in identifying that the restriction must be in the pursuit of a legitimate public interest. As will be shown below, these bodies often in particular interchange the public interest requirements of public safety, public order, or the fundamental rights of others with each other. For example, justification on the ground that the restriction protects the rights and freedoms of others is sometimes associated with another ground such as public safety or health.<sup>67</sup>

For this reason the following discussion attempts to classify the matters related to the limitation of the right in accordance with the public interest pursued while simultaneously issuing a *caveat* that a watertight classification is not always achievable. Mindful of this *caveat* the restrictions on the ground of public health and public morality are discussed first, followed by the limitations in accordance with public safety, the fundamental rights of others and lastly limitations on the ground of public order.

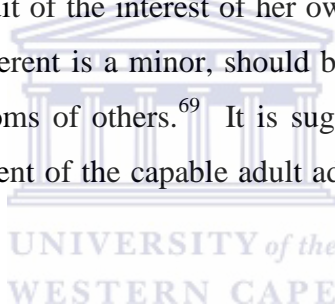
---

<sup>66</sup> E Brems 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht (1996) 240, 243, available at <<http://www.zaoerv.de>> last accessed on 10 May 2010.

<sup>67</sup> *Ibid* 261.

### 6.2.3.1 Restriction on the grounds of public health and public morality

Limitations on the ground of public health are aimed at preventing epidemic or other diseases. For example, a duty to vaccinate against certain dreaded diseases, such a small pox, may impose a limitation on a religious adherent's belief to not voluntarily harm the body in the interest of public health.<sup>68</sup> The question further arises if a state may justifiably limit an individual's right in seeking to protect such individual's own health. For example, if a Jehovah's Witness, in accordance with the tenets of her faith, refuses a blood transfusion, may the state intervene and restrict her right on the ground that the limitation is in pursuit of the interest of her own health. It is evident that the right to intervene, if the adherent is a minor, should be justified under the ground to protect the rights and freedoms of others.<sup>69</sup> It is suggested that there should be no reason to intervene in the event of the capable adult adherent making such a decision on the basis of her faith.<sup>70</sup>



Limitations of the right to manifest religious belief are also permitted on the ground of public morality. This requirement is inherently obscure as morals are rules of conduct based on the conscience of the individual and may have a private and public nature.<sup>71</sup>

---

<sup>68</sup> See generally A Davids 'The Revolt of the Malays: A Study of the Reactions of the Cape Muslims to the Smallpox Epidemics of the Nineteenth Century Cape Town' (1983) 5 *Studies in the History of Cape Town* 55.

<sup>69</sup> See *Hoffmann v Austria*, 17 EHRR 293 (1994) (ECtHR 255 –C, 23 June 1993). The Austrian Supreme Court reversed a decision of the lower court in which custody was granted to a mother who had subsequently become an adherent to the Jehovah Witness faith.

<sup>70</sup> For a comprehensive discussion of the Jehovah's Witnesses refusal to undergo blood transfusions see in general Nowak & Vospernik (note 34 above) 163 onwards.

<sup>71</sup> C Kukathas 'Liberalism and Multiculturalism: The Politics of Indifference' (1998) 26 (5) *Political Theory*, 686, 689.



Religion is part of the collections of values that constitute a person and cannot be attributed only to the private sphere; in addition it is not always possible to draw a distinction between religious and non-religious values. Also referred to as ethics, morals signify to an individual how to act in accordance with the ultimate meaning of life.<sup>72</sup> Therefore, morals mean different things to different people. Religious values ordinarily constitute the most important moral guidelines for religious adherents. Consequently, it is often challenging to identify a more privileged universal norm that may be invoked to justify a restriction on religious manifestations. For this reason, states characterised by diversity often have a challenging task of defining limits to the manifestation of a religion or belief based on morality.

From the above it is clear that restriction on the ground of public morality is certainly the most problematic of all the grounds for justification. Public morals have never been mentioned by the Commission or the ECtHR in applications based on article 9.<sup>73</sup>

The ICCPR Human Rights Committee has emphasised in General Comment 22 that:

[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.<sup>74</sup>

Therefore the need to limit the right to freedom to manifest religion should not be based on a claim aimed at protecting morals derived solely from one tradition.<sup>75</sup>

Morals are fluid in that they differ from time to time and society to society<sup>76</sup> and are

---

<sup>72</sup> R Dworkin *A Matter of Principle* (1985) 191.

<sup>73</sup> J Martínez-Torrón 'The European Convention on Human Rights' (2008) 3(2) *Global Jurist Advances* 17.

<sup>74</sup> Paragraph 8 General Comment 22.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Handyside v UK* (see note 52 above) 22.

derived from many social, philosophical and religious traditions.<sup>77</sup> For example the Austrian Constitutional Court has held that Jewish and Islamic tradition of sacrificing and slaughtering of sheep should enjoy priority over the value of protecting animals from unnecessary suffering.<sup>78</sup> Questions on Muslim and African cultural polygamy too will require the balancing of religious values with other values, such as equality. Certain manifestations of belief are ‘so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether’.<sup>79</sup> Rituals involving self-mutilation, as well others, such as human sacrifice, prostitution and slavery may be limited without amounting to discrimination as the offenders are ‘founded in the superior interests of society’.<sup>80</sup>

#### **6.2.3.2 Restrictions for the protection of public safety**

The right to manifest religious belief, through the observance of religious rites and the display of religious dress, may be limited on the ground of public safety. The objective is to allow for restrictions when a danger arises threatening the safety of people. Nonetheless, in most instances the clause, just as the requirement to protect the public health,<sup>81</sup> has been evoked to protect the individual safety of the religious adherent herself.

---

<sup>77</sup> Paragraph 8 General Comment 22.

<sup>78</sup> Judgement of the Austrian Constitutional Court of 17 December 1998 ( Case No B 3028/97) See discussion in M Vašek ‘Ritual slaughter and freedom of religion’ (2009) 3 *Constitutional Law developments in Austria* 228.

<sup>79</sup> DJ Sullivan ‘Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination on the Elimination of Religious Intolerance and Discrimination’ (1988) 82 *American Journal of International law* 487, 511.

<sup>80</sup> *Ibid.*

<sup>81</sup> As discussed in section 6.2.3.1 some religious traditions prohibit the intentional harming of the body and accordingly, vaccination. However, in times of an epidemic the compulsory vaccination of

In the matter of *Singh Binder v Canada*,<sup>82</sup> the ICCPR Human Rights Committee held the dismissal by the Canadian National Railways of a Sikh employee whom had insisted on wearing a turban instead of safety headgear while at work was justified under article 18(3) of the ICCPR. The ICCPR Human Rights Committee held that the requirement for Sikhs to wear safety headgear during work was justified on the ground of public safety. The ICCPR Human Rights Committee treated this matter as a matter of manifestation, consistent with the stipulations of General Comment 22. However the Committee found no violation and held that:

[T]he legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.<sup>83</sup>

Justification of this limitation on the ground of public safety has rightly been criticised<sup>84</sup> as the risk is confined to Mr Singh. It is suggested that a distinction should be drawn between manifestations that endanger the safety of others (public safety) and those that relate to the safety of the person in question.<sup>85</sup> In the event of the manifestation endangering the safety of the person in question only, then the

---

religious adherents could be considered to be a necessary limitation of the right to freedom of religion. In such instances the interpretation of the limitation is clear, particularly when the aim of the limitation is to protect of the rights of others. Protecting an individual's own health from her own religious convictions is clearly more problematic than when the limitation is aimed at protecting the rights of others.

<sup>82</sup> *Singh Binder v Canada*, *Comm* No 208/ 1986 (UN Human Rights Committee, 9 November 1989) UN Doc A/45/40 (Vol II) Annex IX, SE (1990).

<sup>83</sup> *Ibid* 6.2.

<sup>84</sup> BG Tahzib *Freedom of Religion and Belief: Ensuring Effective International Legal Protection* (1996) Boston: Martinus Nijhoff Publishers, 296.

<sup>85</sup> *Ibid*.

individual right to freedom of religion should be allowed to supersede the individuals safety if the individual so chooses.<sup>86</sup>

Taylor argues that the conceptual distinction between restrictions on manifestations of belief (the wearing of religious headdress) and the obligatory wearing of safety equipment contrary to religious mandate (coercion) is a complex distinction.<sup>87</sup> The preference of the European institutions has been to decide such issues of coercion on the basis of manifestation of religious belief. A more recognisable case of coercion, rather than manifestation, is evident in the case concerning the forced removal of beard by a Muslim prisoner.<sup>88</sup> In the matter of *Clement Boodoo v Trinidad and Tobago*<sup>89</sup> the ICCPR Human Rights Committee however found a violation of article 18 as the claimant claimed that:

---

<sup>86</sup> This line of reasoning is similar to the argument put forward in Section 6.2.3.1 in terms of which adults adhering to the Jehovah witness faith should be allowed to refuse to consent to blood transfusions as a form of medical treatment.

<sup>87</sup> Taylor (see note 44 above) 133. For a comprehensive discussion of the coercion or the freedom from performing acts incompatible with the prescriptions of a religion, such as taking the oath, conscientious objection to military service, participation in religious or civic ceremonies contrary to the adherents faith see, compulsory prevention or treatment of disease see Study of Discrimination in the Matter of Religious Rights and Practices: Report of Mr. Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 12 U.N. ESCOR Sub-Comm on Prevention of Discrimination and Protection of Minorities (Agenda Item 5), U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) (1979) 11 *New York University Journal of International Law & Politics* 227, 257. (Krishnaswami Study).

<sup>88</sup> General Comment 22 has expounded the content of observance and practice of religion or belief to include not only ceremonial acts but also customs and conduct related to religious conviction such as the observance of special dietary regulations, and the wearing of religious dress, distinctive clothing or head coverings as well as grooming customs such as the cutting of beards. See paragraph 4 of General Comment 22.

<sup>89</sup> *Clement Boodoo v Trinidad and Tobago* Comm No 721/1996 (UN Human Rights Committee, 2 April 2002).

[H]e had been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegations in paragraph 2.3 – 2.6, the Committee concludes that there has been a violation of article 18 of the Covenant.<sup>90</sup>

Taylor alleges that the forced beard shaving in these matters is not religiously neutral since it requires the individual to sacrifice his religious belief and in place thereof exhibit practices inconsistent therewith.<sup>91</sup> Taylor maintains that there are several incidents where issues of coercion and manifestation may coincide.

The interpreting bodies at times construe restrictions on the ground of protecting public safety to intersect with public order. For example, governments have regularly limited the manifestation of religious belief on the ground of public order when restricting the right to freedom of religion of prisoners. The European Commission on Human Rights has considered the right of a Buddhist prisoner to grow a beard<sup>92</sup> and the right of a Sikh prisoner to wear special clothing<sup>93</sup> under the restrictions provided for in pursuit of public order. Both these matters were found inadmissible and the limitation was consequently not further scrutinised. Through finding the applications inadmissible to European Commission did not conduct an enquiry into the question as to if the restriction was necessary to protect a public interest. Nor did the Commission scrutinise if the restriction was narrowly tailored to serve the public interest. In

---

<sup>90</sup> *Clement Boodoo v Trinidad and Tobago* (note 89 above) 6.6.

<sup>91</sup> Taylor (note 44 above) 135.

<sup>92</sup> *X v Austria* App No 1753 /63 (EComHR, 15 February 1965) inadmissibility decision, Yb 8, 174

<sup>93</sup> *X v United Kingdom* App No 8231/78(EComHR, 28 Decisions and Reports 5, 28, 6 March 1982) inadmissibility decision. (*X v United Kingdom*)

following this approach the European Commission does not afford the right to manifest religious belief adequate protection.

### **6.2.3.3 Restrictions for the protection of the rights and freedoms of others**

In addition to the limitation of the right to manifest religious belief in the interest of protecting public interests as discussed above the right to manifest religious belief may also be limited in the interest of protecting the fundamental rights and freedoms of others. For example, the right to manifest religion through teachings (proselytism) may be restricted to protect the fundamental rights of others. In this regard, the aim of the restriction of actions of improper proselytism is to protect the freedom of religion of other religious groups against conversion as a result the right to manifest religion through missionary activities may be limited in order to protect the religious freedom of others not to be converted.

The ECtHR for the first time in the matter of *Kokkinakis v Greece*<sup>94</sup> decided on a question related to the individual's right to freedom of conscience.<sup>95</sup> Proselytism was the central issue in this decision and the ECtHR held that article 9 includes the right of individuals and religious groups to disseminate their doctrines and to gain new followers through proselytism, provided that they do not use abusive, fraudulent or violent means.

---

<sup>94</sup> *Kokkinakis v Greece* 17 EHRR 397 [1994] ECtHR 260 A, 25 May 1993] 399 (*Kokkinakis*).

<sup>95</sup> Article 9 of the ECHR drew its inspiration from article 18 of the UDHR to reduce the risk of articles that were at anomalous with the UN instruments. Article 9 consists of an absolute right to freedom of thought, conscience, and religion, including the right to change religion; a right to manifest such a belief; and a number of qualifications to the right to manifest religious belief. The limitation of the right to manifest one's religious belief contained in article 9(2) of the ECHR is in essence very similar to the qualification contained in article 18(3) of the ICCPR.

In *Kokkinakis* the ECtHR held that article 9 of the ECHR included the right of individuals to share their dogma through proselytism, provided that they do not do so in an ‘improper’ fashion.<sup>96</sup> Mr Kokkinakis, a follower of the Jehovah’s Witnesses, was arrested under a Greek law that declared proselytism a crime.<sup>97</sup> The ECtHR did not declare the Greek law incompatible with the ECHR, as it may be interpreted to protect the rights of others. However, the ECtHR did hold that they right to disseminate religious information is integral to the right to freedom of religion and that the Greek prohibition was only applicable to ‘improper proselytism’.<sup>98</sup> As the Greek government had not provided evidence that Mr Kokkinakis engaged in improper proselytism his conviction was an infringement of the ECHR. The ECtHR held that the statute which allowed for prosecution of proselytisers was not ‘narrowly drawn to define and punish specific conduct’, but was subject to prosecutorial discretion.<sup>99</sup>

The ECtHR in the matter of *Kokkinakis* reaffirmed the value of freedom of religion in a democratic society and held that:

[F]reedom of thought, conscience, and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics,

---

<sup>96</sup> Regarding the action of proselytism see generally PM Taylor ‘The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression’ (2006) *Brigham Young University Law Review* 811, 836.

<sup>97</sup> Proselytism is criminalised in Greece by virtue of section 4 of Law no. 1363/1938 (as amended) and is defined as meaning: ‘in particular, any direct or indirect attempt to intrude on the religion or beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety’.

<sup>98</sup> Regarding the action of proselytism see generally Taylor (note 96 above) 836.

<sup>99</sup> *Kokkinakis* (note 94 above) 311.

sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>100</sup>

The affirmation of the right to freedom of religion as put forward in the *Kokkinakis* case causes one to believe that this affirmation will necessitate a strict scrutiny of any limitation imposed on the right to freedom of religion. However the jurisprudence of the ECtHR reveals quite the opposite. The requirement that a limiting provision must be narrowly drawn to serve the protection of the specific public interest has not been constantly applied. The European Commission, for example, failed to appreciate the value of the right to freedom of religion and consequently accepted less narrowly drawn limiting provisions. Of particular concern has been the approach of the European Commission to declare that a religious adherent could possibly waive his right to manifest religious belief through voluntarily agreeing to certain duties that are in conflict with his religious belief.

In the application of *Ahmad v United Kingdom* the European Commission denied the admissibility of a claim of a Muslim school teacher.<sup>101</sup> The claim of Mr Ahmad's application followed a refusal by the school authorities to extend his lunch hour to enable him to attend the Friday prayer.<sup>102</sup> In deciding on the admissibility, the decision of the European Commission may be criticised for the following reasons: firstly, it failed to analyse the school code; secondly, it failed to require a narrowly tailored restriction aimed at serving a compelling state interest; and thirdly, it failed to

---

<sup>100</sup> *Ibid* 53.

<sup>101</sup> Before 1998, individuals filed an application before the European Commission of Human Rights, alleging an infringement. The Commission then decided on the issue of admissibility of the complaint to the ECtHR acting as a filter to decide which cases deserved examination by the ECtHR. See discussion in section 4.9.1.

<sup>102</sup> See *Ahmad v United Kingdom* App No 8160/78, 4 Eur Comm'n H R 126 (1981). The inadmissibility decision of *Ahmad* follows a similar previous application to the European Commission in which the Commission held that there was no interference with the right to manifest religious belief. See Dec. Adm. 8160/78, 22 Decision and Reports 27. See *X v United Kingdom* (note 93 above).



conduct an enquiry to ascertain if the school could have accommodated the request without compromising the needs of the students or school. The European Commission merely held that the right to conscience was not violated because the teacher himself had made the decision to apply and accept the teaching position. The European Commission in following this approach assumed that the right to conscience is not infringed as long as the option of resignation remains and the acceptance of the conditions of employment are voluntary.

The voluntary nature of employment was also relied upon by the European Commission in the matter *X v United Kingdom*.<sup>103</sup> In this matter a Muslim school teacher accepted the terms of employment which required full time attendance without mentioning his religious Friday afternoon prayers requirements. Subsequently, he was refused by the school authorities to take time off for prayer. The Commission found that this refusal did not violate the right to freedom of religion and therefore held that the application was inadmissible.

The above reasoning by the European Commission that the right to freedom of religion was not infringed if the nature of employment is voluntary, is criticised. It is contended that the European Commission, when relying upon the fact that an applicant has a choice to resign or continue with employment, does not adequately scrutinise the limiting provision. The necessity to limit the adherents' right in seeking to achieve a certain public interest is not adequately balanced. This need to balance conflicting interests is even more significant where the employer requires an employee to act contrary to his beliefs. For example, in the matter of *Stedman v United Kingdom*<sup>104</sup> the voluntary nature of employment was emphasised by the European Commission, when the applicant claimed religious reasons for not being able to work on a Sunday,

---

<sup>103</sup> *X. v United Kingdom* (note 93 above) 33.

<sup>104</sup> *Stedman v United Kingdom* App. No.29107/95, 89 – A (1997) D&R 104, 107-8.

even though the change to work on a Sunday was unilaterally imposed by the employer. The Commission regarded her complaint as an issue of contractual liability, holding that she had been dismissed as a result of her failure to work certain hours rather than for her religious belief as such, and that she was free to resign from her employment.

The ECtHR has further held that a limitation is justified not only in the event of voluntary employment, but also when the limitation is sporadic in nature. In the matter of *Mann Singh v France*,<sup>105</sup> the applicant, a practicing Sikh, supplied photos showing him wearing a turban to the licensing department. Upon which the licensing department refused twice to issue a duplicate driving license. Subsequent to this, the Minister of Transport, Public Works, Tourism and the Sea sent a circular in December 2005. The circular stipulated that identity photographs for use on driving licenses or duplicate licenses had to be accompanied by a photograph showing the person 'bareheaded and facing forward'. This was designed to minimise the risk of fraud or falsification of driving licenses, by enabling the holder to be identified with the maximum degree of certainty. The ECtHR ruled that the limitation of the tenets and rites of the Sikh religion were sporadic and were not disproportionate to the aim pursued. Therefore, the limitation was justified in principle and proportionate to the aim pursued and the complaint was manifestly ill- founded.

In contrast with the reasoning of the European Commission that the voluntary nature of employment negates a claim and the reasoning of the ECtHR that a sporadic infringement may be justified, is the reasoning of the European Court of Justice (ECJ) in Luxembourg<sup>106</sup> in the matter of *Prais v EC Council*.<sup>107</sup> In the matter of *Prais* a complaint by a Jewish teacher who was unable to hold examinations on Saturdays

---

<sup>105</sup> *Mann Singh v France* (No 24479/07).

<sup>106</sup> See section 4.9.2.4.

<sup>107</sup> *Prais v EC Council* (Case 130/75) 1976 ECR 1589, 2 CMLR 708.

because of his religious convictions was successfully protected in terms of the non-discrimination provisions of European Community Law.

From the above discussion it is evident that the monitoring mechanisms of the ECHR have mostly been more inclined to find that there has been no infringement or that the infringement is justified.

#### **6.2.3.4 Restrictions for the protection of public order**

In the event of the limitation being based on a state's need to protect the public order, it has been said that the term public order must be interpreted in the narrow sense of the word, to mean the prevention of public disorder.<sup>108</sup> This narrow interpretation of public order incorporates those restrictions that are essential for the coexistence of human beings.<sup>109</sup> The concept public order therefore should be distinguished from the French expression *l'ordre public*, which relates to the policies of an orderly society.<sup>110</sup> In light of the above definition of public order it is suggested that dress regulations, such as the prohibition of Islamic headscarf-*hijab* and turbans for Sikh men should not *per se* be justified on the ground of public order, as it can hardly be contested that wearing of a headscarf or turban leads to public disorder.

However, case law suggests that the courts have been eager to interpret the provision of public order in a more general sense. For example, in the application of

---

<sup>108</sup> Principle 22 of the Siracusa Principles incorrectly states: 'The expression 'public order' (*ordre public*) as used in the Covenant may be defined as the sum total of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of the public order'.

<sup>109</sup> See in general Nowak & Vospernik (note 34 above) 152.

<sup>110</sup> See generally R de Lange 'The European Public Order, Constitutional Principles And Fundamental Rights' (2007) 1 (1) *Erasmus Law Review* 3.

*Karaduman v Turkey*<sup>111</sup> the applicant refused to remove her headscarf when taking a photo for degree certificate purposes. As a result, the Turkish state university refused to issue her with a degree certificate. The European Commission on Human Rights in *Karaduman* decided that the act, although motivated by religious belief, was not a manifestation of that belief since:

The purpose of the photograph affixed to a degree certificate is to identify the person concerned. It cannot be used by that person to manifest his religious belief.<sup>112</sup>

This approach indicates a very restrictive view of what counts as a religious 'practice'. For this reason, the Commission failed to acknowledge that the university's action might have infringed on the applicant's right to manifest her religious belief. Similarly, in the application of *Bulut v Turkey*<sup>113</sup> the European Commission denied that the refusal of the Turkish state university to issue diplomas in which the photographs submitted by the applicants pictured the applicants wearing headscarves, did not pose an infringement on the right to manifest religious belief. Both applications were declared inadmissible by the Commission. The Commission accepted the arguments of the Turkish government that within the particular legal and social circumstances a display of a headscarf could create conflict and place other students under pressure. In the interest of public order the limitation was therefore justified.

The European Commission's reasoning in the matters of *Karaduman* and *Bulut*, in terms of which secular universities are able to limit the manifestation of religious symbols when the limitation is aimed at ensuring harmonious coexistence between

---

<sup>111</sup> *Karaduman v Turkey*, App. No. 16278/90 (EComHR, 74, DR 93, 3 May 1993) inadmissibility decision.

<sup>112</sup> *Ibid* 109.

<sup>113</sup> *Bulut v Turkey* Dec. Adm. 18783/91. (EComHR, 74, Decisions and Reports 93, 3 May 1993) inadmissibility decision.

students of various faiths and protecting public order and the beliefs of others, has been carried forward in decisions of the ECtHR.

In the matter of *Kurtulmus v Turkey*<sup>114</sup> the applicant, a professor at the Istanbul University, was subject to a disciplinary investigation by the University for wearing an Islamic headscarf-*hijab*. Following the disciplinary proceedings, a law was enacted, granting amnesty to civil servants who had been subject to disciplinary measures for wearing the Islamic headscarf and allowing for their reinstatement. The applicant did not apply for reinstatement but made an application to the ECtHR claiming that her right to manifest religious belief had been infringed.<sup>115</sup> The ECtHR found the application manifestly ill founded. The ECtHR stressed that the applicant had chosen to become a civil servant and so had to accept the consequences in terms of her employment. The grounds for the decision was that the limitation was proportionate to the pursuit of the legitimate interest of a democratic state in that the dress code applied without distinction to all members of civil society and was aimed at upholding the principles of secularism and neutrality. Given the margin of appreciation, the ECtHR held that interference was justified and proportionate particularly in light of the voluntary nature of the employment, in that the applicant had chosen to become a civil servant.<sup>116</sup>

The point of view of the ECtHR in *Kurtulmus* once again incorrectly relies on the voluntary nature of employment as criticised above in the matter of *Ahmad v United Kingdom* and *X v United Kingdom*.

---

<sup>114</sup> *Kurtulmus v Turkey* (No 65500/01).

<sup>115</sup> The case *Kurtulmus v Turkey* is not available in English therefore the above summary of the case is drawn from the following N Sundkvist *The Wearing of Religious Symbols at the Workplace in Sweden* Master Thesis Faculty of Law University of Lund (2010).

<sup>116</sup> Sundkvist (note 115 above) 41.

In opposition to the decisions in of the ECHR institutions in *Karaduman*, *Bulut* and *Kurtulmus* is the communication of the ICCPR Human Rights Committee in the matter of *Hudoyberganova v Uzbekistan*.<sup>117</sup> In the matter of *Hudoyberganova*, an Uzbek University suspended a female Muslim student for allegedly wearing an Islamic headscarf. The majority<sup>118</sup> of the ICCPR Human Rights Committee concluded that there had been a general violation of article 18(2) of the ICCPR. This conclusion must however be seen in light of the fact that the Uzbekistan government failed to argue why the limitation should be permissible. Therefore, the ICCPR Human Rights Committee did not address the question of possible grounds on which the limitation could be justified. The ICCPR Human Rights Committee further confirmed that ‘the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion’.<sup>119</sup>

From the above discussion it is clear that the monitoring mechanisms of the ECHR have mostly been more inclined to find that there is no infringement or that the infringement is justified on the ground of protecting the public order. The right to protect the public order on the one hand directly impacts on the restricted approach of the ECHR bodies in protecting the right to manifest religious belief. The application of the doctrine of the margin of appreciation in terms of which the countries are driven by different national and political policies on the other hand impacts on the varying interpretations of the right to manifest religious belief. In contrast with the approach of the ECHR bodies there is some indication that the ICCPR Human Rights Committee may more readily find an infringement and is therefore more moderate in guaranteeing the protection of the right to manifest religious belief.

---

<sup>117</sup> *Hudoyberganova v Uzbekistan* (note 19 above).

<sup>118</sup> Three Committee members, decided to append individual opinions, referring to the uncertain state of the record and to more complex causes for Ms. Hudoyberganova’s exclusion from the institute, based on her own statements.

<sup>119</sup> *Hudoyberganova v Uzbekistan* (note 19 above) 6.2.

In addition to limitations imposed on the right to manifest religious belief for the protection of public order as provided for in the ICCPR and the ECHR and discussed above, some states, such as Switzerland, Turkey and France have justified limitations of the right to manifest religious belief, based on the principle of secularism. The restriction of the public display of religious symbols is seen as infringing on the requirement of state neutrality as required by a secular state. An evaluation of the relevance of the principle of secularism as a ground of justification for the right to manifest religious belief follows next.

### **6.3 Evaluation of the principle of secularism / public neutrality as an analogous ground of justification**

The discussion below evaluates the claim that secular states may limit the right to manifest religious belief based on the principle of secularism. In general, the justification of states in limiting the right to manifest religious belief based on the principle of secularism is founded on the following three concepts: First, the aim of the limitation is to protect the rights of others against conversion or religious pressure. Second, the aim of the limitation is to protect the public order through creating a neutral public space. Finally, the aim of the limitation is to ensure gender equality and to protect women from patriarchal and discriminatory religious practices.<sup>120</sup>

The applicability of these three concepts will be evaluated in relation to the following two areas in which the right to manifest religious belief through the display of the

---

<sup>120</sup> For an overview of secularism in Europe and the application thereof by the ECtHR see C Evans and CA Thomas ‘Church-State Relations in the European Court of Human Rights’ (2006) *Brigham Young University Law Review* 699.

Islamic headscarf-*hijab* has been limited in states on the basis of secularism: Firstly, limiting the right of public employees, such as teachers in state schools. Secondly, limitations imposed on the rights of private individuals, namely students at tertiary institutions, scholars at primary and secondary schools and other private individuals in the public domain. After this evaluation, a critique of the employment of the principle of secularism, as a possible ground for the justification of a limitation on the right to manifest religious belief is offered.

### **6.3.1 Public employees - teachers at public schools wearing the *Islamic headscarf-hijab*: the matter of *Dahlab v Switzerland***

The matter of *Dahlab v Switzerland*<sup>121</sup> raises the issue of the right of a teacher, employed in a public primary school, to manifest her religious belief. The application was declared inadmissible by the ECtHR. The ECtHR recognised that prohibiting a teacher to wear the headscarf while teaching was an infringement of her right to religious freedom, after which the ECtHR proceeded to scrutinise the possible justification of the infringement on the right to manifest religious belief.

Despite agreeing that the prohibition was an infringement on the right to freedom of religion, the ECtHR did not directly acknowledge that the display of the Islamic

---

<sup>121</sup> *Dahlab v Switzerland*, application No. 42393/98, ECtHR decision of 15 February 2001 (cf. ECHR 2001-V Eur Court HR 449 (*Dahlab*)). The background to the case, in brief is as follows: In September 1990, Ms Dahlab was appointed as a primary-school teacher with responsibility for pupils aged between four and eight. In March 1991, she converted to Islam and began wearing the Islamic headscarf at school. In May 1995 the district schools inspector informed the primary education department that the applicant had regularly worn a headscarf at school without attracting any comment from pupils or parents. The department requested the applicant to stop and subsequently issued a ban on Muslim employees wearing headscarves, on the ground that this was unacceptable in a public secular education system.



headscarf forms part of the practice of religion. This hesitation on the side of the ECtHR, to expressly state that the display of the Islamic headscarf forms part of the practice of religious belief, could be indicative of a general reluctance to acknowledge the value of religious practices outside of Christianity.<sup>122</sup> The ECtHR further commented that some leeway must be allowed in circumstances where the conduct 'would be regarded by the average citizen as being of minor importance'.<sup>123</sup> In contrast to this hesitance displayed by the ECtHR the ICCPR Human Rights Committee unambiguously confirmed each individual's right to wear clothes in the public that conforms to the individual's religion.<sup>124</sup>

The ECtHR, although finding a limitation of the right to manifest religious belief, held that within the margin of appreciation the Swiss authorities had acted reasonably as the prohibition of the headscarf was a measure necessary for the protection of public order, public safety, and the rights and freedom of others. In addition the ECtHR emphasised that as young students may be more easily influenced, extreme care was called for. As a result, the ECtHR upheld the Swiss Federal Courts' interpretation of the neutrality principle that was required to preserve the 'religious harmony' in the community.<sup>125</sup>

---

<sup>122</sup> For a discussion of this point and others pertaining to the *Sahin v Turkey* judgment see C Evans 'The "Islamic scarf" in the European court of human rights' (2006) 7 (1) *Melbourne Journal of International Law* 52, 65. For a further illustration of the ECtHR bias towards Christian values see the decision in ECtHR, *Refah Partisi (The Welfare Party) and Others v Turkey*, Judgment of 13 February 2003, 132 in which the Grand Chamber concurred with the view of the Chamber that 'Sharia (Islamic law primarily derived from Quran [the Islamic holy book] and Sunnah [sayings and actions of Prophet Muhammad, the prophet of Islam]) is incompatible with the fundamental principles of democracy, as set forth in the ECHR.

<sup>123</sup> *Dahlab* (note 121 above) 453.

<sup>124</sup> *Hudoyberganova v Uzbekistan* (note 19 above) 6.2.

<sup>125</sup> *Dahlab* (note 121 above) 12.

The ECtHR illustrates three elements to its reasoning in finding the application inadmissible. First, that wearing the headscarf might have a proselytising effect; second, that wearing the headscarf is incompatible with gender equality, and third, that it is incompatible with tolerance and respect for others. The reasoning of the ECtHR is expressed as follows:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as wearing a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>126</sup>

The national authorities were of the opinion that the Islamic headscarf is a 'powerful external symbol' within the context of a primary school teacher's ability to influence.<sup>127</sup> The ECtHR concurred with the Swiss Federal Court that the prohibition was justified in that the headscarf may pose a threat as in that:

Teachers must ... endorse both the objectives of the State school system and the obligations incumbent on the education authorities, including the strict obligation of denominational neutrality....<sup>128</sup>

It is contended that the ECtHR's argument regarding proselytism is weak. In the case of *Kokkinakis* the court distinguished between permissible and unacceptable forms of

---

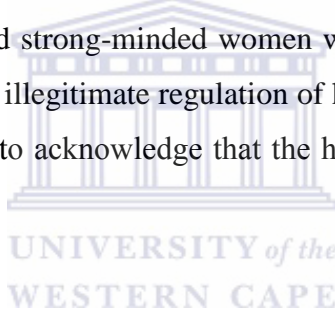
<sup>126</sup> *Dahlab* (note 121 above) 463.

<sup>127</sup> *Dahlab* (note 121 above) 462.

<sup>128</sup> *Ibid.*

proselytism and found the practice of Mr Kokkinakis not to be improper and therefore permissible. It is contended that Ms Dahlab was definitely not involved in any improper proselytism. At worst her actions could be described as a covert in that she was being true to her religion in her behaviour. It is difficult to understand how this amounts to improper proselytism on children in religious matters.

Regarding the issue of gender inequality, the ECtHR simply makes the assertion that wearing the veil is incompatible with gender equality, in that the requirement to veil 'appears to be imposed on women by a precept which is laid down in the Koran'.<sup>129</sup> The approach of the ECtHR appears to be founded on the view that the Koran and Islam are oppressive to women. The ECtHR failed to appreciate that this was the behaviour of an educated and strong-minded women who refused to be oppressed by what she considered to be an illegitimate regulation of her clothing.<sup>130</sup> In addition this decision of the ECtHR fails to acknowledge that the headscarf's functions and social significance are varied.<sup>131</sup>



---

<sup>129</sup> *Dahlab* (note 121 above) 463.

<sup>130</sup> This argument however does not deny that in certain instances the choice of women may be taken away by the government, the family or her cultural environment. However, a blanket acceptance that all women who wear the veil are forced to do so is unfounded. This paternalism of the ECtHR is also criticised in the dissenting judgment of Tulkens J in *Sahin v Turkey*, Grand Chamber decision as discussed in Section 6.3.2 below.

<sup>131</sup> S Poulter 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43, 71. The Quebec Human Rights Committee confirms this point of view in the following manner, 'one should presume that *hijab*-wearers are expressing their religious convictions and the *hijab* should only be banned when it is demonstrated-and not just presumed that public order or sexual equality is in danger': as cited in CD Baines, 'L 'Affaire des Foulards Discrimination or the Price of a Secular Public Education System?' (1996) 29 *The Vanderbilt Journal of Transnational Law* 303, 324.

It is further apparent that the ECtHR is contradicting itself in its own reasoning. On the one hand, Ms Dahlab represents a victim of gender inequality, oppressed, submissive, a victim of patriarchy, and on the other hand, Ms Dahlab is seen as a forceful proselyte, who threatens the rights of innocent children. The ECtHR in this line of reasoning views Ms Dahlab simultaneously as an aggressor and as victim in need of protection from cultural and religious domination.

In the course of this contradicting reasoning the ECtHR does not succeed in showing how the proselytising and discriminatory effect of the headscarf is rendered incompatible with tolerance and respect for others required in a democratic society.<sup>132</sup> It is argued that the ECtHR did not adequately weigh up the competing interests, the importance of the right to manifest religious belief and the impact of the limitation of the right on the individual *vis-a-vis* the fundamental rights of others.<sup>133</sup>

It is further contended that the ECtHR erred in deferring too much to the states margin of appreciation. The 'religious peace' of the school did not appear to have suffered any serious threat in the lengthy period the applicant wore the Islamic headscarf before being prohibited from doing so. In this period there was no complaint from either the students or their parents.<sup>134</sup> Moreover, the display of the Islamic headscarf in an environment of mutual respect could be more consistent with the dictates of neutrality and evidence of the reality of religious pluralism.

It is suggested that the one-sided argument that the display of religious symbols by Ms Dahlab may raise concerns of coercion and that harm to others does not in any manner indicate that the display of these symbols, in a different context, may indeed give rise

---

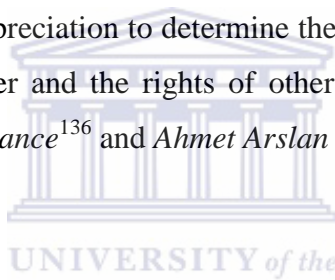
<sup>132</sup> *Dahlab* (note 121 above) 463.

<sup>133</sup> An example of a more rigorous weighing of the competing values, is illustrated by *Tahzib-Lie* (note 2 above) 473-83.

<sup>134</sup> *Dahlab* (note 121 above) 467.

to questions pertaining to neutrality. For example, questions related to the actor as well as the place of action could raise questions of endorsement or entanglement with religion. However, if the actor is a member of a religious minority then the argument of endorsement or entanglement becomes less persuasive. It is argued that these concerns regarding state neutrality are however even less persuasive if the actor is a private individual and not a representative of the state. In contrast with *Dahlab* the following three matters were all concerned with the limitation of the rights of private citizens in their private capacity to manifest their religious beliefs.

However, following the reasoning of the ECtHR in *Dahlab*, the ECtHR once again relied upon the margin of appreciation to determine the best interests of a secular state in protecting the public order and the rights of others, in the following matters of: *Sahin v Turkey*,<sup>135</sup> *Atkas v France*<sup>136</sup> and *Ahmet Arslan and Others v Turkey*.<sup>137</sup>



### **6.3.2 Private individuals and the display of the *Islamic headscarf-hijab* or other religious motivated dress**

#### **6.3.2.1 Students at public universities: *Sahin v Turkey***

In the case of *Sahin v Turkey*, Ms Sahin lodged a complaint alleging that the Turkish state university's regulations banning the Islamic headscarf violated her rights under the ECHR.<sup>138</sup> The ECtHR Chamber upheld the prohibition on the wearing of a

---

<sup>135</sup> *Sahin v Turkey*, Grand Chamber decision (note 19 above).

<sup>136</sup> *Atkas v France* (No. 43563/08).

<sup>137</sup> *Ahmet Arslan v Turkey* (ECtHR, App. No. 41135/98) 23 February 2010.

<sup>138</sup> Article 8 (private life), Article 9 (religion), article 10 (expression) and article 14 (non-discrimination) of the ECHR and article 2 of Protocol No. 1 (unjustified interference with the right to education).

headscarf at a Turkish university and held that the prohibition was justified on the grounds of protecting the rights and interests of others and protecting public order through protecting secularism in a majority Islamic state. The ECtHR Chamber stated:

Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonable differ widely, the role of the national-decision making body must be given special importance.... In such cases, it is necessary to have regard to the fair balance that must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of the public order and pluralism.<sup>139</sup>

The ECtHR Chamber further held that:

[W]hen examining the question of the Islamic headscarf in the Turkish context, there had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it.<sup>140</sup>

Ms Sahin held that her religious belief did not challenge the principle of secularism, nor did she wear the veil in an ostentatious manner intended to create religious pressure. In addition, she held that the headscarf did not challenge the rights of others, as the Islamic headscarf is not in itself incompatible with secularism and neutrality in

---

Article 2 of Protocol No. 1 ECHR states that: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’. In the Chamber and subsequent Grand Chamber judgments, the ECtHR focused on both article 9 and article 2 of Protocol No. 1. On the right to education of children see generally M Nowak ‘The Right to Education’ in A Eide *et al.* (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 268, 271.

<sup>139</sup> *Sahin v Turkey*, Chamber decision (note 19 above) 101.

<sup>140</sup> *Sahin v Turkey*, Chamber decision (note 19 above) 108

education.<sup>141</sup> She advised that in plural societies, the eradication of difference was not advisable. Furthermore, she indicated that the assurance of tolerance between competing groups needs was preferable.<sup>142</sup> In addition, as the religious needs of women adhering to the Islamic faith were different, they had to be treated differently.<sup>143</sup> As the wearing of yarmulkes by Jewish students was allowed, this implied discrimination between adherents of these different faiths.

The Turkish government held that the neutrality of the public services was a prerequisite for a liberal, pluralist democracy and of particular importance in Turkey. The ECtHR Chamber held that in a secular state where the majority of the population belongs to a particular religion these measures were necessary. These measures prevent pressure on students who do not belong to the majority religion and therefore are justified as they protect the peaceful coexistence of students and protect the public order.<sup>144</sup> The margin of appreciation left it to the states to regulate the peaceful coexistence and the protection of the rights of others.

Following the judgment of the Chamber, *Sahin* requested reconsideration before the Grand Chamber.<sup>145</sup> The Grand Chamber confirmed that the restriction was justified. They contended that the limitation protects the state interests and the rights and freedoms of others and by maintains public order through promoting the principle of secularism.<sup>146</sup>

---

<sup>141</sup> *Sahin v Turkey*, Chamber decision (note 19 above) 87.

<sup>142</sup> *Sahin v Turkey*, Chamber decision (note 19 above) 88.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Sahin v Turkey*, Chamber decision (note 19 above) 108.

<sup>145</sup> *Sahin* Grand Chamber decision (note 19 above).

<sup>146</sup> *Sahin* Grand Chamber decision (note 19 above) 99. For a comprehensive overview of the history and facts of the *Sahin* case see M Ssenyonjo 'The Islamic veil and freedom of religion, the rights to education and work: a survey of recent international and national cases' (2008) 58 *Chinese Journal of International Law* 653.

The Grand Chamber acknowledged that in a democratic society, opinions on the state-religion relationship may reasonably differ widely. In such a context it is considered that 'the role of the national decision making body must be given special importance'.<sup>147</sup> The court emphasised that what was important in determining the margin of appreciation was the following factors: The need to protect the rights and freedoms of others; the preservation of public order; and the securing of true religious pluralism.<sup>148</sup>

The Grand Chamber of the ECtHR expressed the duty of states in plural communities as follows:

The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious belief or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups.<sup>149</sup>

It is evident from the decision in *Sahin* that the ECtHR will generally allow for a limitation of the display of religious dress in a secular community if the argument is put forward that the limitation is aimed at the protection of the public order in a secular community. Accordingly, secularity is often perceived as the most suitable approach to ensure the above referred to equal treatment of all religions. This perception, however must be criticised, as it does not take into consideration that the very origin of secularism is inherently tainted with conflict in that the origin of secularism was found during the:

---

<sup>147</sup> *Sahin* Grand Chamber decision (note 19 above) 109.

<sup>148</sup> *Sahin* Grand Chamber decision (note 19 above) 110.

<sup>149</sup> *Sahin* Grand Chamber decision (see note 19 above) 107.



[P]eriods of confrontation, of intolerance, and often of violence against those who held dissenting beliefs. Moreover, in current controversies involving religion and the state, where the doctrines are cited for the ostensible purpose of resolving conflicts, they continue to be applied in ways that divide citizens on the basis of their beliefs and that belittle those whose beliefs do not conform to popular preferences.<sup>150</sup>

The narrow interpretation of public order as originally applied in the matter of *Dahlab* and now further entrenched in the matter of *Sahin* is not justified and indeed poses an unwarranted infringement on the right to freely manifest religious belief. The dissent of Tulkens J, discussed below, provides a more suitable approach to balancing the need to protect the public against disorder on the one hand, and the right to manifest religious belief freely, on the other hand.



#### *Dissenting judgment in Sahin*

Regarding the issues of justification of the infringements, on the right to education and the right to freedom of religion in the matter of *Sahin*, a dissenting judgment was put forward by Tulkens J. Only the concerns relating to the right to manifest religious belief are explored.

When scrutinising the limitation on the right to manifest religious belief, Tulkens J ascribes to the principle of secularism but disagrees with the manner in which it was applied by the majority. She argues that secularism must not be weighed against equality and liberty, but that an approach of harmonising these principles must be sought. In this regard General Comments to article 18 of the ICCPR require that states display a disposition of ‘equality and non-discrimination’ toward all religions.<sup>151</sup>

---

<sup>150</sup> JT Gunn 'Religious Freedom and *Laïcité*: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419, 422.

<sup>151</sup> Paragraph 8 of General Comment 22.

These provisions may be interpreted to indicate that the duty of the state is to foster religious diversity in that an ‘indissociable’ union exists between democratic society and religious diversity. Religious pluralism necessitates the full and equal rights of adherents to all faiths to choose their own way of a good life, as long as their choice does not interfere with the rights of others.<sup>152</sup>

This obligation to religious pluralism therefore requires that states should tolerate diverse religious point of views. For that reason, a state’s ability to restrict religious freedom on the ground that a public manifestation of religious ideas or practice is ‘necessary’ to protect public society and the state must be scrutinised. This scrutiny requires that the state is able to show that a true, identifiable ground is necessary to justify the restriction.<sup>153</sup>

Tulkens J further argues that in this investigation only ‘indisputable facts and reasons whose legitimacy is beyond doubt’ are able to justify interference with a right guaranteed by the ECHR.<sup>154</sup> The importance that Tulkens J places on the right to manifest religious belief and the level of scrutiny she proposes is significant. It is clear that she appreciates the importance of the right and requires that any limitation of the right to be subject to strict scrutiny of the existence of indisputable facts, which are beyond doubt.

For the majority it was a simple question of whether the wearing of the Islamic headscarf contravened the principle of secularism. For Tulkens J, the significant question was to identify the relationship between wearing the Islamic headscarf and the principle of secularism. In appreciating this relationship the following issues had

---

<sup>152</sup> *Sahin* Grand Chamber decision (see note 19 above) 104.

<sup>153</sup> *Sahin* Grand Chamber decision (see note 19 above) 106.

<sup>154</sup> *Sahin* Grand Chamber decision (see note 19 above) 115.

to be assessed; firstly, does the wearer call into doubt the principle of secularism, and secondly, did the wearer contravene the principle of secularism through her actions.<sup>155</sup> Tulkens J draws a clear distinction between public servants, pupils and students. Her point of view is that the rights of students and pupils to manifest their religious belief should not inevitably be limited in a secular state. The views expressed by Tulkens J are supported by Boyle, who has argued that secularism and democracy are not threatened by respecting the choice of an adult woman to wear religious garb.<sup>156</sup>

The approach followed by Tulkens J is strongly advocated. That is to say, secularism *per se*, should not constitute sufficient ground to justify a limitation on the rights of individuals outside of the public sector. Indeed, the claim that secularism may constitute a justifiable ground for limiting the right to manifest religious belief within the public sector is questioned.<sup>157</sup> This point of view is underscored by the following enquiry. If neutrality in the public sector requires the removal of all visible signs of religious orientation, how can gender and race neutrality be enforced? It is argued that the state cannot remove all visible signs of any possible predisposition, and that religious manifestations therefore should not be singled out in this quest for a neutral state.

It is therefore contended that the association between the preservation of a secular state as a permissible justification for imposing a limitation on the right to manifest religious belief on the grounds of public order and state neutrality must be challenged.

---

<sup>155</sup> *Sahin* Grand Chamber decision (see note 19 above) 7.

<sup>156</sup> See 'Interview with Professor Boyle' in '*Leyla Sahin v Turkey*'.

Available at <<http://www.saman.com>> last accessed on 10 May 2010.

<sup>157</sup> In this regard see generally N Lerner 'How Wide the Margin of Appreciation? The Turkish Headscarf Case, The Strasbourg Court, and Secularist Tolerance (2005) 13 *Willamette Journal of International Law and Dispute Resolution* 65, 85.

### 6.3.2.2 Scholars in public schools: *Atkas v France*

The decision in *Atkas* followed the expulsion of Muslim girls for wearing headscarves and Sikh young men for wearing a *keski* or under-turban while attending a public school.<sup>158</sup> The headmasters considered these headdresses in breach of a French Act of 15 March 2004<sup>159</sup> in terms of which the wear of all conspicuous signs of religious faith while attending public school is prohibited. The pupils challenged their expulsions before the French administrative courts. The administrative courts dismissed their applications at first instance and on appeal. The ECtHR found the matters inadmissible under article 9 of the ECHR in that the restriction was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of others

---

<sup>158</sup> In France, before 2004, the French Conseil d'Etat can be regarded as having generally supported 'open' neutrality in terms of which the manifestation of all religions in the public sphere was generally permitted. As noted by the Board of Experts of the International Religious Liberty Association (IRLA): 'Between 1989 and 2004, the French Conseil d'Etat determined, in approximately fifty decisions and judgments, that Muslim school girls had a right to wear headscarves in state schools provided that they did not display the headscarves in a proselytizing manner and that they did not disrupt schools. The Conseil d'Etat made these judgments based upon its interpretation of the French Constitution, international human rights law, and the French concept of *laïcité*'. See Board of Experts of the International Religious Liberty Association (IRLA), Guiding Principles Regarding Student Rights to wear or Display Religious Symbols (Siguenza, 15 November 2005) paragraph. 9, available at <[www.irla.org/documents/reports/symbols.html](http://www.irla.org/documents/reports/symbols.html)> last accessed on 10 September 2010.

<sup>159</sup> In 2003 President Jacques Chirac of France formed the Stasi Commission, in terms of Decree No. 2003-607 of 3 July 2003, to conduct 'an analysis of the application or the principle of *laïcité* in the Republic'.. Following a report of the Stasi Commission, the French Parliament, enacted the law on secularity and conspicuous religious symbols in schools (Act of 15 March 2004 - 2004-228 of 15 March 2004) which came into effect on 2 September 2004. Law of 2004 (note 17 above). This Act banned students from wearing 'conspicuous' or 'ostensible' religious symbols in French public primary and secondary schools.

and public order. In these circumstances, and having regard to the margin of appreciation, the expulsions were justified and proportionate to the aim pursued.<sup>160</sup>

It is reasoned that this decision, similarly to the decisions in *Dahlab* and *Sahin*, illustrate the fact that the ECtHR will in general find that there is no infringement on the right to manifest religious belief, if the infringement is in terms of a law that is aimed at protecting the secular nature of the state. This approach of the ECtHR does not allow for any scrutiny into determining the necessity of the public interest sought as well as the precise nature of the restriction in achieving the public interest. The proportionality of the infringement is never considered. In finding that there is no infringement the ECtHR did not precede to the second stage of the investigation and in doing so does not ensure the adequate protection of the right to manifest religious belief. It is contended that this approach of the ECtHR does therefore not ensure the optimal protection of the right to manifest religious belief.

### **6.3.2.3 Private individuals in the public domain: the matter of *Ahmet Arslan and Others v Turkey***

Evidence of more nuanced approach is visible in the reasoning of the ECtHR in the matter of *Ahmet Arslan and Others v Turkey*. The applicants, members of a religious group, believed that their religion required them to wear a turban. The applicants were convicted under legislation prohibiting the wearing of certain forms of clothing in public areas.

---

<sup>160</sup> Prior to the enactment of the Law of 2004, the ECtHR in the matters of *Dogru v France* (No 27058/05) and *Kervanci v France* (No 31645/04) found that the expulsion of two female pupils from a state school for refusing to remove their headscarves during physical education and sports lessons justifiable for reasons of health and safety. For a more specific discussion on the right to manifest religious belief in schools see IT Plesner 'Legal Limitations to Freedom of Religion or Belief in School Education' (2006) 19 *Emory International Law Review* 557, 586.

The ECtHR held that as their dress was religiously motivated their conviction fell within the ambit of article 9. The ECtHR further held that as far as the limitation of religiously motivated dress was to ensure respect for secular and democratic principles, it pursued a number of legitimate aims. However, the applicants were ordinary citizens and wore the clothes in a public area. The ECtHR therefore held that regulations on the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one's religion, were not applicable. Furthermore, the applicants did not present a threat to public order, nor did they exercise pressure on others. The limitation of the applicants' freedom to manifest their beliefs was not based on sufficient reason for the purpose of article 9 and therefore the applicants' rights were violated.

It is submitted that this decision of the ECtHR is illustrative of a more appropriate interpretation of the notion that respect for secular principles does not *per se* require the removal of religious symbols from the public domain. In this judgment, the ECtHR distinguished between displays by ordinary citizens in general public areas from the display by state employees in public establishments. This distinction is welcomed. However, as asserted previously in the discussion of *Dahlab*, it is contended that even representatives of the state engaged in public service, a display of public expression of religious belief does not *per se* indicate that the state endorses a particular religion. The court ought to scrutinise the actor as well as the place of action in determining the effect of the religious display on the neutrality of the state.

#### **6.3.4 Critique of the application of the principle of secularism**

It is apparent from the above discussion that the right to manifest religious belief through the display of religious dress and in particular the Islamic headscarf-*hijab* is

often justified on the ground that the limitation protects the so-called public order in a secular state. The achievement of neutrality stands central to secular states. Restrictions on the right to manifest religious belief in the field of public employment therefore have often been supported by claims that the limitation is necessitated by the secular nature and religious neutrality of the state. The state may, for example, reason that the headscarf is a visible token of a particular religion and therefore not acceptable in the neutral public domain. The achievement of perfect neutrality however is difficult in theory and impossible in practice.

The approach of the ECtHR in the above decisions indicates the difficulty in striking a balance between the right to manifest religious belief on the one hand, and the duty of governments to protect public interests, and in particular the public order and state neutrality, on the other hand. This difficulty is compounded in the blanket acceptance of restrictions in the interest of secularism for the following reasons set out below.

#### **6.3.4.1 Different interpretations of the dictates of secularism**

The relativity of achieving a balance is increased in that states apply different interpretations of the dictates of the principle of secularism. Some states may interpret the principle of secularism as an analogous ground for state neutrality and public order. For example, in France the debate on the headscarf is more relevant with regards to primary and secondary state schools. The debate on the headscarf has however particular relevance to students at state universities in Turkey. While in other states, which do not adhere to a secular relationship between the state and religion, such as Germany, the Netherlands, Switzerland and the United Kingdom,<sup>161</sup> both

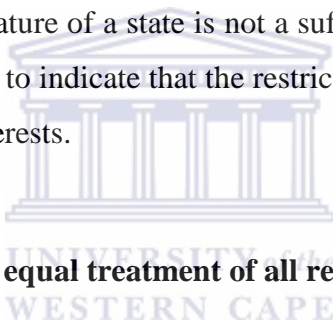
---

<sup>161</sup> *Shabina Begum v Denbigh High School* E L R 374 (Q B 2004), 2004 WL 1174215.

scholars and students are permitted to wear the headscarf. The German Constitutional Court has even ruled that teachers are entitled to wear the headscarf.<sup>162</sup>

#### **6.3.4.2 Secularism is not a listed public interest ground**

The methodology of the ECtHR towards interpreting secularism, as ground for restriction the freedom to manifest religious belief, is problematic in that neither the ICCPR nor the ECHR lists the principle of secularism as a ground upon which the right to manifest religious belief may be limited. In addition, as shown below, the necessity clause must be construed as an exhaustive list of possible justifications.<sup>163</sup> Therefore the mere secular nature of a state is not a sufficient reason to limit religious freedom. The state will have to indicate that the restricted behaviour indeed is a threat to one of the listed public interests.



#### **5.3.4.3 Secularism aimed at equal treatment of all religions**

The ICCPR and the ECHR endorse the notion that the principle of secularism should be interpreted in a manner that allows that diverse arrays of religions to prosper, as long as this approach does not violate the provisions of the limitations provisions contained in these instruments. It is argued that to the extent that Turkey and France rely on the principle of secularism, to shield government and other citizens from the impact of committed adherents they are in breach of the principles of democratic society.<sup>164</sup>

---

<sup>162</sup> *Koptuch-Urteil* [Headscarf Decision] (September 2003) Bundesverfassungsgericht [BVerGE] 108,208 (F R G)

<sup>163</sup> See Section 6.2.2.

<sup>164</sup> See Section 5.2.2.



Justification of the limitation in accordance with the principle of secularism, in which a state claims that it has a legitimate interest in protecting the secular character of the government, as a display of religion may give the appearance of an endorsement or establishment of religion is not persuasive. The terms establishment and endorsement of religion, although frequently employed by the United States Supreme Court, are not only to be associated with American jurisprudence. These terms also form part of the vocabulary of the relationship between the state and religion as discussed in section 3.6. It is within this context that these terms are used. In addition, as discussed previously, the ICCPR does not prohibit the existence of an established religion so long as that establishment does not discriminate against other religions or restrict the religious freedom of members who do not subscribe to the state religion.<sup>165</sup>

This position of the ICCPR may be interpreted to support an interpretation of secularism that requires a more accommodationist approach towards religion in which religion is neither favoured nor opposed or a even a more cooperationist approach where the state is actively committed to equal treatment of all religions.<sup>166</sup> Even the existence of an established church is not excluded as long as the existence of the established church does not discriminate against other religions.<sup>167</sup>

#### **6.3.4.4 Limitations need to be necessary**

In addition a limitation on the right to manifest religious belief would need to be necessary, which has been interpreted to mean serving a ‘pressing social need’.<sup>168</sup> Accordingly an outright ban on the display of religious symbols cannot possibly be

---

<sup>165</sup> See section 4.3.1.

<sup>166</sup> See section 4.3.

<sup>167</sup> See section 4.3.

<sup>168</sup> See section 6.2

justified under a strict scrutiny regime. The state would have to show the ‘pressing social need’ and the ban would have to be proportionate to the need.

Regarding the application of the Law of 2004, as discussed in more detail in section 6.3.2.2 and section 7.2.2, France would have to show that causing another to feel disrespected is an infringement of another’s fundamental human right, or that the disrespect caused a threat to the public order in the narrow sense the word, which would be very challenging.

#### **6.3.4.5 The requirement of state neutrality**

The ECtHR agreed that in a secular community the principle of *laïcité* indeed may impose restrictions on civil servants rights to manifest their religion, especially in the education environment where students are easily influenced and ‘religious peace’ must be protected with tremendous care.<sup>169</sup> This interpretation of the principle of *laïcité* by the ECtHR regarding the limitation of civil servants is challenged. It is suggested that the need for teachers to conduct themselves in a professional, independent, impartial and neutral manner can be regulated in terms of effective workplace regulations and codes of conduct and not only in terms of religious dress limitations that are enforced under the guise of adherence to the principle of *laïcité*.

Similarly the argument related to neutrality raised in section 6.3.2.1 can be voiced here too. That is, if neutrality is said to require the removal of all visible signs of religious orientation, it would not be possible to enforce gender and race neutrality. From this line of reasoning it is clear that the state cannot remove all visible signs of any possible predisposition.

---

<sup>169</sup> *Sahin* Grand Chamber decision (note 19 above) 111.

In addition it is contended that the absence of religious dress in the public domain may indeed not be neutral at all, but could in reality signal the endorsement of other religious values such as Christian values or even agnostic or atheistic values. The so-called neutrality of the state may further be brought into question if the limiting policy is not uniformly enforced against all religiously motivated garments, irrespective if such a symbol is ostentatious or discrete, such as the crucifix, the ceremonial dagger (*kirpan*) or even the Hindu *bindi*.

In this regard the pursuit of neutrality appears to have imposed a secular point of view that has resulted in the devaluation of religious convictions and manifestations in the public domain. In this way support for religious pluralism has been abandoned in favour of the notion of secularism or non-religion. The fact that a woman is allowed to wear a headscarf may more readily indicate that a state is tolerant and respecting of all diverse religious belief. This tolerance may be more reflective of a truly neutral state in which all religious adherents are tolerated. It is further suggested that removing all displays of religious dress from the public domain may as a substitute for neutrality more accurately signify a fictional absence of religion from the public domain.

This fictional representation of neutrality may further impose a more onerous burden on some religions in relation to other religions, as the display of religious dress may be optional in some religions and obligatory in others. For example, it is obligatory for Sikhs to wear turbans while the display of dreadlocks by Rastafarians, as well as the crucifix by Christians has been considered optional. Therefore it is argued that in certain states the limitation of the Islamic headscarf is not proportional to protecting the public objectives of public safety, public health, public order and morals. For

example in Turkey women who consider veiling part to be a religious obligation<sup>170</sup> are excluded from the entire public sector.<sup>171</sup> This exclusion deprives women of a university education and their ability to be productive members of society through education and employment.

#### 6.3.4.6 Expression of bias

In addition to the critique of the fictional representation of neutrality, the ECtHR persists in expressing a moral value judgment regarding the wearing of the headscarf and declared that that the Islamic veil:

[S]eems to be imposed to women by koranic prescription which ... is difficult to reconcile with the principle of equality of sexes.<sup>172</sup>

This moral value judgment expressed by the ECtHR may also be illustrative of the ECtHR bias in favour of certain predominantly traditional Christian religions and consequent prejudice towards those religions that do not conform to these traditional values.<sup>173</sup> This bias may further indicate a certain prejudice in the imposition of a

---

<sup>170</sup> The manifestation of religious practices may be differentiated in that a distinction can be drawn between those who feel 'obligated' to partake in a particular observation or rite and those who are merely 'encouraged' to do so. For a further discussion of this distinction see generally van der Schyff (note 11 above) 177.

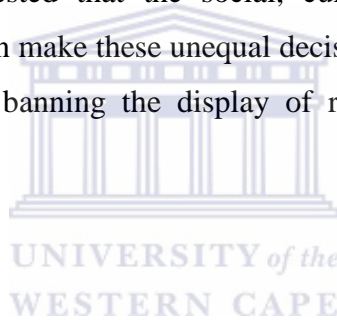
<sup>171</sup> D Özlem 'The Head-Cover Controversy in Contemporary Turkey' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 497, 503.

<sup>172</sup> Translation as provided in J Martínez-Torrón & R Navarro-Valls 'The Protection of Religious Freedom in the System of the Council of Europe' in T Lindholm, WC Durham, BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 209, 227.

<sup>173</sup> The ECtHR has often justified interference by states to protect the cultural/religious sensitiveness of the Christian majority. See for example the case of *Müller and Others v Switzerland* App. No. 10737/84, 133 Eur. H.R. Rep. (ser. A) 212 (1988) in which the ECtHR upheld restrictive measures taken in reaction to the controversial nature of certain paintings displayed at an exhibition in Fribourg.

limitation as well as the continued application of such a limitation on these non-conforming religions.

It is argued that any limitation of the right to manifest a religious belief, that is imposed on for example, scholars, students or teachers to wear the Islamic headscarf, should be justified on a case-by-case basis. This analysis should take into account the human rights of those wearing Islamic dress as a religious practice, as well as the rights of others. If equal treatment of Muslim women forms the basis for imposing such a limitation, it must be appreciated that a general ban of the Islamic headscarf dress does not assure an environment in which autonomous and meaningful choices can be made. It is suggested that the social, cultural, economic and political environment in which women make these unequal decisions must be challenged which is not achieved by merely banning the display of religious symbols by scholars, students or teachers.



---

In *Otto-Preminger Institute v Austria*, App. No. 13470/87, 295-A Eur. H.R. Rep. (ser. A) 34 (1994), the ECtHR found that the seizure and subsequent forfeiture of the film *Das Liebeskonzil* justified. In *Wingrove v United Kingdom* App. No. 17419/90 (Eur. Ct. H.R. 1996), the ECtHR upheld the refusal of the British authorities to grant a certificate for the video work, *Visions of Ecstasy*. This predisposition towards traditional religions is also evident in the jurisprudence of other international bodies. A case in point is the matter of *Assembly of the Church of the Universe v Canada - MAB, WAT and J AYT v Canada* Comm No 570/1993 ICCPR Human Rights Committee, 8 April 1994) inadmissibility decision. In this case the ICCPR Human Rights Committee held claim of adherents to the Assembly of the Church of the Universe who as a result of their religious practices, which involved the cultivation, possession, distribution and worship of marijuana, were subjected to criminal prosecutions under the Canadian Narcotic Control Act, inadmissible. The ICCPR Human Rights Committee held that such a belief could scarcely be brought under the provisions of article 18 in that the worship of marijuana hardly could be considered to represent a religious belief.

#### 6.4 Some further relevant developments in other legal instruments

The enactment of the Law of 2004 which banned students from wearing ‘conspicuous’ or ‘ostensible’ religious symbols in French public primary and secondary schools has negatively affected, in particular, Muslim girls from wearing the Islamic headscarf. The law has forced Muslim families to remove girls from the state educational system, infringing on the right of the child to freely manifest her religious belief<sup>174</sup> as entrenched in the Convention of the Rights of the Child (CRC).<sup>175</sup> The right of the child to education is also negatively implicated.<sup>176</sup> To this end the Committee on the Rights of the Child noted that the Act ‘may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education, and not achieve the expected results’.<sup>177</sup>



---

<sup>174</sup> Article 14 of the Convention on the Rights of the Child (CRC). This Convention was adopted for signature, ratification and accession by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990. (CRC) G.A. Res. 25, U.N. Doc. A/RES/44/25 (1989).

<sup>175</sup> Article 14 of the CRC provides that:

‘14 (1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.  
14 (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.’

<sup>176</sup> Article 28 of the CRC provides for the right to education of the child.

<sup>177</sup> CRC Committee, Concluding Observations: France, CRC/C/15/Add.240 (30 June 2004), paragraph. 25.

The Law of 2004 also impacts on the non-discrimination provisions. In this regard the Committee on the Elimination of Racial Discrimination (CERD Committee) <sup>178</sup> recommended that France:

[S]hould continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that everyone can always exercise that right.<sup>179</sup>

The Law of 2004 also impacts negatively on women in particular. To this end the objective of the Convention on the Elimination of Discrimination Against Women (CEDAW) <sup>180</sup> is described in General Recommendation 25 as aimed at eliminating *de facto* and *de jure* discrimination. This Recommendation grants *de facto* equality and substantive equality the same meaning in that both are strategies seeking to achieve ‘equality of results’.<sup>181</sup> In this regard, the CEDAW Committee received a complaint about a headscarf ban in the matter of *Rahime Kayhan v Turkey*.<sup>182</sup> The complaint concerned a Turkish teacher who was dismissed for wearing a headscarf. She argued that this was a violation of article 11 CEDAW, which guarantees the prohibition of gender-based discrimination in employment. The complaint was held inadmissible, as the complainant had not exhausted domestic remedies.

---

<sup>178</sup>United Nations Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by GA Res. 1904 ( XVIII) of 20 November 1963.

<sup>179</sup> CERD Committee, Concluding Observations: France, CERD/C/FRA/CO/16 (18 April 2005), paragraph. 18.

<sup>180</sup> The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly of the United Nations, resolution 341/80 of 18 December 1979 and entered into force on 3 September 1981.

<sup>181</sup> See RJ Cook and S Howard ‘Accommodating Women’s Differences under the Women’s Anti-Discrimination Convention’ (2007) 56 *Emory Law Journal* 1039, 1043 -48.

<sup>182</sup> CEDAW Committee, Communication *Kayhan v Turkey* (note 19 above).

In addition, religious freedom is also protected in terms of the express guarantee of minority rights under article 27.<sup>183</sup> The restriction may indeed also infringe on international standards protecting the rights of minorities. Persons belonging to religious minorities should be enabled to express their characteristics, which may include the right to use their traditional dress or attire.<sup>184</sup> It is well known that France is unreceptive to the concept of ‘group’ or ‘minority’ rights and has entered an expressed reservation to article 27 of the ICCPR.<sup>185</sup>

## 6.5 Conclusion

This chapter has analysed the approaches followed by the various international bodies when a limitation imposed on the right to manifest religion through the observation of religious rites as well as the cultivation religious appearances is scrutinised. From this analysis the following similarities were identified. Within the international context the UN framework, the European and American regional frameworks all require compliance with similar criteria when the justifiability of a limitation on the right to manifest religious belief is determined.

Firstly, when the need to protect public interests such as public health and public safety are relied upon, these bodies in most instances will rely on such public interests

---

<sup>183</sup> Article 27 of the ICCPR reads that: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.

<sup>184</sup> Article 4(2) of the Declaration on the Rights of Persons Belonging to National, Religious, and Linguistic Minorities.

<sup>185</sup> Accession of France to ICCPR 8 November 1980.



in an attempt to protect the health and the safety of a particular individual whose religious rights are being limited. This approach is criticised and it is suggested that these criteria of a public health or public safety interest should not be applied in this manner – particularly not when the religious adherent is exercising a cognisant, informed and uncoerced positive decision to manifest her religious belief, while being fully aware of the fact that this decision may impact on her individual health or safety. It is further suggested that the appropriate manner to balance the conflicting interest of religion, on the one hand, and the individuals' own safety or health, on the other hand, be left to the individual herself to determine.

Secondly, when applying the requirement that the limitation must serve a public interest such as public safety, order or the fundamental rights and freedoms of others, it is apparent that these bodies regularly interchange these public interests with each other. For example when scrutinising a limitation imposed on the right to wear the Islamic headscarf, international bodies interchangeably refer to the need to protect public safety, public order as well as the rights of others. As a result these public interests are treated with a measure of a relativity measure in achieving the desired public interest.

International bodies have been eager to interpret the provision of public order in a more general sense and not restricted to the prevention as such of public disorder. As a result of these interpretations, international bodies are more inclined to find that a limitation is justified in a secular state. The limitation is considered to ensure harmonious coexistence between adherents of various faiths and is thus seen as protecting the public order and the beliefs of others. This narrow interpretation of public order is not justified and it is strongly suggested that this approach poses an unwarranted infringement on the right to freely manifest religious belief. A more tailored approach to balance the need to protect the public against disorder on the one

hand, and the right to freely manifest religious belief, on the other hand should be found.

A possible approach would be to harmonise the principles of liberty and equality through assessing the following questions: namely, does the display of, for example, the Islamic headscarf cast any doubt on the principle of secularism, and does the adherent contravene the principle of secularism through her display of the Islamic headscarf?

Thirdly, it is contended that secularism *per se* cannot establish sufficient ground for the justification of an infringement on the right to manifest religious belief of those outside of the public sector on the ground of public order. This contention is also advanced when the limitation imposed is on those in the public sector. Neutrality cannot be attained through the removal of visible appearance of orientation. For example, gender and race orientation are not able to be eradicated and would remain as indicators of any predisposition. Therefore, it is suggested that just as neutrality in instances of race and gender orientation is achieved through the imposition of effective workplace regulations and codes of conduct that are aimed at ensuring professional, independent, impartial conduct in the public sector, the same is possible for religious orientation.

In particular, the very notion of the existence of neutrality is questioned. Almost all the cases discussed illustrate that the notions of state neutrality and uniformity are often indicative of a predisposition towards traditional religions. The effect of this predisposition is that the rights of adherents of non-traditional religions are often limited and these adherents are discriminated against.

In this regard emphasis is placed upon the inference by the ECtHR that the pursuit of neutrality appears to have imposed a secular point of view. This has resulted in the

devaluation of religious convictions and manifestations in the public domain. As a result, support for religious pluralism has been abandoned in favour of the notion of secularism or non-religion. States must be reminded of their obligation to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs.<sup>186</sup> The appeal of the Special Rapporteur on Freedom of Religion or Belief is relevant in this regard:

[D]ress should not be the subject of political regulation [and] flexible and tolerant attitudes [are needed] so as to allow the variety and richness of ... garments to manifest themselves without constraints.<sup>187</sup>

Fourthly, it is imperative that the necessity to protect the identified public interest is proportionate to the infringement on the adherents' ability to manifest her religious belief. In this regard, the importance and the nature of the non-derogable right of freedom of religion must be adequately considered. Each case must be evaluated on its own merits in terms of which the right to manifest religious belief is balanced against the need to protect public safety, order, health, morality or the fundamental freedoms of others. The tendency of the international bodies to find a limitation justifiable without progressing to the necessity analysis and without therefore balancing these rights is criticised.

A further approach in evaluating the necessity of a limitation is to evaluate the proportionality of the limitation in relation to the state interest served. In this evaluation, the proportionality test requires that the least restrictive infringement on the right must be made in order to serve the state interest. This evaluation can only be made if the public interest at which the limitation is aimed has been identified.

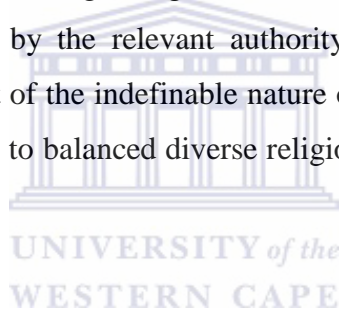
---

<sup>186</sup> See article 4 (2) of the 1981 Declaration.

<sup>187</sup> Special Rapporteur Amor *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* UN Doc E/CN.4/1996/95/ Add 2 paragraph 97 (1996).

Fifthly, in determining the proportionality of the infringement in relation to the public interest served, it is once again apparent that the standard of neutrality is indefinable. International bodies and states are influenced by values. These values are usually the values of the dominant or majority religion or tradition. These bodies may attempt to perpetuate these values and privileges even in times of increasing religious diversity and multiculturalism.

In summary, when scrutinising a limitation for justifiability international bodies should identify the public interest that the limitation is aimed at protecting. Thereafter this interest must be weighed against the infringement to ensure a narrowly tailored limitation. Claims by the relevant authority of neutrality and uniformity should be considered in light of the indefinable nature of these concepts. The judicial body should actively attempt to balanced diverse religious values with other values.<sup>188</sup>



---

<sup>188</sup> It has been suggested that criteria to give guidance on how best to balance these competing claims is advisable. In this regard, the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE has developed *Guidelines for Review of Legislation Pertaining to Religion or Belief* prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the Council of Europe's Commission for Democracy Through Law (Venice Commission), 2004. Available at <[http://www.osce.org/odihr/item\\_11\\_13600.html](http://www.osce.org/odihr/item_11_13600.html)> last accessed on 10 May 2010.

## Chapter 7

### Application of the right to manifest religious belief in selected national legal contexts

#### 7.1 Introduction

In the previous chapter the application of the right to manifest religious belief in the international legal context was analysed. From this analysis it is evident that limitations imposed on the right to manifest religious belief has frequently required judicial review. In particular the display of the Islamic headscarf-*hijab* has repeatedly been the ground for approaching the international enforcement bodies. The rights of students at universities to wear the Islamic headscarf-*hijab* was raised in accordance with the provisions of the European Convention on Human Rights (ECHR) in the matters of *Karaduman v Turkey*;<sup>1</sup> *Bulut v Turkey Kurtulmus*<sup>2</sup> and *Turkey and Leyla Sahin v Turkey*.<sup>3</sup> In the matter of *Hudoyberganova v Uzbekistan*<sup>4</sup> a student at a University in Uzbekistan was successful in relying on the protection afforded in terms of article 18 of the International Convention on Civil and Political Rights (ICCPR). The right of teachers to wear the Islamic headscarf-*hijab* was also the point of concern in the matters of *Dahlab v Switzerland*<sup>5</sup> and *Kayhan v Turkey*.<sup>6</sup> The right of pupils to

---

<sup>1</sup> *Karaduman v Turkey*, App. No. 16278/90 (EComHR, 74, DR 93, 3 May 1993) inadmissibility decision.

<sup>2</sup> *Bulut v Turkey Kurtulmus* Application no. 18783/91.

<sup>3</sup> Application No 44774/98, *Leyla Sahin v Turkey*, Grand Chambers, Judgment of 10 November 2005, 19 BHCR 590, [2006] ELR 73. (*Sahin v Turkey*).

<sup>4</sup> Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004).

<sup>5</sup> *Dahlab v Switzerland*, application No. 42393/98, ECtHR decision of 15 February 2001 (cf. ECHR 2001-V).

<sup>6</sup> *Rahime Kayhan v Turkey*, Communication No -8/2005, CEDAW/C/34/D/8/2005 (2006).

wear the headscarf-*hijab* has been at issue in the matters of *Dogru v France*,<sup>7</sup> *Kervanci v France*<sup>8</sup> as well as *Atkas v France*.<sup>9</sup>

The rights of other religious minorities to display religious dress, *in casu* the Sikh turban, was advanced through relying upon article 18 of the ICCPR in the matter of *Singh Binder v Canada*,<sup>10</sup> and denied in the matter of *Mann Singh v France*<sup>11</sup> by the European Court of Human Rights (ECtHR). The right of a Muslim prisoner to wear a beard was successfully protected in the matter of *Clement Boodoo v Trinidad and Tobago*<sup>12</sup> in terms of article 18 of the ICCPR.

The claim of a Buddhist prisoner to wear a beard was, however, found inadmissible in *X v Austria*.<sup>13</sup> So too was the claim by a Sikh prisoner to wear special clothing in *X v United Kingdom*.<sup>14</sup> Likewise the right of a Muslim school teacher to take an extended lunch on Fridays enabling him to attend mosque, was found inadmissible in both *Ahmad v United Kingdom*<sup>15</sup> and *X v United Kingdom*.<sup>16</sup>

UNIVERSITY of the  
WESTERN CAPE

---

<sup>7</sup> *Dogru v France* (No 27058/05) (Eur. Ct. H.R. 2008).

Available at <<http://www.bailii.org/eu/cases/ECHR/2008/1579.html>> last accessed on 10 May 2010

<sup>8</sup> *Kervanci v France* (No 31645/04). (Eur. Ct. H.R. 2008) (no English translation available, according to the European Court of Human Rights website).

<sup>9</sup> *Atkas v France* (No. 43563/08).

<sup>10</sup> *Singh Binder v Canada*, *Comm* No 208/ 1986 (UN Human Rights Committee, 9 November 1989) U N Doc A/45/40 (Vol II) Annex IX, SE (1990).

<sup>11</sup> *Mann Singh v France* (No 24479/07).

<sup>12</sup> *Clement Boodoo v Trinidad and Tobago* *Comm* No 721/1996 (UN Human Rights Committee, 2 April 2002).

<sup>13</sup> *X v Austria* App No 1753 /63 (EComHR, 15 February 1965) inadmissibility decision, Yb 8, 174.

<sup>14</sup> *X v United Kingdom* App No 8231/78(EComHR, 28 Decisions and Reports 5, 28, 6 March 1982) inadmissibility decision.

<sup>15</sup> *Ahmad v United Kingdom* App No 8160/78, 4 EComHR 126 (1981).

<sup>16</sup> *X v United Kingdom*, App. No. 8160/78 (1981) 22 DR 27.

From the above cases it is apparent that the display of religious symbols in the public sphere has brought about much debate, and at the forefront of this debate is the Islamic headscarf.

### 7.1.1 Religious diversity

Despite measures put in place in some countries to curb immigration,<sup>17</sup> it is foreseen that the debate regarding the protection of religious diversity will intensify due to the impact of globalisation and the effect of increased migration that has altered the composition of traditionally homogenous nations. It is estimated that the population of France is about 95 million of which five million are Muslim.<sup>18</sup> In Germany, Turks make up one of the largest immigrant group<sup>19</sup> of which ninety five percent are Muslim. Indeed integration of Muslim communities into the local culture has been problematic at times.

Together with the increase in population diversity, perceptions of the wearing of the Islamic headscarf are varied as well.<sup>20</sup> Positive perceptions of the headscarf accept the

---

<sup>17</sup> See generally J Doomernik & J Michael *Modes of Migration Regulation and Control in Europe* (2008).

<sup>18</sup> Exact numbers of Muslims in France are not possible to calculate since the country does not officially track religion and ethnicity, though it is estimated at five to ten percent. CIA World Factbook (2005). Available at <<http://www.cia.gov/cia/publications/factbook/geos/fr.html>> last accessed on 10 October 2010. The United Nations Committee on the Elimination of Racial Discrimination considers that this inadequate statistical coverage impacts negatively on France's efforts to combat racial discrimination. See 'Concluding Observations of the CERD', UC Doc CERD/C/FRA/CO/16 (18 April 2005).

<sup>19</sup> Information available at <<http://www.tatsachen-ueber-deutschland.de>> last accessed 09 August 2010.

<sup>20</sup> T Choudhury 'Perceptions of discrimination and Islamophobia - Voices from members of Muslim communities in the European Union EUMC 2006' (2006) *European Monitoring Centre on Racism and Xenophobia* 8.

headscarf as a symbol of identity or a religious symbol that allows women to participate as emancipated and dignified members in a secular society.<sup>21</sup> Negative perceptions may view the headscarf as a political symbol or an obligation that subjugates women.<sup>22</sup>

In response to these concerns some states have undertaken measures to ban the wearing of religious symbols. Conspicuous religious symbols have been banned in state primary and secondary schools in France<sup>23</sup> and are prohibited in universities in Turkey.<sup>24</sup> On the other hand, headscarves can be worn in most circumstances in the Netherlands.<sup>25</sup>

---

Available at <[http://www.fra.europa.eu/fraWebsite/attachments/Perceptions\\_EN.pdf](http://www.fra.europa.eu/fraWebsite/attachments/Perceptions_EN.pdf)> last accessed on 09 August 2010.

<sup>21</sup> For an overview of the diverse meanings attached to the wear of the Islamic headscarf see AK Wing & MN Smith 'Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban' (2006) 39 *University of California Davis Law Review* 743.

<sup>22</sup> See discussion of bias in section 6.3.4.6.

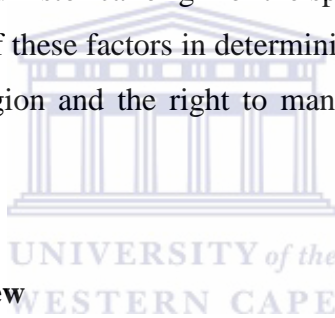
<sup>23</sup> The French Law of 2004. Discussed in more detail in section 7.2.2.

<sup>24</sup> See discussion of *Sahin v Turkey* (note 3 above) in section 6.2.3.1.

<sup>25</sup> For a discussion on the headscarf in parts of Europe see generally E Brems 'Diversity in the Classroom: The Headscarf Controversy in European Schools' (2006) *Peace and Change* 117. Brems notes that in the Netherlands both scholars and teachers are permitted to wear the veil and the issue is not treated as a matter of religious freedom but as a matter of equal treatment or non-discrimination. The Equal Treatment Commission has examined complaints of teachers. The Commission claimed that the mere fact that a teacher wears an Islamic headscarf does not preclude a neutral disposition. The existence of such an attitude can only be made after a discussion with the relevant teacher. In Belgium scholars may be restricted from wearing the Islamic headscarf as the right to wear the headscarf is left to the discretion of the schools, both public and Catholic schools. The Belgium government has also created a commission to examine the issue of the Islamic headscarf and secularism. The Commission presented three different alternatives, ranging from a general prohibition to the freedom to manifest one's religious belief. Brems *ibid* 123.



The accommodation of religious symbols is however dependent on a variety of factors, including generally the following: firstly, the legal arrangement between the state and religion; secondly, the constitutional provisions in terms of which the right to freedom of religion in general and in particular the right to manifest religious belief is protected. Thirdly, the manner in which a limitation of the right to manifest religious belief in the public sphere will be justified in terms of the application of, for example, a constitutional proportionality review test. This review requires that the right be balanced against the possible public interest threat. However, the manner in which this balancing act is interpreted will differ from state to state. This difference in approach is generally based on the political and legal doctrine of a state and is often influenced by the cultural and historical origin of the specific state. What follows next is an investigative analysis of these factors in determining the scope and application of the right to freedom of religion and the right to manifest religious belief in certain countries.



### **7.1.2 Investigative overview**

The aim of this chapter is to investigate the foundations of the right to freedom of religion in the following five countries; France, the United Kingdom (England), Germany, the United States of America (USA) and Canada. The legal application of the right to freedom of religion is analysed in these countries with regards to a selection of cases<sup>26</sup> to appreciate the validity and effectiveness of the South African national legal norms and practices and to gather suggestions about how best to interpret these norms in the event of future challenges. However, any investigative evaluation of other countries' systems must always be carried out subject to the *proviso* that all countries face unique challenges. The investigative component of this

---

<sup>26</sup> The selection in general focused on cases in which the right to manifest religious belief through the display of religious dress or the practice of religious rites and rituals, was in question.

thesis therefore aims to determine to what extent the solutions found in other countries could be suitable and viable in the South African context. The abovementioned countries were selected for the reasons discussed briefly next.

### **7.1.2.1 Respect for the protection of fundamental rights**

The right to freedom of religion is provided for in international,<sup>27</sup> regional<sup>28</sup> and national instruments.<sup>29</sup> The countries selected all are signatories to the United Nations (UN) instruments as well as specific regional instruments. In addition the right to freedom of religion is also protected in constitutional or other legislative texts. For this reason it is argued that France, the United Kingdom (England), Germany, the USA and Canada all share a commitment to religious liberty. However, all these countries are confronted with the challenges of religious diversity that will be elaborated on in more detail in each country specific section, and which in turn raises the question of how to protect the religious rights of all.

### **7.1.2.2 Historical culture**

The term historical culture is used to indicate the archaic disposition of religion and the relationship between religion and the specific state. In this regard it is claimed that France, the United Kingdom (England) and Germany are all countries with an existing dominant and majority religious culture, predominantly either Roman Catholic or Protestant. As a result of globalisation and immigration these countries are

---

<sup>27</sup> See section 4.2, 4.3 and 4.4.

<sup>28</sup> See section 4.8.1, 4.9 and 4.10.

<sup>29</sup> See section 7.1.

increasingly confronted with the needs of minority or immigrant faiths.<sup>30</sup> The existence of a minority presence may necessitate that the minority culture exerts its identity against the majority culture.<sup>31</sup> For example, Martin claims that Catholic practice has been higher in Protestant countries where Catholics are in a minority than where they are in a majority and dominant.<sup>32</sup>

On the other hand, it is claimed that both the USA and Canada are both countries settled by people of mostly European decent and are predominantly English speaking. It is reasoned that in this regard they share some resemblance with South Africa with regards to the migration of European settlers after 1652 and subsequent periods of colonisation.<sup>33</sup>

### 7.1.2.3 Separation between the state and religion

As indicated previously<sup>34</sup> the relationship between the state and religion has a significant influence on the protection of the right to manifest religious belief. France, on the one hand is the most extreme example of a system of separation of state and religion. All of the countries that form part of this investigative analysis represent a different arrangement between the state and religion. France is a proclaimed '*laic*' state and the principle of *laïcité* indicates that the state is seen as politically

---

<sup>30</sup> United Nations Department of Economic and Social Affairs 'International Migration 2006'. Available at < [http://www.un.org/esa/population/publications/2006Migration\\_Chart/](http://www.un.org/esa/population/publications/2006Migration_Chart/) >last accessed on 10 May 2009.

<sup>31</sup> See generally M Clarke 'The concept of Sub-Culture' (1974) *The British Journal of Sociology* 428.

<sup>32</sup> D Martin *On Secularization Towards a Revised General Theory* (2005) 92.

<sup>33</sup> See generally AJ Christopher 'Official land disposal policies and European settlement in southern Africa 1860–1960' (1983) 9 (4) *Journal of Historical Geography* 369. The impact of colonisation on the historical culture of South Africa is discussed in more detail in section 8.2.

<sup>34</sup> See section 7.2.3.

independent of any religious influence.<sup>35</sup> In England there is no separation between the state and religion and the Anglican Church is the established Church in England.<sup>36</sup> However, the notion of an established church does not give any preferential status to any religion and ‘all are entitled to equal respect’.<sup>37</sup> In contrast to the United Kingdom there is no state church in Germany and religion and the state are separated according to the principle of the neutrality of the state in the German Constitution.<sup>38</sup> In the USA the relationship between the state and religion is determined in terms of the First Amendment that regulates the ‘establishment of religion’,<sup>39</sup> an ambiguous phrase which has been interpreted in different manners.<sup>40</sup> These include preventing government from interfering with religion; alternatively preventing government from offering preferential treatment to certain religions; and lastly preventing government from prescribing religion.<sup>41</sup>

Unlike the USA, France and Germany where the relationship between the state and religion is prescribed in the constitutional text, the Canadian Charter of Rights and Freedoms (Canadian Charter) contains no explicit limit on government support for

---

<sup>35</sup> L Barnett ‘Freedom of Religion and Religious Symbols in the Public Sphere’ (2008) *Law and Government Division* 1, 17.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Suleiman v Juffali* 1 FLE 479, 490 (2002).

<sup>38</sup> See generally K Ladeur ‘The Myth of The Neutral State and The Individualisation of Religion: The Relationship between State and Religion in The Face of Fundamentalism’ (2009) *Cardozo Law Review* 2445.

<sup>39</sup> See generally Chemerinsky, ‘Why Church and State Should Be Separate’ (2008), 49 *William & Mary Bill of Rights Journal* 2193.

<sup>40</sup> See generally DP Apanovitch ‘Religion and Rehabilitation: The Requisition of God By The State’ (1998) 47 *Duke Law Journal* 785.

<sup>41</sup> *Ibid.*

religion. Stephenson goes so far as to argue that: [N]othing in the Charter nor Canadian jurisprudence prohibits the advancement of religion per se by the state'.<sup>42</sup>

Judges have however often held that state endorsement of one religion is an infringement on the right to freedom of religion and have argued that state sponsorship of one tradition discriminates against others.<sup>43</sup>

Of particular interest is the inclusion of section 27 in the Canadian Charter from which it is apparent that the Canadian Charter was specifically designed to accommodate ethnic, linguistic and cultural diversity.<sup>44</sup> Section 28 guarantees the rights in the Charter equally to men and women. The interpretation of these Canadian Charter provisions has contributed to Canada's international reputation for egalitarianism.<sup>45</sup>

#### **7.1.2.4 Legal systems regulating fundamental rights**

The legal system affording protection to the right to freedom of religion and the limitation thereof can be structured in different manners. One approach could be in terms of a constitutional provisions or another could be regulation in terms of the common law or specific legislation. The USA, Germany and Canada, all have written constitutions entrenching the right to freedom of religion. The United Kingdom does not have a constitution and the protection of fundamental rights is primarily through anti-discrimination laws. More recently the enactment of the Human Rights Act of

---

<sup>42</sup> CA Stephenson 'Religious Exercises and Instruction in Ontario Public Schools' (1991) 49 *University of Toronto Faculty Law Review* 82, 95.

<sup>43</sup> See generally SI Smithey 'Religious Freedom and Equality Concerns under the Canadian Charter of Rights and Freedoms' (2001) 34 (1) *Canadian Journal of Political Science* 85.

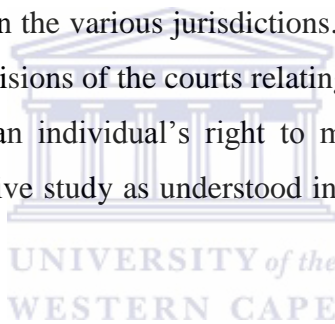
<sup>44</sup> For this reason South Africa has relied heavily on the Canadian Charter's features in drafting its Constitution as to benefit by the combination of guarantees of rights and the provision of a general limitation clause.

<sup>45</sup> See generally Smithey (note 43 above).

1998 has provided mechanisms in terms of which English Law has to respect the rights contained in the European Convention of Human Rights (ECHR).

### **7.1.3 Extent of the investigative analysis**

The current research takes the form of a literature review of the constitutional arrangement between the state and religion, as well as current law in relation to the protection afforded to the right to manifest a religious belief. The manner in which these systems ultimately impact on the enjoyment of the right to freedom of religion is best illustrated through a discussion of the application of general limitation on the right to freedom of religion in the various jurisdictions. For this reason the discussion will concentrate on some decisions of the courts relating to laws of general application that impose limitations on an individual's right to manifest religious belief. This evaluation is not a comparative study as understood in its strict sense as explained in section 1.7.



### **7.1.4 Limitation**

The selection of countries that are included in this chapter does not include African states other than South Africa, for reasons explained in section 1.7. Similarly the inclusion of India was also discounted on specific grounds as clarified in section 1.7.

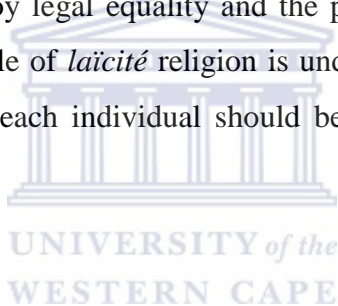
Furthermore, the emphasis in this chapter is primarily on an analysis of the decisions of the court as explained in section 7.1.3. In the selection of these decisions in the various jurisdictions, emphasis was placed on national cases that in general relied on international law, alternatively, in which the dispute progressed to an international forum. The analysis of the jurisprudence of France was however compromised as

most of the decisions are not available in English; therefore to a large extent reliance was placed on secondary sources in this aspect of the investigation.

## 7.2 France

### 7.2.1 Relationship between the state and religion

France is a proclaimed 'laic' state. The principle of *laïcité*<sup>46</sup> has a central place in French national identity and indicates the concept in terms of which the state is seen as politically independent of any religious influence.<sup>47</sup> Public services are secularised, religious denominations enjoy legal equality and the principle of non-discrimination applies.<sup>48</sup> Under the principle of *laïcité* religion is understood as an essential private matter in relation to which each individual should be able to exercise autonomous



---

<sup>46</sup> Rémond indicates that the French word *laïcité* has no equivalent in other language and the meaning thereof is exclusively French. See R René *Religion and Society in Modern Europe* Translated (1999) 11. Keane notes that the untranslatable nature of the French expression of *laïcité* is indicative of the fact that no other European society requires a word that underlines the absence of religion from the public sphere with such authority. For example in Arabic and Farsi there is no word to describe secular, secularity or secularism, as the division between the worldly and the spiritual is unthinkable. See J Keane 'Secularism?' in D Marquand & RL Nettle (ed) *Political Quarterly Religion and Democracy* (2000) 15. The English term laicism is used to translate the French term *laïcité* as proposed by J Baubérot 'The Place of Religion in Public Life: The Lay Approach' in T Lindholm, WC Durham, BG Tahzib-Lie (eds.) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 441.

<sup>47</sup> See generally J Gunn 'Under God but not the Scarf. The Founding Myths of Religious Freedom in the United States and Laicite in France' (2004) 7 *Journal of Church and State* 8.

<sup>48</sup> See generally J Baubérot 'Secularism and French Religious Liberty: A Sociological and Historical View' (2003) *Brigham Young University Law Review* 241.

choice.<sup>49</sup> However, limitations imposed on the freedom of religion can be justified with reference to the need to protect the public order of the secular state.<sup>50</sup>

*Laïcité* stipulates that the religion should be excluded from the ‘public space’, including civil affairs, and public education.<sup>51</sup> For example, the public school is considered to be the forum for building an integrated cohesive nation, producing ‘French citizens and not the citizens of multicultural ethnic policy’.<sup>52</sup> *Laïcité* can therefore be defined as separation between the state and religion in which the state is fundamentally separated from religion through the form of an anti-religion.<sup>53</sup> This interpretation of separation has however been defined as a form of anti-religion to deal with the excesses of religion.<sup>54</sup>

Despite this point of view the general position in France in general is that *laïcité* does not deny the existence of religion, as the constitution provides for religious freedom and secularism is seen as the means to sustain individual freedom of religion.<sup>55</sup> The aim of the provision of *laïcité* is to allow the existence of diverse religions and accordingly the state cannot be associated with only one religion.<sup>56</sup>

---

<sup>49</sup> *Ibid.*

<sup>50</sup> See generally J Freedman ‘Secularism as a Barrier to Integration? The French Dilemma’ (2004) 42 (3) *International Migration* 5.

<sup>51</sup> See generally Baubérot (note 48 above).

<sup>52</sup> AE Galeotti ‘Citizenship and Equality: The Place for Toleration’ (1993) 21 (4) *Political Theory* 585, 592.

<sup>53</sup> Gunn (note 47 above) 8-9.

<sup>54</sup> S Poulter ‘Muslim Headscarves in School: Contrasting Legal Approaches in England and France’ (1997) 17 *Oxford Journal of Legal Studies* 50.

<sup>55</sup> Article I of the Constitution of 1958

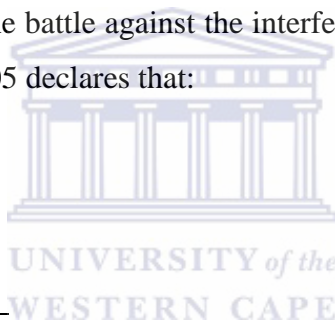
<sup>56</sup> See generally Baubérot (note 48 above).



From the above it is clear that *laïcité* is a multifaceted concept and there has been debate as to its meaning and application in a modern context, and specifically in so far as the integration of Muslim population is concerned.<sup>57</sup> In understanding the multifaceted nature of the concept a brief overview of the historical development of the principle of *laïcité* is helpful.

### 7.2.1.1 Historical development of the principle of *laïcité*<sup>58</sup>

In France *laïcité* was entrenched through a series of legislative measures ensuring equality and freedom for all. In 1905 a specific law on the relation between state and church was passed, ending the battle against the interference of the Catholic Church.<sup>59</sup> Article 1 of the statute of 1905 declares that:



---

<sup>57</sup> Freedman (note 50 above) 27.

<sup>58</sup> For a historical overview of the acceptance of the principle of *laïcité* in France see generally C Dominique ‘Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004’ (2004) 54 *The American Journal of Comparative Law* 337.

<sup>59</sup> Galton describes that the relationship between church and state in France was reached after centuries of embittered and often violent conflict, such as the Religious Wars from 1562 – 1598. Indeed one of the objectives of the French Revolution (1789 – 1795) was to diminish the power of the Catholic Church. The Constitution of 1795 proclaimed that state authority was derived from the people and introduced a separation of church and state in the fields of marriage, health and education. The 1905 Law of Separation concerning the relationship between state and church is considered to be the starting point for the principle of *laïcité*. For a comprehensive overview of the history of the relationship between the State and Church in France see AH Galton *Church and State in France 1300 – 1870* (1907).

For a further discussion see <[www.legifrance.gouv.fr/texteconsolide/MCEBW.htm](http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm)> last accessed on 10 May 2010.

The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under the sole restrictions prescribed by the interest in public order, as prescribed below.<sup>60</sup>

It is suggested that the 1905 law established the separation of religion and state and that the law was the foundation of the principle of *laïcité*. However, the first reference to *laïcité* is made in the constitutional texts of 1946 and 1958. Article 1 of the 1958 Constitution ensures the equality of all citizens before the law, without distinction of origin, race or religion. It ensures respect of all beliefs, and declares that:

France is an indivisible, secular, democratic, and social Republic. She ensures equality before the law to all citizens without distinction based on origin, race or religion. She respects all beliefs.<sup>61</sup>

Article 2 of the 1958 Constitution states the motto of the Republic as ‘Liberty, Equality and Fraternity’. Equality is an integral component of the French constitutional framework and the concept of citizenship is based upon the Republican values of individualism and equality. This philosophy sees all citizens as equal and consequently the law does not recognise any differences between citizens. Therefore the law does not recognise minority rights, minority groups or ethnic citizens.<sup>62</sup>

---

<sup>60</sup> Article 1 Law on separation of church and state

Available at

[www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX\\_SIMPLE\\_AV90&nod=1LX9051211P1](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX_SIMPLE_AV90&nod=1LX9051211P1)

last accessed on 10 May 2010.

<sup>61</sup> Article I of the Constitution of 1958 ‘*La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances.*

<sup>62</sup> France has taken the view that it has no minorities, stating in its third periodic report under the ICCPR: ‘Since the basic principles of public law prohibit distinction between citizens on grounds of origin, race or religion, France is a country in which there are no minorities’. See in this regard the third periodic report on France under the ICCPR (15 May 1997) UN Doc CCPR/C/76/Add 7, paragraph 394. This point of view is further affirmed in that France has entered into a reservation regarding the application of Article 27 of the ICCPR in France. Article 27 provides that: ‘In those States in which

Notwithstanding this policy of integration, it is widely accepted that the integration of Muslims, in particular, has been poorly treated and the multifaceted nature of *laïcité* has brought debate as to its meaning and application in a modern context.<sup>63</sup> This debate is evident in the passing of the French Law of 2004<sup>64</sup> as discussed below.

### 7.2.2 The French Law of 2004

---

ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy the own culture, to profess or practice their own religion, or to use their own language'. France's particular approach to minority rights is also evidenced in its refusal to become party to the Council of Europe's Framework Convention on National Minorities (1994) – See UN Doc CCPR/ C/79/Add 80 para 24, as well as the European Charter on Regional and Minority Languages (1992) and Convention 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal People in Independent Countries (1989). The ICCPR Committee however does not agree with the French reasoning and has taken the view that 'The existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by the state party but requires to be established by objective criteria'. In this regard see General Comment 23, on the Rights of Minorities' UN Doc CCPR/C/21/ Rev 1/Add5 (8 April 1994). In addition in response to the statement that there are no minorities the ICCPR Human Rights Committee responded as follows in the concluding observations to the third report: 'The ICCPR Human Rights Committee is, however, unable to agree that France is a country in which there are no ethnic, religious or linguistic minorities'. For a discussion of the French approach see generally D McGoldrick *Human Rights and Religion-The Islamic Headscarf Debate in Europe* (2006) 43. The French approach is in strong contrast with the approach followed in the USA, Canada and South Africa, where the community is perceived as multicultural and in which the group and culture is placed before individualism.

<sup>63</sup> See Freedman (note 50 above) 5; P Weil 'Lifting the veil' (2004) 22 (3) *French Politics, Culture and Society* 142, 143.

<sup>64</sup> The law on the application of the principle of secularity in public schools was adopted on 15 March 2004 and published on 17 March 2004 (Law of March 15, 2004 no. 2004-228)38. (*Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*).

Regardless of the above guarantee to the right to freedom of religion as well and right to manifest religious belief, President Jacques Chirac in December 2003 proposed a prohibition on the wearing of the Islamic headscarf-*hijab* in schools.<sup>65</sup> Chirac's speech followed the publication of the *Stasi Report*,<sup>66</sup> a wide-ranging document describing the difficulties of accommodating different races, cultures and religions while maintaining the principle of secularism. The above report resulted in the French Law of 2004. Article 1 of the Law of 2004 provides that:

In state primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The school rules shall state that a dialogue shall precede the institution of disciplinary proceedings with the pupil.<sup>67</sup>

Consequently the law prohibits the wearing of conspicuous (*ostensiblement*) religious affiliated symbols, clothing, and garb in public schools. These symbols include the Islamic headscarf, Jewish skullcap, Sikh turban, and large Christian crosses.<sup>68</sup> This

---

<sup>65</sup> Assemblée Nationale, Mission d'information 1275, 4 December 2003 (the Debré report)

Available at <<http://www.assemblee-nationale.fr/debrereport>> last accessed on 5 January 2010.

<sup>66</sup> Report of the Commission de Reflexion *sur l'application du principe de la laïcité dans la République* (hereinafter referred to as the *Stasi Report*).

<sup>67</sup> 'Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève' Law on secularity in public schools 2004-228 of March.

<sup>68</sup> In March 2004, the Ministry of Education published regulations in a *Circulaire* to assist schools in determining 'discreet religious symbols' the display which of was permitted. See *Circulaire* of 18 May 2004, published in the *Journal Officiel* of 22 May 2005, 9033. The *Circulaire* referred to 'signs and attire, which when displayed, led to the immediate recognition of a religious affiliation'. The *Circulaire* explicitly refers to Muslim headscarves and Jewish skullcaps and large Christian crosses. The Sikh turban, is not mentioned in the *Circulaire*, however expulsion of boys wearing the turban was upheld by the French court. See 'Sikh Schoolboys Lose French Case'. 19 April 2005 Available at <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4461905.stm>> last accessed on 09 August 2010. For a historical overview of the 2004 law see generally J Taieb 'Freedom of religion: from France to the United States, a national conflict of law' (2004) 4 (3) *Global Jurist Advances* 1. See also D Custos

ban was based on article 2 of the French Constitution and the intent by the law is to create neutrality and religious tolerance in public schools; however, it may have had the opposite effect.<sup>69</sup> It is argued that through banning these symbols of various religions, the right to manifest one's religious belief has been severely limited. Furthermore it is reasoned that the law in effect creates conditions in which minority groups are required to surrender their distinctive characteristics, religious belief and religious tenets for the sake of assimilating into the French culture.

In addition, the Law of 2004 has had a negative impact on the rights of learners to adhere to their religious belief. On 20 January 2005, 48 students were expelled. Most of those barred from attending classes were Muslim girls who refused to take off their headscarves while three Sikh boys were also ordered out of the classroom for wearing turbans.<sup>70</sup> On 14 December 2007, a French court upheld the ban on the turbans law in

---

'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004' (2006) 54 *American Journal of Comparative Law* 337.

<sup>69</sup> The Muslim population has suffered direct and indirect discrimination in education, the work place and housing. See 'The Situation of Muslims in France' in *Monitoring the EU Accession Process: Minority Protection* (New York, The Open Society Institute, 2002) Part 3. Available at <[www.eumap.org/reports/2002/eu/international/sections/france/2002\\_m\\_france.pdf](http://www.eumap.org/reports/2002/eu/international/sections/france/2002_m_france.pdf)> last accessed on 10 May 2010. This cycle of discrimination triggered the rioting of youths of mainly Arab and African origin in October/November 2005. In November 2005, President Chirac declared a state of emergency. Décret no 2005-1387 du 8 novembre 2005 relatif à l' application de la loi no 55 – 385 du 3 avril 1955, 9 November 2005 *Journal officiel de la république française*, Texte 6 sur 98.

Available at

<[http://medias.lemonde.fr/mmpub/edt/doc/20051109/708103\\_joe\\_20051109\\_0261\\_0006.pdf](http://medias.lemonde.fr/mmpub/edt/doc/20051109/708103_joe_20051109_0261_0006.pdf)>

last accessed on 5 July 2010.

<sup>70</sup> 'Beyond the Body of Belief'.

Available at <<http://www.becketfund.org/index.php/article/364.html>> last accessed on 23/10/10. See also Submission of The Becket Fund for Religious Liberty 8 February 2008 to the United Nations Human Rights Council in relation to the Universal Periodic Review France. Available at

public schools by expelling Bikramjit Singh, Jasvir Singh, and Ranjit Singh from the Louise-Michel High School of Bobigny. The judge ruled that the under-turbans that they wore were not discreet, and the court concluded that in the interest of secularism in public schools, the ban should be kept in place.<sup>71</sup>

More recently the impact of the prohibition of the Islamic headscarf has intensified and the prohibition will in all possibility be extended to banning face covering Islamic veils (*niqab*) in the public domain.<sup>72</sup> The current French president, Nicolas Sarkozy has defended the ban on women wearing the full face veil and the Minister of Interior, Michèle Alliot-Marie considers the *niqab* to have no place in a secular society committed to women's rights.<sup>73</sup> In this regard he stated that France is:

[A]n old country anchored in a certain idea of how to live together. A full veil which completely hides the face is an attack on those values, which for us are so fundamental. Citizenship has to be lived with an uncovered face. There can therefore be absolutely no solution other than a ban in all public places.<sup>74</sup>

This comment illustrates the following two fundamental underpinnings of the prohibitions of conspicuous religious symbols in the public sphere. First, that it

---

<[http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/FR/BFRL\\_FRA\\_UPR\\_S2\\_2008\\_BecketFundforReligiousLiberty\\_uprsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/FR/BFRL_FRA_UPR_S2_2008_BecketFundforReligiousLiberty_uprsubmission.pdf)> last accessed on 10 May 2010.

<sup>71</sup> ECtHR judgment *Jasvir Singh*. Available at

<[www.unitedsikhs.org/.../Translation\\_ECtHRJudgment\\_Jasvir\\_Singh\\_16\\_July\\_2009.doc](http://www.unitedsikhs.org/.../Translation_ECtHRJudgment_Jasvir_Singh_16_July_2009.doc)>

last accessed on 22 October 2010.

<sup>72</sup> L Davies 'Nicolas Sarkozy's cabinet approves bill to ban full Islamic veil' guardian.co.uk, Tuesday 13 July 2010.

Available at <<http://www.guardian.co.uk/world/2010/jul/13/french-ban-face-veils/print>> last accessed on 10 September 2010. This ban has already been approved by the lower house of parliament and will now move to the upper house of parliament.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

attacks fundamental values such as equality, and second, the manner in which citizenship has to be lived – with an uncovered face. These two underpinnings are explored in more detail below.

### **7.2.2.1 The Islamic headscarf and gender inequality**

The comment of the French Minister of Interior, Alliot-Marie, shows that the prohibition of the Islamic headscarf is premised on a unitary assumption that the headscarf is a symbol of gender inequality. This assumption does not acknowledge that the headscarf is also a symbol of female Muslim identity that has multiple religious and cultural dimensions.<sup>75</sup> The Islamic headscarf derives its religious significance in the Islamic tradition from the Koran<sup>76</sup> and validity and the extent of covering vary in different countries and among Muslim women.<sup>77</sup> The headscarf has no unitary meaning. Rather, 'it reflects the diversity of women's experience and aspirations around the world'.<sup>78</sup> In this regard it has been noted that:

An Islamic headscarf could mean: loyalty to tradition, belief in chastity of women, symbol of religious identity, respect for wishes of parents and families, signal of not being sexually available, expression of cultural identity, refusal to westernise.<sup>79</sup>

---

<sup>75</sup> Wing and Smith (note 21 above) 743.

<sup>76</sup> The Koran is the word of Allah as told to the Prophet Mohammed. Available at <<http://www.islamonline.net/english/introducingislam/topic03.shtml>> last accessed on 10 July 2009. In this regard see generally further NA Shah 'Women's Human Rights in the Koran: an Interpretive Approach' (2006) 28 (4) *Human Rights Quarterly* 868.

<sup>77</sup> See section 1.3.

<sup>78</sup> A Giddens 'French Headscarf Ban Against Interests of Women' (2004) *New Perspectives Quarterly* 43.

<sup>79</sup> See N Nathwani 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights' (2007) 25 (2) *Netherlands Quarterly Human Rights Journal* 221, 244. At least seven diverse competing and conflicting interpretations of Islamic identity have been identified. In this regard see MH Yavuz 'Islam and Europeanisation in Turkish - Muslim

If the equality of Muslim women and their capability to make independent choices, for example as experienced by Muslim women being harassed for not wearing the Islamic-headscarf is the cause of this concern, it is argued that this concern cannot effectively be addressed through a ban on the wearing of such dress. The empowerment of these women needs to be enhanced through the creation of enabling social, economical, cultural, legal and political conditions.

#### **7.2.2.2 The assignment of religion to the private sphere**

In addition to the fact that the prohibition of the Islamic headscarf is premised on the incorrect unitary assumption that the headscarf is a symbol of gender inequality, this prohibition is further grounded on the secularist notion that religion is a private matter.<sup>80</sup> Secularism incorporates and relies on a division between the public and the private as well as the secular and religious. Integrated into these divides is also the assumed divide between civilized and uncivilized.<sup>81</sup>

Further it has been stated that the headscarf debate, illustrates that:

[T]he French secular state today abides in a sense by the *cuius region eius religio* principle (the religion of the ruler is the religion of his subjects), even though it disclaims any religious allegiance and governs a largely irreligious society.<sup>82</sup>

---

socio-political movements' in TA Byrnes and PJ Katzenstein (ed) *Religion in an Expanding Europe* (2006) 225, 227.

<sup>80</sup> See S On 'Brian Barry and the Headscarf Case in France' (2006) 5 *Contemporary Political Theory* 176, 192.

<sup>81</sup> T Asad *Formations of the Secular: Christianity, Islam, Modernity* (2003). Asad includes in this list the divide between justified and unjustified violence for example as illustrated through the rhetoric of the justification of the 'war on terror'.

<sup>82</sup> *Ibid* 175.



Although not specifically identifying French secularism as a religion, this comment suggests that French secularism is the ‘religion of the ruler’ in terms of which the French government imposes its particular religious demands on its citizens in the public domain, with the aim of promoting social stability.<sup>83</sup> This ‘religion of the ruler’ demands religious neutrality of the public domain. However, in this demand, the political demands of groups who claim the right to the public expression of faith are not taken into account. In actual fact the approach precludes mutual accommodation between immigrant groups and host societies necessary for successful immigrant incorporation.<sup>84</sup>

It makes no sense to tell Muslim school girls that they can wear headscarves at home but not at school. It is part of how they define themselves in public life.<sup>85</sup> This divide between public and private produces a fragmented consciousness. Religion cannot be restricted to the private sphere as ‘[i]t is linked to thought, to action; it influences our view on humanity and on the world as a whole; it influences culture and our concept of freedom itself’.<sup>86</sup>

### **7.2.2.3 The concept of French citizenship**

In addition to the separation between the public and the private sphere, French secularism further constitutes an opinion about true human existence and defines how

---

<sup>83</sup> *Ibid.*

<sup>84</sup> J Casanova ‘Religion, European secular identities, and European integration’ in TA Byrnes and PJ Katzenstein (ed) *Religion in an Expanding Europe* (2006) 65, 80.

<sup>85</sup> Asad (note 81 above) 220.

<sup>86</sup> L Bloß ‘European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process’ (2003) 13/03 *Jean Monnet Working Paper* 13.

citizens ought to live and dress in the public realm. It also specifies common values and interests for all French citizens.<sup>87</sup> In this regard France abides by a secular tradition which sees national Republican identity as taking precedence over individual identity.<sup>88</sup> French Republicanism emphasises the coming together of citizens who have distanced themselves from their particular cultural traditions.<sup>89</sup> For this reason ethnic belonging and religious differences are relegated to the private sphere. One of the crucial aspects of the French interpretation of the right to freedom of religion is that the right is defined as a *liberté publique*, and not as a civil right.<sup>90</sup> The right is a natural right to enjoy the freedom of religion, but as defined and limited by state law.<sup>91</sup>

It has been suggested that the turmoil about the Islamic headscarf may have its origin in the time of French colonialism in Algeria, and the racial and gender configurations that were formed at the time.<sup>92</sup> This legacy of colonialism, together with a certain perception of sexuality and gender merges with the issue of the veil in France. The veil, as a symbol of gender oppression, reveals the concept of what constitutes a proper and acceptable French citizen and femininity.<sup>93</sup>

---

<sup>87</sup> See generally A Merrett 'Religious Liberty as a Paradigm For the Development of Human Rights' Research Paper (1997) 5. Available at [http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=cwces\\_papers](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=cwces_papers) last accessed on 24 October 2010.

<sup>88</sup> Barnett (note 35 above) 28.

<sup>89</sup> *Ibid* 29.

<sup>90</sup> *Ibid* 26.

<sup>91</sup> *Ibid* .

<sup>92</sup> See generally JW Scott *Politics of the Veil* (2007).

<sup>93</sup> B Bhandar 'The Ties that Bind: Multiculturalism and Secularism Reconsidered' (2009) 36 (3) *Journal of Law and Society* 301, 317.

### 7.2.3 International concerns

The legislative ban of the Islamic headscarves has been widely criticised. Three leading international human rights non-governmental organisations, Human Rights Watch,<sup>94</sup> the Minority Rights Group,<sup>95</sup> and the International Helsinki Federation for Human Rights,<sup>96</sup> have expressed the view that the French ban violates international human rights law. In September 2005, the Special Rapporteur on Freedom of Religion, Asma Jahangir, visited France and expressed her concern at the indirect effects of the application of the law.<sup>97</sup> The Special Rapporteur on Freedom of Religion or Belief noted that the law constitutes a limitation of the right to manifest a religion or a belief. In addition, this prohibition may not comply with paragraph 3 of article 18 of the ICCPR, that provides for certain such limitations under restrictive conditions as read together with General Comment 22, which emphasises that paragraph 3 of article 18 ‘is to be strictly interpreted’.<sup>98</sup> It is imperative to note that

---

<sup>94</sup> See ‘France: Headscarf Ban Violates Religious Freedom’, Human Rights Watch, Statement of 27 February 2004.

Available at <[http://www.hrw.org/English/doc/2004/02/26/france7666\\_txt.htm](http://www.hrw.org/English/doc/2004/02/26/france7666_txt.htm)> last accessed on 10 March 2009. The report states that a proposed law would be ‘discriminatory’ as it disproportionately affects Muslim girls. It stated that: ‘The impact of a ban on visible religious symbols, even though phrased in neutral terms, will fall disproportionately on Muslim girls, and thus violate anti-discrimination provisions of international human rights law as well as the right to equal educational opportunity’.

<sup>95</sup> See ‘French Ban on Faith Symbols Would Contravene International Human Rights Law’ Minority Rights Group 28 January 2004. Available at <[http://www.minorityrights.org/news\\_detail.asp?ID=20](http://www.minorityrights.org/news_detail.asp?ID=20)> last accessed on 6 July 2010.

<sup>96</sup> See ‘A Ban in Religious Symbols Would Violate International Protection of Freedom of Religion’ (17 December 2003). Available at <[www.hrwf.org](http://www.hrwf.org)> last accessed on 10 May 2010.

<sup>97</sup> ‘Special Rapporteur on Freedom of Religion Ends Visit to France’ UN Press Release, 30 September 2005. Available at <[www.un.org](http://www.un.org)> last accessed on 5 July 2010.

<sup>98</sup> Country missions: France September 2005 E/CN.4/2006/5/Add.4 Available at <<http://www2.ohchr.org/english/issues/religion/visits.htm>> last accessed on 5 July 2010.

the wearing or display of religious symbols is an essential part of the right to manifest one's religion. This right can only be limited under strict conditions.<sup>99</sup>

In summary, the Special Rapporteur on Freedom of Religion or Belief is of the opinion that the Law of 2004 is appropriate insofar as it is intended, in accordance with the principle of the best interests of the child, to protect the autonomy of minors who may be pressured or forced to wear a headscarf or other religious symbols. However, the law denies the rights of those minors who have freely chosen to wear a religious symbol to school as part of their religious belief. In this regard the law may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education.<sup>100</sup> Moreover, the implementation of the law by educational institutions has led, in a number of cases, to abuse amongst young Muslim women. The stigmatisation of the headscarf has provoked acts of religious intolerance when women wear it outside school, at university or in the workplace.<sup>101</sup>

### **7.2.3.1 Possible international challenge to the Law of 2004**

---

<sup>99</sup> See generally E Brems 'Above Children's Heads - The Headscarf Controversy in European Schools from the Perspective of Children's Rights' (2006) 14 (2) *International Journal of Children's Rights* 119.

<sup>100</sup> Regarding the impact of the Law of 2004 on the right to education see M Ssenyonjo 'The Islamic veil and freedom of religion, the rights to education and work: a survey of recent international and national cases' (2007) 6 (3) *Chinese Journal of International Law* 653. See generally also IT Plesner 'Legal Limitations to Freedom of Religion or Belief in School Education' (2006) 19 *Emory International Law Review* 557.

<sup>101</sup> Country missions: France September 2005 E/CN.4/2006/5/Add.4 at 3 available at <<http://www.2.ohchr.org/english/issues/religion/visits.htm>> last accessed on 5 July 2010.

The legality of the Law of 2004 can be challenged in the international domain through referring the limitation to either the ICCPR Human Rights Committee<sup>102</sup> or to the regional bodies of the ECJ in Luxembourg or the ECtHR in Strasbourg.<sup>103</sup> The usefulness of these referrals is however questioned as discussed below.

The most recent case law of the ECtHR is not too promising for those contesting the validity of the prohibition of conspicuous religious signs in public educational institutions in terms of the provisions of article 9 of the ECHR. The ECtHR reasoning in the *Sahin* case would most likely apply to secular France as well.<sup>104</sup> This inference is supported by Brems who argues that the ECtHR is likely to leave this issue to the state parties in line with the application of the doctrine of margin of appreciation.<sup>105</sup>

The success of a challenge to the ECJ in Luxembourg on the ground that the Law of 2004 is in violation of the principle of equality, only if the question falls under within the scope of EU law, is also not without difficulty. The principle of equality is embedded in the Charter of Fundamental Rights and incorporated in the European Union Law under the provisions of the Lisbon Treaty.<sup>106</sup> The Lisbon Treaty, however,

---

<sup>102</sup> The Optional Protocol to the ICCPR allows for individual reference to the ICCPR Human Rights Committee. Germany ratified on the 25 August 1993, France on 17 February 1984, Canada on the 19 May 1976, whilst the UK and the USA have not signed the optional protocol to the ICCPR.

<sup>103</sup> The Law of 2004 has indeed been referred to the ECtHR in Strasbourg in the matter of *France v Atkas* (note 9 above) as discussed in section 6.3.2.2. However the matter was found inadmissible. For further reading on an international challenge see generally A Riley 'Headscarves, Skullcaps and Crosses: Is the Proposed French Ban Safe From European Challenge?'(2004) *Center for European Policy Studies*, Policy Brief No. 49.

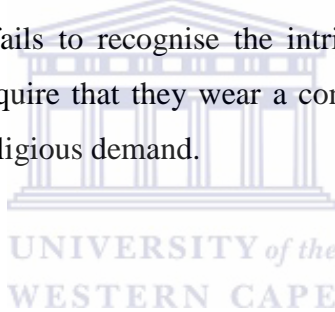
<sup>104</sup> See generally C Evans 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 4 *Melbourne Journal of International Law* 4.

<sup>105</sup> Brems (note 25 above) 129.

<sup>106</sup> See generally C McCrudden & S Prechal 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach European Network Of Legal Experts In The Field Of Gender Equality'

encourages a conciliatory reading of the respective texts in the event of conflict between the European Charter of Fundamental Human Rights and the French Constitution. In light of this conciliatory reading it is possible to infer that the ECJ too will not seek a confrontational decision. However in light of the recent ratification of the Lisbon Treaty there is to date no jurisprudence to support this inference.

In this regard it can be reasoned that the restrictive concept of equality as embraced by the French judiciary will have to be reconciled with the Aristotelian approach articulated by the European courts in terms of which the worst form of inequality is to try to make unequal things equal.<sup>107</sup> This French concept appears to prevent the examination of the question of restrictions of religious practices in indirect discrimination terms, as it fails to recognise the intrinsic difference between those believers whose religions require that they wear a conspicuous garb, and those who are not subjected to such a religious demand.



### **7.3 United Kingdom - England**

The United Kingdom (UK) is a parliamentary democracy. It has neither a written constitution prescribing the separation of powers, nor an entrenched constitutional bill of rights.<sup>108</sup> Therefore no constitutional guarantees for the protection of fundamental rights exist.<sup>109</sup> In this regard reliance in the past were primarily made on anti-

---

Available at

<<http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en>> last accessed on 1 December 2010.

<sup>107</sup> See generally Dominique (note 58 above) 337.

<sup>108</sup> United Nations Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir Mission To The United Kingdom Of Great Britain And Northern Ireland A/HRC/7/10/Add.3 7 February 2008, 14-23.

<sup>109</sup> *Ibid.*

discrimination laws, such as the Race Relations Act (1976) dealing with issues of discrimination.<sup>110</sup> More recently the Human Rights Act (1998) provides for domestic remedies in the event of a violation of a right as contained in the ECHR.<sup>111</sup> In addition, European Community Law Employment Equality (Religion or Belief) Regulations 2003 also provide for the protection of the religious rights of workers. Given the differences in the territories of the UK<sup>112</sup> as well as the manner in which establishment of religion differs throughout the territories, the focus will be on England.

### 7.3.1 Relationship between state and religion

In the England there is no separation between state and religion.<sup>113</sup> Quite the contrary is true as two prominent public life realms depend upon religious affiliation. Firstly, the sovereign's position is tied with obligations towards Anglican Christianity.<sup>114</sup> Only Anglican Christians can inherit the Crown, and they must affirm this faith at their coronation.<sup>115</sup> Reigning monarchs who convert to Roman Catholicism, or marry a Roman Catholic, lose the Crown instantaneously.<sup>116</sup> In England the head of the state

---

<sup>110</sup> See section 7.3.2.1.

<sup>111</sup> See section 7.3.2.2.

<sup>112</sup> England, Wales, Scotland and Northern Ireland.

<sup>113</sup> B Cohen 'Executive Summary – Discrimination based on religion and belief in the United Kingdom' in I Chopin, J Cormack and J Niessen (eds) *The implementation of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) as it relates to religion and belief in 15 EU Member States* (2004),167.

Available at <[http://www.migration-online.de/data/migration\\_policy\\_group\\_5.pdf](http://www.migration-online.de/data/migration_policy_group_5.pdf)> last accessed on 29 November 2010.

<sup>114</sup> See generally Bloß (note 86 above).

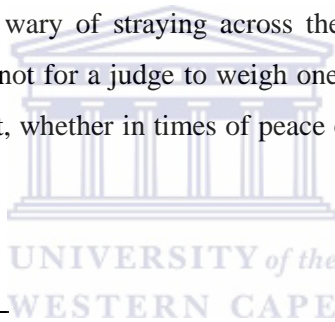
<sup>115</sup> P Cumper & P Edge 'First Amongst Equals: The English State and the Anglican Church in the 21<sup>st</sup> Century?' (2006) *University of Detroit Mercy Law Review* 601, 617.

<sup>116</sup> *Ibid* 604.

is also the head of the established church, being the Church of England.<sup>117</sup> Secondly, the appointment of the Lords Spiritual in the House of Lords, which is a legislative position, depends upon their association within a particular religious hierarchy.<sup>118</sup>

Despite the existence of this establishment, the relationship between the state and religion in the legal system is aptly illustrated by the following remark by Munby J:

Although historically this country is part of the Christian west, and although it has an established church which is Christian, I sit as a secular judge serving a multi-cultural community of many faiths in which all of us can now take pride, sworn to do justice “to all manner of people”. Religion – whatever the particular believer’s faith – is no doubt something to be encouraged but it is not the business of the secular courts. ... A secular judge must be wary of straying across the well-recognised divide between church and state. It is not for a judge to weigh one religion against another. All are entitled to equal respect, whether in times of peace or, as at present, amidst a clash of arms.<sup>119</sup>



---

<sup>117</sup> See section 9 of the Act of Supremacy 1558 that reads: ‘This Act united and annexed spiritual jurisdiction to the Crown, section 8: ‘We acknowledge that the Queen’s excellent majesty, acting according to the laws of the realm, is the highest power under God in this kingdom and has supreme authority over all persons in all causes as well as ecclesiastical as civil.’(Canon A7). Minnerath explains that the Church of England was disestablished in Ireland in 1869 and in Wales in 1920 where the Anglican Church since became an association under private law. In Scotland the Presbyterian Church was established in the sixteenth century. In this regard see generally R Minnerath ‘The Right to Autonomy in Religious Affairs’ in T Lindholm, WC Durham & BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 302; see also P Cumper ‘Religious Liberty in the United Kingdom’ in *Religious Human Rights in a Global Perspective Legal Perspectives* (ed) JD van der Vyver & J Witte Jr (eds) (1996) 205- 242.

<sup>118</sup> Cumper & Edge (note 115 above) 620.

<sup>119</sup> *Suleiman v Juffali* (note 37 above) (In which it was considered whether a Muslim *talaq* (divorce) could be recognised in the UK family law). Although this is a civil matter this remark has even more relevance in the public domain.



Of particular relevance, is the notion of an established church that does not give preferential status to any religion. In addition all religions are considered as a positive component of life which should be supported by the state. In general, the established church is given visibility in public life and forms a central part of many symbolic functions and legislative participation.<sup>120</sup> These forms of the public display of religious expression have not caused much debate as the English establishment does not impose any religious belief on its citizens and publicly values the role of religion.<sup>121</sup>

While recognising that the established church inevitably reflects the social position and historical inheritance of Christianity in British society, Modood argues that:

The minimal nature of the Anglican establishment, its relative openness to other denominations and faiths seeking public space and the fact that its very existence is an ongoing acknowledgement of the public character of religion are all reasons why it may seem far less intimidating to minority faiths than a triumphant secularism. Where secularism is already the dominant ideology and the national church is marginal, it is dishonest to suggest that religious equality and empowerment of the new minority faiths begins with a critique of establishment.<sup>122</sup>

Despite Modood's benign evaluation of the establishment of the Church of England, religious privileges to the established church remain protected in law. The Church of

---

<sup>120</sup> There are a number of seats within the House of Lords (non-elected Second Chamber of Parliament) for a number of bishops of the Church of England.

<sup>121</sup> JD Fischer & CJ Wallace 'God and Caesar in the Twenty First Century: What recent cases say about Church-State Relations in England and the United States' (2006) 18 *University of Louisville Journal of International Law* 485, 491.

<sup>122</sup> T Modood 'Minorities, Faith and Citizenship' (1992) 12 *Discernment: A Christian Journal for Inter-Religious Encounter* 59, 60.

England remains privileged.<sup>123</sup> Weller too opposes the arguments put forward by Modood and conversely claims that:

[T]he implications of the Establishment to do with education, the law and pastoral services are not just of a '*minimal nature*' and that they, in fact, have substantial consequences for individuals, and certainly for communities and organizations of the other than established religious traditions.<sup>124</sup>

Although Modood and Weller have different opinions regarding the influence of the established church on the right to freedom of religion, it is reasoned that both Modood and Weller are correct in their opinion that the existence of an established church does acknowledge the importance of religion in civil society. In this recognition it is a particular conception of the dominant religion that is acknowledged and not necessarily a diversity of religions.<sup>125</sup> The protection of these minority religious rights under such a regime is evaluated next.

### 7.3.2 Legal framework for the protection of fundamental rights

As no constitutional guarantees for the protection of fundamental rights exists in the UK, protection is primarily given by way of specific anti-discrimination laws, such as the Race Relations Act and the Human Rights Act. Both of which are discussed in more detail below. Other specific legislation includes, for example, the Prison Act of 1952, in terms of which provision is made for religious diets. Also Sikh prisoners are

---

<sup>123</sup> Within the Education Act and public education domain as well as the structural embedded position of the Church of England in chaplaincies in the armed forces and prison service.

<sup>124</sup> P Weller 'Equity, Inclusivity and Participation in a Plural Society: Challenging the Establishment of the Church of England' in PW Edge & G Harvey (eds) *Law and Religion in Contemporary Society: Communities, Individualism and the State* (2002) 53, 62.

<sup>125</sup> In this regard see generally Fischer & Wallace (note 121 above) 485.

permitted to keep a *kirpan*<sup>126</sup> in the form of a small symbolic replica, inlaid in a comb.<sup>127</sup>

There is no legislation that specifically addresses the manifestation of religious observances of employees. A number of cases alleging indirect discrimination on racial grounds have been brought where the employer or the educational institution imposed a dress code on health and safety grounds that disadvantaged members of particular racial groups who were not able to comply with the dress requirements. An example is a requirement for all railways repairs workers to wear protective headgear.<sup>128</sup> The outcome of such a case would, as in any other complaint of indirect discrimination, depend on whether the employer could show that their need for the rule outweighed its discriminatory impact.

Public health has also been invoked to justify limitations. For example, rules forbidding the wearing of beards in a chocolate factory,<sup>129</sup> a confectionery factory,<sup>130</sup> a bakery,<sup>131</sup> and an ice-cream factory<sup>132</sup> have been justified on the ground of protecting the public health. The prohibition of female circumcision<sup>133</sup> and ritual tattooing<sup>134</sup> may be justified as necessary to protect the fundamental rights and freedoms of others.

---

<sup>126</sup> Baptized Sikhs, believe in five symbols of faith (the Five K's) including a comb (kangha), a pair of britches (kachha), a bracelet (karha), a head turban to cover uncut hair (keski), and a sword (kirpan). In this regard see generally HS Dilagira *Who are the Sikhs?* (2000).

<sup>127</sup> See Directory and Guide on Religious Practices in HM Prison Service (London 1992). Available at <[www.hmprisonservice.gov.uk/assets/.../10000322\\_51Religion.pdf](http://www.hmprisonservice.gov.uk/assets/.../10000322_51Religion.pdf)> last accessed on 10 May 2010.

<sup>128</sup> *Singh v British Rail Engineering Ltd.* [1986] ICR 22.

<sup>129</sup> *Panesar v Nestle Co. Ltd.* [1980] I.C.R. 144.

<sup>130</sup> *Singh v Rowntree Mackintosh Ltd.* [1979] I.R.L.R. 199.

<sup>131</sup> *Kabal Singh v R.H.M. Bakeries (Southern) Ltd.*, EAT 818/77.

<sup>132</sup> *Singh v Lyons Maid Ltd.* [1975] IRLR 328.

<sup>133</sup> Prohibition of Female Circumcision Act 1985.

<sup>134</sup> Section 2 of the Tattooing of Minors Act, 1969.

Ritual slaughtering of sheep or goats at religious festivals is considered contrary to the Protection of Animals Act 1911, to which there is no specific religious exemption. In other instances statutory exemptions are made to allow for the protection of the right to freedom of religion. For example, Sikhs enjoy exemptions from general rules requiring the wearing of crash helmets on motor cycles,<sup>135</sup> and a special defence to prosecution for carrying a *kirpan*;<sup>136</sup> exemption to the swearing of a Christian oath in judicial proceedings is provided.<sup>137</sup> However, of particular relevance are the Race Relations Act of 1976 (RRA) and the Human Rights Act of 1998 (HRA), both of which are discussed in more detail below.

### **7.3.2.1 Race Relations Act of 1976**

Often the right to manifest religious belief has been enforced in terms of the enforcement of equal treatment provisions. Discrimination based on race is regulated in terms of the provisions of the RRA. The RRA forbids discrimination on 'racial grounds' in the workplace, either direct or indirect, on the grounds of colour, race,

---

<sup>135</sup> Section 16 of the Road Traffic Act 1988.

<sup>136</sup> Section 139 of the Criminal Justice Act 1988.

<sup>137</sup> Section 1 of the Oaths Act 1978. Further relevant legislation includes the Equality Act. The Equality Act makes it illegal to discriminate on the grounds of 'religion or belief' or the 'lack of religion or belief' in the provision of goods, facilities and services, education, the use and disposal of property, and the exercise of public functions. The Equality Act established the Commission for Equality and Human Rights which is responsible for promoting an awareness of the Act's provisions, promoting equality and diversity, and working towards the elimination of unlawful discrimination and harassment. The Racial and Religious Hatred Act 2006 defines 'religious hatred' as hatred against a group of persons which may be determined by reference to religious belief or lack of religious belief. The Act does not define religion or what constitutes a religious belief. Offences must be threatening and have the intent to stir up religious hatred. The Act is not applicable to utterances or behaviour inside private dwellings. Similarly, criticism or mere dislike of a religious belief is excluded.

nationality or ethnic origin.<sup>138</sup> To be successful in proving a claim of discrimination the claimant has to show that he belongs to a racial group. In the matter of *Mandla*,<sup>139</sup> a Sikh boy who was denied admission to a school on the ground that he wished to wear a turban, was successful with his claim of indirect racial discrimination, as the House of Lords held that Sikhs are an ‘ethnic’ as well as a religious group, and thereby protected under the provisions of the RRA. The following two requirements were laid down to enable a person to qualify as a member of an ethnic group. First, a long shared history, distinguishing it from other groups. Second, a cultural tradition of its own, including family and social customs, common geographical origin, common ancestors, common language, common literature and a common religion.<sup>140</sup>

---

<sup>138</sup> Section 3(1) of the RRA stipulates that: ‘racial grounds’ means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins’.

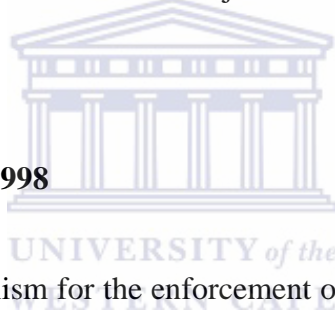
<sup>139</sup> *Mandla v Lee* [1983] IRLR 209

<sup>140</sup> The case of *Mandla v Lee* remains the benchmark. The requirements for an ethnic group were stipulated as follows in *Mandla v Lee* (note 139 above) 562 by Lord Fraser of Tullybelton:

‘For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: – (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups. A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the

Ethnic origin therefore has been interpreted broadly and can include both religious and racial difference. This broad interpretation is in line with the approach recommended in section 1.3. In this regard Sikhs, Jews<sup>141</sup> and Gypsies have been categorised as separate races.

However, British courts and tribunals have held that Muslims, Rastafarians and Jehovah's Witnesses fall outside the protection of the RRA.<sup>142</sup> Accordingly a Rastafarian's appeal was denied when an employer rejected his application for a position as a van driver with Crown Suppliers as he refused to shave off his dreadlocks.<sup>143</sup> In *R v Paul Simon Taylor*<sup>144</sup> the court held that the use and supply of cannabis by a young Rastafarian cannot be justified as lawful when motivated by religion.



### 7.3.2.2 Human Rights Act 1998

The HRA provides a mechanism for the enforcement of the ECHR within the UK and is a mechanism in terms of which English Law can be harmonised with the provisions

---

purposes, of the Act, a member. That appears to be consistent with the words at the end of subsection (1) of section 3: References to a person's racial group refer to any group into which he falls.'

<sup>141</sup> A Jewish employee was also excluded from protection in *Seide v Gillette Industries Ltd.* [1980], IRLR 427 at 430, where the discrimination was based on religious grounds and was not racially motivated.

<sup>142</sup> Most notably, it was recently held by the Court of Appeal that Rastafarians were not within the protection of the RRA because, although their movement goes back nearly sixty years, and 'they are a separate group with identifiable characteristics, they have not established some separate identity by reference to their ethnic origins', as required by *Mandla*; see *Dawkins v Dept. of Environment* [1993] IRLR 284. Therefore, as Rastafarians did not classify as a race this action could not be brought under the Race Relations Act.

<sup>143</sup> *Dawkins v Dept. of Environment* [1993] IRLR 284, CA 528 -29.

<sup>144</sup> *R v Paul Simon Taylor* [2001] EWCA Crim. 2263 (Criminal Division).

of the ECHR.<sup>145</sup> Section 3 of the HRA determines that courts, ‘so far as where it is possible to do so’ must read and give effect to primary and subordinate legislation in a way in which it is compatible with the ECHR. In this manner the HRA positively affirms the human rights and the right to non-discrimination as entrenched in the ECHR.

Before the enactment of the HRA the only protection for religious symbols was in terms of the RRA, with a result that ethnic symbols were better protected than religious symbols. The HRA now provides for the protection of religious symbols.<sup>146</sup> State schools are accordingly under an obligation to comply with the provisions of the ECHR.<sup>147</sup> When devising uniform policies, schools are therefore required to accommodate religious diversity. The school has the obligation to allow for cultural and religious diversity while simultaneously maintaining uniformity in schools. The Department of Children, Schools and Families has issued guidelines to assist schools in balancing religious diversity with uniform policies in schools.<sup>148</sup> Schools are

---

<sup>145</sup> See generally A Kavanagh *Constitutional review under the UK Human Rights Act* (2009).

<sup>146</sup> Article 9 of ECHR.

<sup>147</sup> Section 6 of the HRA provides that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

<sup>148</sup> See the guidelines issued by the Department for Children, Schools and Families (DCSF) to schools on school uniform and related policies, 4 October 2007, available at

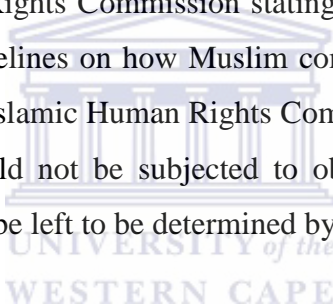
<<http://www.teachernet.gov.uk/management/atoz/u/uniform>> last accessed on 10 October 2010.

Schools are left with balancing the promotion of respect for cultural and religious diversity and maintaining a shared ethos at school through the design of uniform policies. This non-statutory guidance strongly recommends wide consultations on school uniform policies including community leaders representing minority ethnic and religious groups and calls on schools to act reasonably in accommodating religious requirements. It further explains that restricting the freedom of pupils to manifest their religion may be lawful if justified on grounds specified in the HRA, including health, safety and the protection of the rights and freedoms of others. Furthermore, the guidance emphasises that each case will depend on the circumstances of the particular school and that it is for a school to determine what sort of uniform policy is appropriate for it.

required to act reasonably in accommodating religious requirements and Paragraph 22 of the guidelines provide that:

In fulfilling its obligations, a school may have to balance the rights of individual pupils against the best interests of the school community as a whole. Where a school has good reason for restricting an individual's freedoms, for example, to ensure the effective delivery of teaching and learning, the promotion of cohesion and good order in the school, the prevention of bullying, or genuine health and safety or security considerations, then the restriction of an individual's rights to manifest their religion or belief may be justified.<sup>149</sup>

The Department of Education's guidance<sup>150</sup> regarding full-face veils in schools has led to the Islamic Human Rights Commission stating that it is inappropriate for the Government to provide guidelines on how Muslim communities should express their faith. This statement of the Islamic Human Rights Commission is justified as the right to freedom of religion should not be subjected to objective determination and the requirements of faith should be left to be determined by the adherents of such faith.



### **7.3.3 Application of the HRA and the RRA**

The promulgation of the HRA has brought about considerable jurisprudence regarding the balancing of the right to freely manifest religious belief with the right of schools to impose uniform dress codes. Prominent are the following decisions;<sup>151</sup> first the

---

<sup>149</sup> See paragraph 19 DCSF guidance.

<sup>150</sup> Department of Education guidance March 19, 2007.

Available at <<http://www.teachernet.gov.uk/management/atoz/u/uniform>> last accessed on 10 October 2010

<sup>151</sup> The manner in which these decisions are arranged herein is drawn from S Bacquet 'Manifestation of Belief and Religious Symbols at Schools: Setting Boundaries in English Courts' (2009) 4 *Religion and*



decision of the House of Lords<sup>152</sup> in the matter of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*<sup>153</sup> regarding the display of a *jilbab*; second, the decision of *R (on the application of X) v Head Teacher and Governors of Y School*<sup>154</sup> regarding the wear of a *niqab*; third, the matter of *R (on the application of Playfoot) v Governing Body of Millais School*<sup>155</sup> regarding the wear of a ‘purity ring’.<sup>156</sup>

---

*Human Rights* 121–135. For a discussion on *Begum* see generally MM Idriss ‘The House of Lords, Shabina Begum and proportionality’ (2006) 11(3) *Judicial Review* 239.

<sup>152</sup> The House of Lords has served as the highest court in the UK from 1876. In 2009 the UK Supreme Court took over the House of Lords judicial functions.

<sup>153</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, (*Begum*). Shabina Begum, a Muslim, born in the UK to parents who came from Bangladesh at first wore the *shalwar kameeze*. At the age of nearly 14 she contended that she wished to wear the *jilbab* – a long coat like garment that concealed the contours of the female body in accordance with the religious requirements of her faith. The appeal to the House of Lords follows from a decision in March 2005 in which the Court of Appeal declared that Shabina Begum had unlawfully been excluded from Denbigh High School for insisting to wear the *jilbab*. See Decisions *R (on the application of Begum) v Denbigh High School* [2005] EWCA Civ 199 (02 March 2005) 1 WLR 3372 (*Begum* (2005)). Available at <<http://www.bailii.org/ew/cases/EWCA/Civ/2005/199.html>> last accessed on 10 July 2010. The appeal was against the decision of the England and Wales High Court (Administrative Court) Decisions - *Begum, R (on the application of) v Denbigh High School* [2004] EWHC 1389 (Admin+) (15 June 2004) ELR 374. Available at <<http://www.bailii.org/ew/cases/EWHC/Admin/2004/1389.html>> last accessed on 10 July 2010. In the court *a quo* Justice Bennett held that the school had acted reasonably in offering a uniform that satisfied the requirements of Islamic dress code (paragraph 8). He further held that the reasonable uniform code was necessary for providing a positive and inclusive ethos in the school (paragraph 42).

<sup>154</sup> *R (on the application of X) v Head Teacher and Governors of Y School* [2008] 1 All ER 249 (*X v Y*). In this regard see also G Lee (2007) ‘Schoolgirl loses court battle to wear niqab’ *The Guardian* 22 February 2007.

<sup>155</sup> *R (on the application of Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin) (*Playfoot*).

<sup>156</sup> A purity ring is a silver ring worn by members of the ‘Silver Ring Thing Movement’ (SRT) as a symbol of their commitment to chastity before marriage.

The matter of *R (on the application of Sarika Angel Watkins-Singh) v Aberdare Girls' High School*<sup>157</sup> regarding the wear of a *kara* bangle<sup>158</sup> was decided under the provisions of the Race Relations Act. The three cases that were dealt with in accordance with the provisions of the HRA will be dealt with first, followed by the *Watkins-Singh* matter in terms of the provisions of the RRA.

### 7.3.3.1 Human Rights Act

With the enactment of the HRA the manifestation of religious symbols is provided for in terms of the provisions of the ECHR. The court will first enquire if section 9 of the ECHR<sup>159</sup> is applicable in that a sincerely held religious belief is compromised. Thereafter the court will have to determine if the right has been limited and if so if the limitation is justified. The investigation of the courts in the matters of *Begum, X v Y* and *Playfoot* are discussed next.

*Is there a sincerely held religious belief in terms of article 9 of the ECHR?*

The court at first enquires if there is an infringement of a sincerely held religious belief conducting this inquiry. In the matters of *Begum, X v Y* and *Playfoot*, the court without difficulty held that the claimants' belief was sincere. However in *Playfoot*,

---

See: <<http://www.silverringthing.org.uk>> last accessed on 1 July 2010.

<sup>157</sup> *R (on the application of Sarika Angel Watkins-Singh) v Aberdare Girls' High School* [2008] EWHC 1865 (Admin) (*Watkins-Singh*).

<sup>158</sup> This is a thin bracelet that Sikhs wear as a manifestation of their belonging to the Sikh faith. The *kara* bangle is part of the five Ks, the five outward signs required of a Sikh to wear. In this regard see generally BN Banerjee *Hindu culture, custom, and ceremony* (1978).

<sup>159</sup> See section 6.3.

the judge found that article 9 was not applicable as a ‘purity ring’ was not a requirement of the Catholic faith.<sup>160</sup> In *Playfoot* the court clearly favours religious symbols over social and cultural symbols. This approach is criticised as the court does not appreciate that a symbol may be a reflection of the particular claimant’s understanding of the requirements of her tradition or belief.

*Is there a limitation of the right that is justified?*

Having found in *Begum* and *X v Y* that the claimants had a sincerely held religious belief, the courts next determined if the claimants’ right had been limited. The court in both *Begum*<sup>161</sup> and *X v Y* found that there was no interference with the right to freely manifest religious belief. The reasoning in both *Begum*<sup>162</sup> and *X v Y*<sup>163</sup> was based on the fact that the claimants had voluntarily chosen to attend the schools, were aware of the uniform policies and had access to other schools where they would be permitted to wear the *jilbab* or the *niqab*.

The reliance upon the voluntary nature of Shabina Begums’ school attendance is put forward by Lord Hoffmann as follows:

I accept that wearing a jilbab to a mixed school was, for her, a manifestation of her religion. The fact that most other Muslims might not have thought it necessary is irrelevant. But her right was not in my opinion infringed because there was nothing to

---

<sup>160</sup> *Playfoot* (note 155 above) 23–24.

<sup>161</sup> For a general discussion of the decision of the House of Lords see Idriss (note 151 above) 239.

<sup>162</sup> In *Begum* (note 153 above) the court stated that the school had been chosen by the claimant; the uniform policy had clearly been explained to parents and pupils; there were other schools that the claimant could attend and where she would be allowed to wear the *jilbab*; the school had designed its policy taking into account the needs of the Muslim community. See paragraphs. 25 and 32.

<sup>163</sup> In *X v Y* (note 154 above) the court stated that since the claimant had been offered another place at a school where she could wear the *niqab* the Buckinghamshire school did not infringe on her right to manifest her religious belief.

stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing.<sup>164</sup>

The court's reliance upon the voluntary nature of attendance is reminiscent of the reasoning of *Ahmad v United Kingdom*<sup>165</sup> and *X v United Kingdom*.<sup>166</sup> The approach of the European Commission of Human Rights in these matters has been previously criticised.<sup>167</sup> Similarly the approach of the courts in the matter of *Begum* and *X v Y* is problematic in light of the fact that the court merely relies upon the fact that a claimant has a choice. The court consequently fails to scrutinise the justifiability of the limiting provision on the right to manifest religious belief. It is argued that the point of departure of the court in determining the justifiability of a limitation on the right to manifest religious belief, should be as follows: The court should be aware that even apparently neutral uniform policies may indeed be representative of the norms of the dominant. In addition, the court should not assume that an apparent voluntary choice of attendance indeed is representative of the individual's choice. What may appear voluntary to the dominant may in actual fact not represent any choice to the vulnerable and marginalised, who at times may be without the competence to exercise such a choice. Furthermore the court ought to be mindful of the discrimination that an individual suffers in comparison with others who are not expected to exercise a choice or either failing to comply with the tenets of their faith or finding an alternative school.

The courts in both the matter of *Begum* and *X v Y* further assert that the school is best situated to deal with school uniform requirements. Judges have been hesitant to

---

<sup>164</sup> *Begum* (note 153 above) 50.

<sup>165</sup> *Ahmad v United Kingdom* (note 15 above).

<sup>166</sup> *X v United Kingdom* (note 16 above) at 33.

<sup>167</sup> See section 6.2.3.3.

adjudicate on ‘religious’ matters<sup>168</sup> and have been more inclined to defer, in the same way as the European Court on Human Rights (ECtHR) has applied the ‘margin of appreciation’.<sup>169</sup> In considering the proportionality of the school’s limitation on the right to manifest the religious belief of Shabina Begum, Lord Bingham refers to the decision of the ECtHR in *Sahin v Turkey*<sup>170</sup> and the need to balance the right to manifest religious belief with the need for ‘religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness.’<sup>171</sup> It is clear that the national court therefore relies on the ECtHR application of the ‘margin of appreciation’ in the matter of *Begum* as well. Lords Bingham, Hoffmann and Scott reasoned that the school itself was in the ‘best position to weigh and consider’<sup>172</sup> the impact of the school uniform policy on the rights of others, and that the schools uniform policy was ‘well within the margin of discretion that must be allowed to the school’s managers’.<sup>173</sup> That the school is best situated to determine what uniform would best suit the schools needs, as illustrated in the following statement of Lord Bingham:

It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgement on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it. And I see no reason to disturb their decision.<sup>174</sup>

---

<sup>168</sup> See Lord Bingham’s statement in *Begum*: ‘This House is not, and could not be, invited to rule on whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in a school of this country. That would be a most inappropriate question for the House in its judicial capacity’. *Begum* (note 153 above) 2.

<sup>169</sup> See section 6.2.2.1.

<sup>170</sup> *Sahin v Turkey* (note 3 above).

<sup>171</sup> *Begum*, (note 153 above) 32.

<sup>172</sup> *Ibid* 65.

<sup>173</sup> *Ibid* 84.

<sup>174</sup> *Ibid* 34.

In deferring to the school authorities in the matter of *Begum*, as well as negating the possibility of an infringement on the right to manifest religious belief as the attendance at the school was voluntary, the House of Lords fails to consider the necessity of the limitation imposed on the right to manifest religious belief. The proportionality of the limitation in seeking to fulfil a legitimate aim and a pressing social need, which the limitation must meet in a relevant and sufficient manner, is not scrutinised. This approach of the House of Lords does not protect the right to freedom of religion in any manner as no opportunity for judicial scrutiny of a limitation is provided.

The House of Lords deferred to the school authorities who were of the opinion that the restriction on the right to wear the *jilbab* in *Begum* was necessary to preserve pluralism and the cohesion within the Muslim student population. It is objectionable, that the Law Lords, although not adjudicating as an international body, have continued to apply the international doctrine of the margin of appreciation. However, here the margin has not been used to defer to another state legislature, but deference has been made to schooling authorities. It is argued that this deference does not allow the court to scrutinise infringements and is an incorrect appreciation of the role of the margin of appreciation.

Cohesion is arguably assisted by a uniform dress code which can ‘smooth over ethnic, religious, and social divisions’.<sup>175</sup> This approach in *Begum* does not reflect on how the display of religious symbols such as the *jilbab* may indeed enhance pluralism and diversity. The court merely considers the display too visibly different and that it therefore should be suppressed.<sup>176</sup> In this regard it is reasoned that the Law Lords interpreted the concept of multiculturalism as tied to Christian culture and not as a

---

<sup>175</sup> *Ibid* 97.

<sup>176</sup> Bhandar (note 93 above) 313. See generally also Bacquet (note 151 above) 121.

means of negotiating between different cultures.<sup>177</sup> Bhandar argues that culture is a set of practices, strongly associated with religious belief. For this reason the principle of multiculturalism, in the UK, is tied up with British cultural and religious identity.<sup>178</sup> As a result, multiculturalism does not reflect different practices that exist in relation to one another and in terms of which a range of cultural differences can be negotiated, but for a concept tied to Christian culture.

### **7.3.3.2 Race Relations Act**

It was only in the matter of *Watkins-Singh* that the right to manifest religious belief was protected and the limitation imposed on the display of the *kara* bracelet was found unjustified. This endorsement of the right was achieved through relying upon the provisions of the RRA, in terms of which Sikhs are considered to be a racial group. It was not possible for the matters of *Begum* and *X v Y* to be heard in terms of the provisions of the RRA as Muslims are not considered to constitute a race. In comparing the decisions in *Begum*, *X v Y*, *Playfoot* with the decision in *Watkins-Singh* it is clear that the HRA has not, as of yet, afforded a higher standard of protection and that the right to diversity was better accommodated in terms of the RRA.

### **7.3.3.3 Appraisal of the reasoning of the Court of Appeal in *Begum*.**

In contrast with the approach of the House of Lords, the Court of Appeal provides a more nuanced consideration of the reality that the Islamic headscarf is diverse in its

---

<sup>177</sup> *Ibid* Bhandar 324.

<sup>178</sup> *Ibid* 320.

meaning and application.<sup>179</sup> The right to manifest religious belief is left to the individual herself to decide. The Court of Appeal further correctly considers the different interpretations of what represents a suitable manifestation of the Islamic headscarf. For some the *shalwar kameeze* is sufficient but for others, albeit a minority, a garment like the *jilbab*, which disguises the shape of the wearer's arms and legs, is required.<sup>180</sup>

Lord Justice Brooke further held that the Civil Court erred in questioning the correctness of the beliefs to wear the *jilbab*. In this regard the Court of Appeal referred to the matter of *Hasan and Chaush v Bulgaria* in which it was held that:

[T]he right to freedom of religion ... excludes any discretion on the part of the State to determine whether religious belief or the means used to express such beliefs are legitimate.<sup>181</sup>

The Court of Appeal goes to great lengths to confirm that the UK is a multicultural society<sup>182</sup> and that it is not the role of the school authorities to choose between various sincerely held religious beliefs, even if a belief is held by a very small minority.<sup>183</sup>

It is argued that this approach of the Court of Appeal is the correct approach, in that the schooling authorities indeed do not have the ability to adjudicate on the validity of sincerely held beliefs and all manifestations must be considered as expressing the individuals' sincere religious belief. Although the right to manifest religious belief

---

<sup>179</sup> In this regard see generally G Davies 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*' (2005) 1 *European Constitutional Law Review* 511.

<sup>180</sup> *Begum* 2005 (note 153 above) 48.

<sup>181</sup> *Hasan and Chaush v Bulgaria* (26<sup>th</sup> October 2000: Appln No. 30985/96) the European Court of Human Rights, paragraph 78.

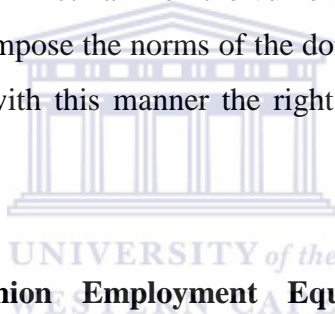
<sup>182</sup> *Begum* 2005 (note 153 above) 91.

<sup>183</sup> *Begum* 2005 (note 153 above) 93.



may be limited, such a limitation must be analysed to determine if the limitation is justified. The court cannot avoid such an analysis in deciding that certain manifestations are not considered representative of the religious belief and consequently no right has been infringed and no justification analysis is required. Such an approach does not further the protection of the right to manifest religious belief as the limiting provision is not scrutinised at all.

The point of departure of the Court of Appeal in determining the justifiability of a limitation on the right to manifest religious belief is mindful that even apparently neutral uniform policies may indeed be representative of the norms of the dominant. A neutral rule may therefore inflict harm on the vulnerable religious other. The Court of Appeal is vigilant not to impose the norms of the dominant on the marginalised. In approaching the limitation with this manner the right to manifest religious belief is afforded better protection.



#### **7.3.4 The European Union Employment Equality (Religion or Belief) Regulations**

Non-discrimination of employees is regulated in terms of the provisions of European Union law aimed at securing an internal market in which employees can move freely from one member state to another for employment purposes.<sup>184</sup> In terms of European

---

<sup>184</sup> Two European Community Directives, the Racial Equality Directive and the Employment Framework Directive, define a set of principles that offer everyone in the EU a common minimum level of legal protection against discrimination. Directive 2000/43/EC of 29 June 2000 and Directive 2000/78/EC of 27 November 2000. Both directives follow directly from article 13 of the Amsterdam Treaty establishing the European Community which reads: ‘the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

Union law an issue of alleged discrimination for wearing a *niqab* at work was heard in the case of *Aishah Azmi v Headfield School and Kirklees Metropolitan Borough Council*.<sup>185</sup> These regulations<sup>186</sup> prohibit ‘direct discrimination’, ‘indirect discrimination’ and discrimination by way of ‘victimisation’ or ‘harassment’ in the workplace by reason of ‘any religion, religious belief or similar philosophical belief’. Ms Azmi wore a *niqab* while assisting pupils between the age six to eleven with maths. Ms Amzi was informed that she would not be able to wear the veil while working with children. She removed it in front of her pupils but refused to do so in front of male teachers. She was subsequently suspended.

The claims of direct and indirect discrimination were dismissed as the reasons for prohibiting her to wear the veil were objective. Namely for the needs of the children to have full face visual communication. Ms Azmi appealed to the Employment Appeals Tribunal (EAT) which held that there was no direct discrimination, probably indirect discrimination but that the actions of the school were justified. Both the court *a quo* and the appeal tribunal failed to identify that the right to freedom of religion had been infringed and failed to scrutinise the justifiability of the limiting provision.

This decision signalled to Muslim women who wish to wear the *niqab* at work that they should rather stay at home.<sup>187</sup> This need to suppress visible signs of difference was also evident in the decision of *Watkins-Singh* where the *kara*, a less visible sign of

---

<sup>185</sup> *Aishah Azmi v Headfield School and Kirklees Metropolitan Borough Council*. Employment Tribunal, case number 1801450/2006, 6 October 2006; Employment Appeals Tribunal, Appeal No. UKEAT/0009/07/MAA. 30 March 2007. Available at

<[www.employmentappeals.gov.uk/Public/Upload/07\\_0009ResfhAMMAA.doc](http://www.employmentappeals.gov.uk/Public/Upload/07_0009ResfhAMMAA.doc)> last accessed on 10 March 2010. See also D Wise ‘Wearing the Veil’ (2006) 156 *New Law Journal* 1786.

<sup>186</sup> Racial Equality Directive and the Employment Framework Directive (note 184 above).

<sup>187</sup> M Morris ‘Blair Tells Immigrants to Integrate or Stay Away’ (2006) *The Independent*, 9 December 2006; F Yeoman ‘Accept British Way of Life or Stay Away, Blair Tells Migrants’ (2006) *The Times*, 9 December 2006.

difference was permitted.<sup>188</sup> Increasingly Muslims in Europe are feeling that acceptance by society is premised on the assumption that they should lose some aspect of their Muslim identity.<sup>189</sup> British Muslim minorities however are claiming that:

[T]hey should not be marginal, subordinate or excluded; that they too [have] their values, norms and voices--should be part of the structuring of the public space.<sup>190</sup>

## 7.4 Germany

Germany is a federal state, with 16 *Länder*<sup>191</sup> and is a constitutional democracy. Fundamental human rights are guaranteed in the federal and state constitutions.<sup>192</sup> The foundational principles contained in the German Constitution<sup>193</sup> are the values of dignity and equality.<sup>194</sup> The right to freedom of religion is protected in terms of

---

<sup>188</sup> See generally A Vakulenko, 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' (2007) 7 (4) *Human Rights Law Review* 721.

<sup>189</sup> See generally Choudhury (note 20 above).

<sup>190</sup> T Madood 'Remaking Multiculturalism after 7/7' (2005) *Open Democracy* (29 September 2005), Available at <[www.opendemocracy.net/conflict-terrorism/multiculturalism\\_2879.jsp](http://www.opendemocracy.net/conflict-terrorism/multiculturalism_2879.jsp)> last accessed on 11 May 2009.

<sup>191</sup> The *Länder* are Baden–Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg–Western Pomerania, North Rhine–Westphalia, Rhineland–Palatinate, Saarland, Saxony, Lower-Saxony, Schleswig–Holstein, Thuringia. Available at <[www.bundestag.de/htdocs\\_e/info/f](http://www.bundestag.de/htdocs_e/info/f)> last accessed on 3 May 2009.

<sup>192</sup> Susanne Baer (2005) Country Report Germany drafted for the European Network of Legal Experts in the nondiscrimination field (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation). Available at <[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm)> last accessed on 3 August 2010.

<sup>193</sup> See the Basic Law for the Federal Republic of Germany.

Available at <[www.bundestag.de/htdocs\\_e/info/germanbasiclaw.pdf](http://www.bundestag.de/htdocs_e/info/germanbasiclaw.pdf)> last accessed on 3 May 2009.

<sup>194</sup> Article 1 (dignity), article 3 (equality) of the Basic Law for the Federal Republic of Germany.

article. 4. The right protects freedom of faith, conscience and of religious and other, secular beliefs or *weltanschauung*.<sup>195</sup>

#### 7.4.1 Relationship between state and religion

There is no state church in Germany. Religion and state is separated according to the principle of the neutrality of the state.<sup>196</sup> Religious communities with corporation status enjoy privileges in that they have a right to levy a church tax on local residents who do not actively leave the church and from their members.<sup>197</sup>

#### 7.4.2 Application of the right to manifest religious belief – *Ludin* case

The right to freedom of religion is afforded and has been offered considerable protection as seen from the following discussion from the *Ludin v Land Baden-Württemberg*.<sup>198</sup> In the case of *Ludin* the Constitutional Court examined closely if the

---

<sup>195</sup> *Weltanschauung* can be translated to mean literally: world-view, sometimes translated as ‘philosophic’ beliefs. See translation of S Baer (2005) Country Report Germany drafted for the European Network of Legal Experts in the nondiscrimination field (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation). Available at [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm) last accessed on 3 September 2010.

<sup>196</sup> Germany laid down the theoretical principle of neutrality in religious matters in article 140 Grundgesetz in connection with article 137 (1) Weimarer Reichsverfassung: ‘Es besteht keine Staatskirche’. (There is no State Church).

<sup>197</sup> See generally CR Barker ‘Church and State Relationships in German “Public Benefit” Law’ (2000) 3 (2) *The International Journal of Not-for-Profit Law* 1.

<sup>198</sup> German Constitutional Court, *Ludin v Land Baden-Württemberg* Case No 2BvR 1436/02, Judgment of 24 September 2003, (*Ludin*). For an overview of the *Ludin* case see RS Fogel ‘Headscarves in

state action was justified or at the very least tolerated by the Constitution.<sup>199</sup> In terms of the proportionality principle it is required that the limitation imposed on a constitutionally protected right by the state is proportionate to the objectives pursued by the limitation.<sup>200</sup> When a litigant alleges a violation of her right to freedom of religion by public authorities the court makes its findings in two stages: first, it determines, whether the conduct infringes on the right to freedom of religion; second, if it does, the court then examines whether the infringement on her right to manifest her religious belief is justified.<sup>201</sup> The approach of the courts in the review of a limitation of the right to manifest religious belief is clear from an analysis of the case of *Ludin*. In the matter of *Ludin*, Fereshta Ludin a 26-year-old German schoolteacher of Muslim faith, was turned down for a permanent teaching position in a state primary school in Baden-Württemberg. The school board, in deciding not to appoint Ms Ludin, was primarily influenced by the following two considerations. First, the display of the headscarf was considered incompatible with the principle of state

---

German Public Schools: Religious Minorities are Welcome in Germany, Unless - God Forbid - They are Religious' (2006) 51 *New York Law School Law Review* 618; RA Kahn 'The Headscarf as Threat: a Comparison of German and U.S. Legal Discourses' (2007) 40 *Vanderbilt Journal of Transnational Law* 417-444; PH Coetzee & APJ Roux 'Ludin's Kopftuch (headdress): A problem of religious freedom in German schools' (2004) 69(2) *Koers* 277 – 315; and M Mahlman 'Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf case' (2003) 4 *German Law Journal* 1099; A von Campenhausen 'The German Headscarf' (2004) *Brigham Young University Law Review* 655; O Gerstenberg *Germany: Freedom of Conscience in Public Schools* (2003) 3 *International Journal of Constitutional Law* 94.

<sup>199</sup> C Koch 'Classroom Crucifixes, Teacher Headscarves, Faith Healers and More-The German Experience of Religious Freedom Under a Bill of Rights'.

Available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1521307](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521307)> last accessed on 23 September 2010.

<sup>200</sup> D Grimm 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 (2) *University of Toronto Law Journal* 383, 385.

<sup>201</sup> *Ibid.*

neutrality.<sup>202</sup> Second, the display of the headscarf could challenge integration and influence the impressionable young students to conform to Islam.

Ms Ludin appealed this decision through three levels of the German administrative courts: from the administrative court in Stuttgart<sup>203</sup> to the administrative court of Baden-Württemberg<sup>204</sup> to the Federal Administrative Court<sup>205</sup> the highest court of appeal for administrative law in Germany. The Federal Administrative Court upheld the board of education's denial of employment to Ms Ludin and ruled that teachers are representatives of the state and must refrain from openly displaying religious symbols in class. Younger students in particular, the court explained, can be easily influenced and have yet to learn mutual respect and tolerance for those with different beliefs.<sup>206</sup> The right to manifest religious belief was therefore balanced with the rights of school children to be free from religious coercion.

After exhausting all remedies in the German administrative court system, Ms Ludin launched a constitutional complaint with the German Constitutional Court.<sup>207</sup> She alleged that her right of religious freedom, as enshrined in article 4 of the German Basic Law had been violated. Specifically, she claimed that wearing the headscarf was a manifestation of her personally held religious belief.<sup>208</sup> The Constitutional Court overturned the Federal Administrative Court's decision and upheld Ms Ludin's

---

<sup>202</sup> *Staatlichen Neutralitätsgebot*.

<sup>203</sup> (*Verwaltungsgericht*) of Stuttgart (decision of 24 March 2000).

<sup>204</sup> (*Verwaltungsgerichtshof*) of Baden-Württemberg (26 June 2001).

<sup>205</sup> Federal Administrative Court (*Bundesverwaltungsgericht*) (4 July 2002).

<sup>206</sup> *Ludin* (note 201 above) 8.

<sup>207</sup> The German Constitutional Court (*Bundesverfassungsgericht*).

<sup>208</sup> In addition to relying on the protection of Article 4 Ms Ludin also claimed that her rights in terms of articles 1(1) (human dignity), 2(1) (personal freedoms), 3(1) and (3) (equality before the law), 4(1) and (2) (freedom of faith, conscience and creed) and 33(2) and (3) (equal citizenship and equal access to civil service employment) of the Basic Law for the Federal Republic of Germany had been infringed.

right to wear a headscarf in the classroom. The Constitutional Court thereby affirmed the importance of the right to manifest religious belief that was considered sufficiently important to trump the lesser harm of the possible coercion of school going children.

It is exemplary that the Constitutional Court confirmed that the headscarf cannot simply be considered as a sign of suppression to women.<sup>209</sup> In addition the Court also confirmed that the religious dress of a teacher does not implicate the neutrality of the state, if the state did not instruct the display of such religious dress.<sup>210</sup> This affirmation is in contrast with the decisions of the ECtHR in both the *Dahlab v Switzerland*<sup>211</sup> and *Sahin v Turkey*.<sup>212</sup>

The reasoning of Constitutional Court was that in the absence of a generally applicable law a teacher could not be refused public office for displaying a religious symbol.<sup>213</sup> The majority further held that there may however be good reasons for a stricter interpretation of the neutrality principle, as a result of the increased religious pluralism in German society and the possibility for conflict at schools.<sup>214</sup> Consequently, although the majority judgment permitted the wearing of the Islamic headscarf, this decision was based on the lack of sufficiently clear legislation regulating the wear of religious symbols. As a result of the decision in *Ludin*, the legislature of Baden-Württemberg enacted a statute providing for such a regulation.<sup>215</sup> The law provides that:

---

<sup>209</sup> *Ludin* (note 201 above) 50.

<sup>210</sup> *Ludin* (note 201 above) 54.

<sup>211</sup> *Dahlab* (note 5 above). See section 6.3.1

<sup>212</sup> See *Sahin* as discussed in section 5.3.2.1.

<sup>213</sup> Held by five of the eight judges in its second chamber (Senat).

<sup>214</sup> *Ludin* (note 201 above) 64.

<sup>215</sup> Five German Länder have adopted laws that prohibit Islamic symbols but specifically permit Christian ones in the public schools (Baden-Württemberg, Saarland, Hesse, Bavaria, and North Rhine-Westphalia) see Universität Trier: Kopftuch, <<http://www.uni-trier.de/index.php?id=24373>> last

Teachers at public schools ... are not allowed to exercise political, religious, ideological or similar manifestations that may endanger or disturb the neutrality of the country towards pupils or parents or the political, religious or ideological peace of the school.<sup>216</sup>

In terms of the regulation a nun's habit was considered to constitute 'work attire'. Hence Muslim teachers were banned from wearing a headscarf while nuns continued to wear habits while teaching in public schools. Muslim public school teachers wearing religious symbols were therefore treated differently from otherwise equally-situated Christian public school teachers, who wear religious symbols and clothing.<sup>217</sup> As a result a Muslim public school teacher who had been asked to remove her headscarf filed a complaint on the grounds of discrimination.<sup>218</sup> The court agreed that certain religious persuasions could not be afforded preferential treatment, and that Baden-Württemberg had to either apply the law equally to all or not at all.<sup>219</sup> Consequently a reprieve exists for the display of religious symbols in public schools as long as there are nuns who teach.<sup>220</sup>

---

accessed 5 May 2010. All of these laws (with the exemption of Saarland) have been tested in courts, with the result that the ban over outlandish, but not Christian symbols has consistently been upheld.

<sup>216</sup> *Gesetz zur Änderung des Schulgesetzes Baden-Württembergs* [Act Amending the School Code of Baden-Württemberg], April 1, 2004, Baden Württemberg GBl. S. 178, Nr. 6 (F.R.G.). Available at <<http://www.uni-trier.de/ievr/kopftuch/GesetzBadenWuerttemberg01042004.htm>> (German), <<http://www.uni-trier.de/ievr/eng/kopftuch.htm>> (abridged English) last accessed on 10 May 2010.

<sup>217</sup> Fogel (note 201 above) 642.

<sup>218</sup> BVerwGE [Federal Administrative Court], June 24, 2004, 2 C 45.03 (F.R.G.). Available at <<http://www.bverwg.de/media/archive/2282.pdf>> last accessed on 10 May 2010.

<sup>219</sup> *Ibid.*

<sup>220</sup> See D Hipp 'Kopftuch-Urteil: Nonnen retten den Islam' [Headscarf Decision: Nuns Rescue Islam], Spiegel Online 8 July 2006. Available at <<http://www.spiegel.de/unispiegel/schule/0,1518,425678,00.html>> last accessed on 10 May 2010.



This decision is illustrative of the historical commitment that some of the German federal states have to Christianity. The *ex lege* separation between state and religion therefore in no manner corresponds with a *de facto* neutrality of the state towards religion. The majority and dominant faith clearly enjoys benefits that minority faiths do not share. This line of reasoning is supported by Bhandar who argues that culture is strongly associated with religious belief. Therefore the principle (or culture) of neutrality, in Germany is tied with German identity, embodied in cultural and religious identity.<sup>221</sup> As a result, neutrality too is tied to Christian culture.

## 7.5 United States of America

The relationship between the state and religion in the USA, as in France, has been shaped by history.<sup>222</sup> The uprising against the British resulted in the USA's Declaration of Independence (1776) and the first Constitution (1787), as well as Bill of Rights, the first ten amendments to the Constitution.<sup>223</sup> Thomas Jefferson made use of the dictates of natural law as a basis for dissolving the political ties with Britain in writing the Declaration.<sup>224</sup> The supremacy of the Constitution as well as the ten

---

<sup>221</sup> Bhandar (note 93 above) 324.

<sup>222</sup> See generally RM Doshi 'Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism and Originalism' (2010) 98 *Georgetown Law Journal* 459.

<sup>223</sup> The Bill of Rights refers to the twelve amendments submitted by Congress to the states of which ten were ratified by the states in September 1789. See generally CH Esbeck 'Differentiating the Free Exercise and Establishment Clauses' (2000) 42(2) *Journal of Church and State* 311.

<sup>224</sup> 'The right to life, liberty, and property as celebrated by John Locke formed the foundation of the American Declaration of Independence, the English Bill of Rights and the French Declaration of Rights. In this regard see D Davis 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of

constitutional amendments was emphasised in the matter of *Marbury v Madison*.<sup>225</sup> The legal system in the USA has a federal tradition in terms of which the power to make and apply law is shared between the central (federal) and local (state) government.<sup>226</sup>

### 7.5.1 The relationship between the state and religion

The most important religious guarantee is contained in the First Amendment to the USA Constitution. The First Amendment, drafted in 1789 and ratified in 1791, provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

This provision contains two distinct, yet interrelated provisions.<sup>227</sup> Firstly, there is the prohibition of the ‘establishment of religion’.<sup>228</sup> Secondly, there is the warranty of

---

Intolerance and of Discrimination Based on Religion or Belief’ (2002) *Brigham Young University Law Review* 217, 221. See also Declaration of Independence 1776’ available at <[http://www.solarnavigator.net/history/declaration\\_of\\_independence.htm](http://www.solarnavigator.net/history/declaration_of_independence.htm)> last accessed on 23 October 2010. See also R Charlow ‘The Elusive Meaning of Religious Equality’ (2006) 83(5) *Washington University Law Review* 1, 29-30.

<sup>225</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

<sup>226</sup> ‘American Legal Tradition.’ Available at <[http://faculty.ucc.edu/egh-damerow/american\\_legal\\_tradition.htm](http://faculty.ucc.edu/egh-damerow/american_legal_tradition.htm)> last accessed on 20 October 2010.

<sup>227</sup> In this regard see generally MA Graber ‘Our Paradoxical Religion Clauses’ (2009) 69 *Maryland Law Review* 1.

<sup>228</sup> Regarding ways in which a specific religion can be established Monsma indicated that one can think of spoken prayers or Bible readings in public schools; public displays of the Ten Commandments; religious symbols such as a cross, nativity scene, or menorah in a public park; prayers at the start of legislative sessions; religious mottoes on coins or on city or state seals; and prayers at commencement exercises or at high school football games. In this regard see SV Monsma *Church-State Relations in Crisis, Debating Neutrality* (2002) 262.

‘free exercise’ of religion. The phrase ‘establishment of religion’ appears to be clear, however the phrase ‘disestablishment’ can be used to describe either separationism,<sup>229</sup> or neutrality,<sup>230</sup> or accommodationist.<sup>231</sup> From these ways of application the following interpretations of the phrase disestablishment have all enjoyed support: First, as a means of preventing government from interfering with religious doctrine. Second, aimed at preventing government from offering preferential treatment to certain religions. Third, intended to prevent government from prescribing obligatory forms of religious belief.<sup>232</sup>

---

<sup>229</sup> Chemerinsky explains that strict separation requires that to the greatest extent possible the religion and state should be separated. Government should be secular and religion should be relegated to the private realm. This interpretation is argued to be supported by Thomas Jefferson’s ‘wall of separation between church and state’. The separationist provision has primarily been contested in matters concerned with public school education, amongst others aspect related to the following issues: Participation in daily school prayers, teaching creation theory as well as the utilisation of public spaces for religious displays, such as nativity crèche scenes. See generally Chemerinsky (note 39 above).

<sup>230</sup> Chemerinsky calls it the ‘neutrality’ approach’ because he is of the opinion that the other approaches are not neutral at all. For example the ‘the role of God in our Nation’s heritage’ is recognised in *Van Orden v Perry*, 545 U.S. 677, 687. See also *Lee v Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (quoting *County of Allegheny v ACLU*, 492 U.S. 573,657 (1989), in which he recognised that the establishment clause must be construed in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage’. See generally Chemerinsky, (note 39 above).

<sup>231</sup> Chemerinsky identifies a third competing vision, quite different from the first two, is called the accommodationist perspective. This view says argues that both religion and government should be accommodated, and therefore accommodates government support for religion. This approach says that the government violates the establishment clause only if it literally establishes a church or coerces religious participation. See generally Chemerinsky (note 39 above).

<sup>232</sup> Chemerinsky argues that there are three competing conceptions of non-establishment among the Justices, see generally Chemerinsky (note 39 above). See also J Witte & CM Green ‘The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles’ in JD van der Vyver & J Witte (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 497 - 558, 528-9.

The USA Supreme Court has used various tests to determine whether government action violates the establishment clause, including the *Lemon* test,<sup>233</sup> the endorsement test,<sup>234</sup> the coercion test,<sup>235</sup> and the neutrality test.<sup>236</sup> If the government measures do not satisfy a particular test used by the court in any given case, it violates the establishment clause.<sup>237</sup> Justice O' Connor in a concurring opinion noted that when

---

<sup>233</sup> *Lemon v Kurtzman* 403 U.S. 602, 612-13(1971) in which case it was stated that there are three tests that can be gleaned from the Supreme Court establishment jurisprudence: '[F]irst the State must have a secular legislative purpose; second, its principle of primary effect must be one that neither advances nor inhibits religion, (citing *Board of Education v Allen*, 392 U.S. 236, 243 (1968)); finally , the statute must not foster an excessive government entanglement with religion,' (citing *Walz v Tax Commissioner of the City of New York*, 397 U.S. 664, 674 (1970)).

<sup>234</sup> *County of Allegheny v ACLU* , 492 U.S 573, 593 (1989) in which case endorsement was defined as being closely linked to promotion and stating that the endorsement test examines whether the government is promoting one religion over another. The endorsement test replaced the excessive entanglement test. The endorsement test precludes government from conveying or attempting to convey that religion or a particular religion is favoured or preferred.

<sup>235</sup> *Lee v Weisman* (see note 230). In the matter of *Lee* the majority of the court held that a subtle coercive pressure is exercised on people to stand during the recital of a graduation prayer. The coercion test holds that 'at a minimum ... government may not coerce anyone to support or participate in a religion or its exercise. From this judgment it is clear that the interpretation of the establishment clause is largely about protecting non-adherents from public manifestation of religion that may indicate their non-belief. In this regard see RL Shaw 'The Establishment Clause and the Concept of Inclusion' (2004) 83(1) *Oregon Law Review* 1, 20.

<sup>236</sup> *Mitchell v Helms* 530 U.S. 793,809 (2000). The court held that if all (religious, irreligious and a-religious belief) were eligible for government aid, then no one would conclude that any preference was shown to any of the beliefs.

<sup>237</sup> In American jurisprudence multiple tests are available in terms of which the appropriateness of government action regarding religion is assessed and for balancing competing claims between establishment and free exercise. Consequently, the definition of what is meant by establishing a religion has become fluid. Examples of the fluidity of the meaning of non-establishment is apparent from the following contradicting decisions. For example in *Lynch v Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) the court held a nativity Crèche in a city park did not violate the

government endorses a particular religious activity it ‘sends a message to nonadherents that they are outsiders, ... and an accompanying message to adherents that they are insiders, favoured members of the political community’.<sup>238</sup>

It has been suggested that the principal aim of the non-establishment clause was to grant religious rights to all religions synonymous with Protestant Christianity.<sup>239</sup> Protestantism therefore surpassed Catholicism, Judaism and indigenous faiths despite guarantees of equal protection. Religious inequality remains prevalent and the religious rights of Jews, Mormons and American Indians are often disregarded;<sup>240</sup> this disregard is aptly articulated by Blackmun J:

When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.<sup>241</sup>

However, in general, none of the drafters to the First Amendment intended to preclude religion totally from the public domain.<sup>242</sup> The intention was to separate church from state and in so doing to protect the individual’s right to freedom of religion. The

---

establishment clause. On the other hand, in *McCreary County v American Civil Liberties Union*, 125 S.Ct. 2722 (2005) the court held that a display of Ten Commandments in Texas court did violate the establishment clause. The Court emphasised that reference to sacred texts on public property would not always violate the establishment clause. In *Van Orden v Perry*, 125 S.Ct. 2854 (2005) the court held that a monument with Ten Commandments on the Texas state state grounds did not violate the establishment clause. Therefore neutrality means that government cannot favour one religion over another but also should not favour non-religion over religion.

<sup>238</sup> *Lynch v Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), 688 (O’Connor J concurring).

<sup>239</sup> J Witte & CM Green (note 232 above) 514.

<sup>240</sup> See generally LH Fuchs *The American Kaleidoscope: Race, Ethnicity and the Civic Culture* (1990).

<sup>241</sup> *Lee v Weisman*, 505 U S 577, 606 -07 (1992) (Blackmun J concurring).

<sup>242</sup> J Witte & CM Green (note 232) 526.

establishment clause and the free exercise clause are indeed intended to support each other in ensuring that religion is neither favoured nor disfavoured.<sup>243</sup> Accordingly, no conflict exists between the free exercise clause and disestablishment clause as a right to free exercise of religion exists, but organs of the state may not assist.<sup>244</sup> The reasoning behind this disestablishment is that if the state endorses a specific religion it creates a sense of symbolic affirmation of a particular religion often at the cost of religious minorities.<sup>245</sup>

As the emphasis is on the right to manifest religious belief, the above discussion of the establishment provisions is considered sufficient. The free exercise provision in relation to the manifestation of religious belief is analysed next.

### **7.5.2 Free exercise of religion**

The right to free exercise of religion includes the right to manifest one's religion in accordance with that belief and includes types of conduct associated with religious activity, such as worship, teaching, practice and observance. For example, the right to practice enables the religious believer to act in accordance with the dictates of her own belief. Over the last 30 years the level of scrutiny in terms of which an infringement on the right to manifest religious belief has been subjected to has altered drastically. First the required test was the compelling state interest test, over time this test was replaced with a reasonableness test. Even more recently the level of scrutiny has even been reduced even further in that a neutral generally applicable rule is not considered

---

<sup>243</sup> TA Uddin 'Evolution towards Neutrality: Evolution disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree' (2007) Spring *Rutgers Journal of Law & Religion* 1, 7.

<sup>244</sup> L Douglas 'Summary and Synthesis: The Crisis in Religious Liberty' (1992) 60 (3) *George Washington Law Review* 841, 843.

<sup>245</sup> *Ibid* 844.

as an infringement on the right to freedom of religion. A brief evaluation of these three tests follows next.

### *Compelling state interest test*

In *Sherbert v Verner*<sup>246</sup> the USA Supreme Court held that the states action forced Sherbert to either abandon her religious principles in order to work on Saturdays, which as a Seventh - day Adventist she refused, or alternatively to be dismissed. On the grounds that she refused to accept available work and accordingly be denied unemployment compensation. Justice Brennan writing on behalf of the majority held that '[g]overnment imposition of such a choice puts the same kind of burden on the free exercise of religion as would a fine imposed on the appellant for her Saturday worship',<sup>247</sup>

For the government to justify its denial it would have to show that there was no alternative form of regulation available to prevent fraudulent unemployment claims without infringing on the First Amendment right. Accordingly, the individual must be accommodated unless the state can show that a compelling state interest exists and that no less restrictive alternative is available.

The Supreme Court in *Sherbert* designed a free exercise constitutional test along the following criteria: First, the policy or law must serve a compelling state interest. Second, the policy or law must be narrowly tailored to achieve that interest with the least possible intrusion on free exercise rights. Third, it must be non-discriminatory against religion and lastly, non-discriminatory against religion in its application. This test was later called 'the compelling state interest test'.<sup>248</sup>

---

<sup>246</sup> *Sherbert v Verner* 374 US 398, 404 (1963).

<sup>247</sup> *Ibid.*

<sup>248</sup> J Witte & CM Green (note 232 above) 539.

The application of the compelling state interest test even allowed Amish parents to be exempted from compliance with compulsory school attendance to preserve their attitudes towards life and family.<sup>249</sup> Following the principles laid down in the *Sherbert* case the Supreme Court in *Wisconsin v Yoder*<sup>250</sup> defended the right of Old Order Amish parents to protect their children from the imposition of values contrary to their traditional Amish beliefs while attending school.

### *Reasonableness test*

The extensive protection of the right to freedom of religion was brought to an abrupt end in *Goldman v Weinberger*,<sup>251</sup> where the court held that the First Amendment does not prohibit the Air Force from disallowing a rabbi serving as a clinical psychologist in a USA Air Force hospital, from wearing his yarmulke as part of his military uniform. The significance of uniformity in the military may also burden the rights of religious believers to manifest their religious belief within the confines of military service.<sup>252</sup> The need to accommodate such diverse religious practice was rejected by a narrow majority<sup>253</sup> of the Supreme Court, which held that '[t]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulation'.<sup>254</sup>

---

<sup>249</sup> *Wisconsin v Yoder* 406 U S 205 (1972).

<sup>250</sup> *Ibid.*

<sup>251</sup> *Goldman v Weinberger* 475 U S 503 (1986). See generally LS Sheleff 'Rabbi Captain Goldman's Yarmulke, Freedom of Religion and Conscience, and Civil (Military) Disobedience' (1987) *Israel Yearbook on Human Rights* 17.

<sup>252</sup> A further area in which the military may burden the right to freedom of religion is military conscription. In this regard the CH Heyns *A Jurisprudential Analysis of Civil Disobedience in South Africa* LLD Thesis University of the Witwatersrand (1991).

<sup>253</sup> Five for the majority and four for the minority.

<sup>254</sup> *Goldman v Weinberger* (note 251 above) 509-10.



No inquiry was made into whether a compelling state interest was served by a narrowly tailored rule that made the least possible intrusion on the right to freedom of religion, as required in the *Shebert* case. The court simply asked if a duty to accommodate existed. Through this interpretation the compelling state interest test was replaced with a reasonableness test. The proportionality of a narrowly tailored intrusion was no longer evaluated.

The reasonableness test was also applied in the matter of *Lyng v Northwest Indian Cemetery Protective Association*.<sup>255</sup> In *Lyng* the court recognised that the building of a road through a sacred site used for centuries by American Indians, would have severe adverse effects on the practice of their religion.<sup>256</sup> Nevertheless the court permitted and defended this action of the USA Forest Services as follows:

The crucial word in the constitutional text is ‘prohibit’. ... However much we wish it otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.<sup>257</sup>

#### *Apparently neutral and generally applicable rule test*

The limiting effect of the reasonableness test on the right to freely exercise religious belief was further entrenched in the even more narrow free exercise test set up in *Oregon Department of Human Resources v Smith*.<sup>258</sup> Smith, an American Indian, who occasionally ingested peyote as part of a sacramental rite, was dismissed because of

---

<sup>255</sup> *Lyng v Northwest Indian Cemetery Protective Association* 485 U S 439 (1988).

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid* O’Connor J, 451.

<sup>258</sup> *Oregon Department of Human Resources v Smith* 494 U S 872 (1990) (*Smith*).

this practice. His application for unemployment compensation was denied on the ground that taking peyote<sup>259</sup> was a criminal activity.

In a majority opinion by Justice Scalia, the Court reasoned that free exercise was no longer a defence to neutral, generally applicable government actions. It was further held that the prohibition was not solely directed at the religious practice, but incidentally forbade an act that religion required. Consequently the free exercise clause confers no constitutional protection where government action is considered neutral and generally applicable.<sup>260</sup> Therefore the act of criminalising is not subject to scrutiny on the grounds of a religious right, as the state does not have to defend its ban.

Scalia J expressed in the leading judgment the concern that to find otherwise would create 'a private right to ignore generally applicable laws'. Scalia J understands that such a system will disfavour minority religions that do not have the means to influence the legislative process, but he believes that is the price to pay if we want to avoid anarchy. Accordingly a neutral law of general application will prevail, regardless of the nature of the state's interest or the nature of the interest of the religious believer.<sup>261</sup> *Smith* indicates a near total loss of the constitutional protection of the right to freedom of religion and in particular the right to manifest religious belief..

It has been argued that the *Smith* decision appears to be in conflict with the requirement that the state shall not interfere in the religious life of individuals, as the *Smith* decision authorises the state to dominate minority religious groups, and to

---

<sup>259</sup> Peyote is a natural hallucinogenic that is taken by eating part of a cactus plant.

<sup>260</sup> *Smith* (note 258 above) Scalia J, 879.

<sup>261</sup> The negative impact of the *Smith* case would have been reduced in terms of the provisions of the Religious Freedom Restoration Act 1993 Pub L No 103 -141 (Nov 16 1993), 107 Stat. 1488, codified at 42 U S C A 2000bb to 2000-4 (Supp. V 1993).

deprive them of their capacity to exercise their faith freely.<sup>262</sup> The significance of *Smith* was that a limitation of the First Amendment right to freedom of religion could be imposed without any justification. In response Congress passed the American Indian Religious Freedom Amendments Act (1994) in terms of which it is permissible to create religious exemptions.<sup>263</sup>

The Act does not protect the use of cannabis by Rastafarians. The question as to whether the distinction between the two communities constitutes unconstitutional religious discrimination, was previously considered in the case of *State v McBride*.<sup>264</sup> The court distinguished between the two communities on the following three grounds; firstly, peyote was used in limited quantities and during specific ceremonies only; secondly, the abuse of peyote was far less common than the abuse of cannabis; and lastly, the USA had a special duty to respect the cultural integrity of Native Americans, and found the discrimination justified.<sup>265</sup>

In addition, the USA Congress enacted the Religious Freedom Restoration Act (RFRA)<sup>266</sup> which required state and federal governments to justify burdens on the free

---

<sup>262</sup> In this regard see generally L Douglas 'The Many Meanings of Separation' (2003) 70 *University of Chicago Law Review* 1701.

<sup>263</sup> Regarding the protection of Indian religious beliefs, including long hair and braids – see generally J Dalton 'There is nothing light about Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions' (2005) *Brigham Young University Law Review* 1575.

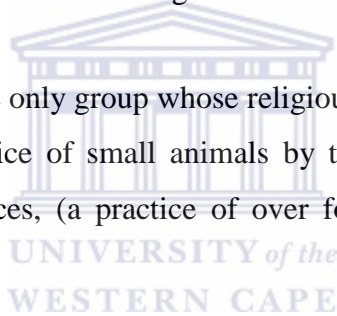
<sup>264</sup> *State v McBride* 955 P 2d 133 (Kan Ct App (1998)).

<sup>265</sup> BC Taylor 'Kansas Denies Religion-Based Defense to Rastafarians on Marijuana Charges.' (1998) 38 *Washburn Law Journal* 307.

<sup>266</sup> Religious Freedom Restoration Act of 1993, 42 USC. The USA congress also passed the International Religious Freedom Act in 1998 in an attempt to protect against international religious persecutions. The Act directs the State Department to prepare annual reports assessing and describing violations of religious freedom in each country. They then evaluate the suggestions brought forward by the USA Commission on International Religious Freedom and of an Ambassador at Large for

exercise of religion by demonstrating that the restriction serves a compelling governmental interest in the least restrictive means possible. In the matter of *City of Boerne v Flores*<sup>267</sup> the USA Supreme Court held that the Religious Freedom Restoration Act only applied to federal institutions, as Congress did not have the capacity to bind the states in such a manner.<sup>268</sup> The RFRA however made an exemption possible for members of the Christian Spiritists who wished to import hoasca, a tea containing a federally proscribed hallucinogen, which, it claimed, facilitated communion. The Supreme Court dismissed the federal Government's submission that no exemption could be granted to accommodate the sect's sacramental use of hoasca. The Court held that the government's failure to grant an exemption to the claimants was inconsistent with their rights under the RFRA.<sup>269</sup>

Native Americans are not the only group whose religious and cultural rights have been restricted. The ritual sacrifice of small animals by the Santeria minority in South Florida at its worship services, (a practice of over four thousand years), has been



---

International Religious Freedom, against which countries the USA president is then capable of imposing penalties as well as sanctions on countries found to be restricting freedom of religion based on the report. In this regard see generally Davis (note 224 above) 233. For an critical evaluation of the International Religious Freedom Act of 1998 see PG 'US Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative' Danchin (2002) 41 *Columbia Journal of Transnational Law* 33.

<sup>267</sup> *City of Boerne v Flores*, 521 US 506 (1997).

<sup>268</sup> For a comprehensive overview of the implementation of religious freedom in USA prisons see generally L Boothby 'Protecting of Freedom of Religion in Restricted or Institutional Settings' in T Lindholm, WC Durham & BG Tahzib-Lie (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 407.

<sup>269</sup> US Supreme Court decision, *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006).

banned by ordinance.<sup>270</sup> In the case of *Church of Lukumi Babalu Aye, Inc v City of Haileah*<sup>271</sup> the Supreme Court while applying the *Smith* test, nevertheless held a city ordinance, that subjected followers of the Santerian faith who engaged in the ritual slaughter of animals subject to criminal punishment, unconstitutional, as it was neither of general application nor neutrally applied. Therefore as a particular religion was being singled out for adverse treatment, the free exercise clause did in this instance provide protection.

In the final instance the applicable test to determine the justifiability of an infringement on the right to manifest religious belief is the test applied in *Smith*. Namely that an apparently neutral and generally applicable rule will not be considered to constitute an unjustified infringement on the right to manifest religious belief.

## 7.6 Canada



The Canadian Charter of Rights and Freedoms (Canadian Charter)<sup>272</sup> is a bill of rights entrenched in the Constitution Act of 1982, and guarantees political and civil rights of the people in Canada.

---

<sup>270</sup> *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 723 F. Supp. 1467, 1469 (S.D. Fla. 1989), *aff'd mem.*, 936 F.2d 586 (11 th Cir. 1991), *cert. granted*, No. 91-948, 1992 U.S. LEXIS 1707 (U.S. Mar. 23, 1992).

<sup>271</sup> *Church of Lukumi Babalu Aye, Inc v City of Haileah* 508 US 520 - Supreme Court, 1993.

<sup>272</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

### 7.6.1 Relationship between state and religion<sup>273</sup>

Unlike the USA or France, where the relationship between the state and religion is prescribed in the Constitutional text, the Canadian Charter contains no explicit limit on government support for religion. Stephenson goes so far as to argue that ‘nothing in the Charter nor Canadian jurisprudence prohibits the advancement of religion per se by the state’.<sup>274</sup>

Judges have however often held that state endorsement of one religion is an infringement of the right to freedom of religion and have argued that state sponsorship of one tradition discriminates against others. Endorsement is said to create an advantage for the dominant religion as well as to impose pressure on minorities to comply with the dominant belief. A case that aptly describes the advantage of state endorsement for the dominant religion is the matter of *R v Big M Drug Mart Ltd.*<sup>275</sup> In *Big M Drug Mart* case the Supreme Court was asked to decide upon the constitutionality of Sunday closing laws. As a result, the Lord’s Day Act of 1906 that prohibited most commercial activity on Sundays was overturned by the Court. The Court held that the right to freedom of religion<sup>276</sup> was violated as the state was imposing a religious viewpoint on those who held different beliefs and therefore

---

<sup>273</sup> For a more detailed history of the relation between church and state in Canada see generally IT Benson ‘The Freedom of Conscience and Religion in Canada: Challenges and Opportunities’ (2007) 21 (1) *Emory International Law Review* 113.

<sup>274</sup> Stephenson (note 42 above) 95.

<sup>275</sup> *R v Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 (*Big M Drug Mart*). Regarding the *Big M Drug Mart* case see generally DM Brown ‘Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights’ (2000) 33 *University of British Columbia Law Review*. 98. See also J Patrick ‘Church, State and Charter Canada’s hidden establishment clause’ (2006) 14 *Tulsa Journal of Comparative & International Law* 27.

<sup>276</sup> Section 2(a) of the Canadian Charter guarantees in that: ‘Everyone has ... freedom of thought, conscience and belief’.

violating the essence of the concept of freedom of religion which is <sup>277</sup> ‘the right to entertain such religious belief as a person chooses, [and] the right to declare religious belief openly and without fear of hindrance or reprisal’.<sup>278</sup>

In the matter of *Zylberberg v Sudbury Board of Education* <sup>279</sup> the anti-establishment principle was extended to public schools in relation to the reading of scripture and prayer at the opening or closing of each public school day. The court held that compelling students to choose not to participate marked them as outsiders and violates their right to be free from participation in religious practices.<sup>280</sup>

### **7.6.2 Constitutional protection of the right to freedom of religion**

The right to freedom of religion is protected in several Canadian Charter provisions.<sup>281</sup> The Canadian Charter in section 2(a) guarantees that: ‘[e]veryone has ... freedom of thought, conscience and belief.’<sup>282</sup>

Section 15(1) of the Canadian Charter prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, sex age or mental disability.<sup>283</sup> Section 27

---

<sup>277</sup> *Big M Drug Mart Ltd.; R.B. v Children’s Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315; Brown (note 275 above) 98-103.

<sup>278</sup> *Big M Drug Mart Ltd.* (note 275 above) 336-37.

<sup>279</sup> *Zylberburg v Sudbury Board of Education* [1988] 52 D.L.R. (4th) 577.

<sup>280</sup> *Ibid* 588-89.

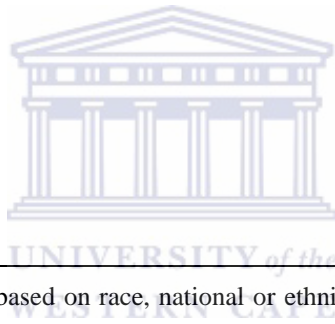
<sup>281</sup> For a more comprehensive overview of the provisions of the Canadian Charter protecting the right to freedom of religion see generally Smithey (note 43 above) 85.

<sup>282</sup> On freedom of religion in Canada see generally R Moon ‘Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms’ (2003) 41(3) *Brandeis Law Journal* 562.

<sup>283</sup> Section 15(1) of the Canadian Charter states that: ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in

emphasises multiculturalism and declares that the Canadian Charter ‘shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians’.<sup>284</sup> Section 27 suggests that religion is included in culture and that the Canadian Charter is aimed at protecting all cultures. The Canadian Charter hence acknowledged that the individual holder of rights has a composite inherited and acquired identity, which the state must respect.<sup>285</sup> From the inclusion of section 27, it is apparent that the Canadian Charter was specifically designed to accommodate ethnic, linguistic and cultural diversity.<sup>286</sup>

### **7.6.3 Definition of religion as a personal and private autonomous choice**



---

particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. In addition to the role played by the Canadian Charter provisions of the Canadian Human Rights Act (R.S., 1985, c. H-6 ) aimed at the elimination of discriminatory practices are also relevant. The purpose of the act is outlined in Section 2(a) which provides: ‘every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted’.

<sup>284</sup> Section 27 of the Canadian Charter declares that the Charter ‘shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.’

<sup>285</sup> In this regard see generally L Weinrib ‘Canada’s Charter: Rights Protection in a Cultural Mosaic.’ (1996) 4 *Cardoza Journal of International and Comparative Law* 395.

<sup>286</sup> For this reason South Africa has relied heavily on the Canadian Charter’s features in drafting its Constitution as to benefit by the combination of guarantees of rights and the provision of a general limitation clause.



It is suggested that through the interpretation of the courts, religion has been moulded in a particular fashion.<sup>287</sup> This suggestion is based on the manner in which the court defined religion in the *Syndicat Northcrest v Amselem*<sup>288</sup> case as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.<sup>289</sup>

From this definition, religion is perceived as comprising of the following elements: first, religion is essentially individual; second, religion is directed towards autonomous choice; and lastly, religion is a private concern. Religion is therefore a personal and private matter and not a community or cultural experience.<sup>290</sup>

This definition of religion as purely an autonomous choice does not adequately reflect the cultural and identity aspect of religion.<sup>291</sup> This non-recognition of the cultural element of religion has further implications for the role of religion in the public sphere. This divide of religion as a private choice fails to acknowledge the cultural significance of religion. Therefore in applying this definition of religion as an essentially private choice, the courts are not acknowledging the cultural and public demands of religion. Berger further contends that this inadequate interpretation of

---

<sup>287</sup> BL Berger 'Law's Religion: Rendering Culture' (2007) 45 (2) *Osgoode Hall Law Journal* 277.

<sup>288</sup> *Syndicat Northcrest v Amselem* (2005) 29 S.C.L.R. In the matter of *Amselem* the right of Orthodox Jews to build *succahs* on their balconies was affirmed. The religious freedom took preference over the condominium agreement that prohibited decorations and constructions on balconies.

<sup>289</sup> *Ibid* 39.

<sup>290</sup> *Ibid* 32.

<sup>291</sup> See generally Berger (note 287 above).

religion has failed to appreciate religion as a culture and has failed to accommodate the cultural claims of religion.<sup>292</sup>

Following a similar line of reasoning, Benson claims that religious belief should be afforded relevance in the public domain.<sup>293</sup> Secular Canada should accordingly be understood to be religiously inclusive rather than exclusive. Benson further claims that this role for religion should be structured according to the principle of cooperation between religion and the state, in which both the state, as well as religion have separate roles. Cooperation will recognise the public dimension of religion in important areas such as education and health care.<sup>294</sup>

#### **7.6.4 Application of the right**

The right to freedom of religion is not absolute and may be subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.<sup>295</sup> Courts have the responsibility to balance certain competing claims. The Supreme Court of Canada has established a test for the application of section 1. This test requires that a limiting law must have a sufficiently important governmental

---

<sup>292</sup> *Ibid.*

<sup>293</sup> IT Benson ‘Taking a Fresh Look at Religion and Public Policy in Canada : The Need for a Paradigm Shift’ (2008) This background paper was commissioned by the Federal Government of Canada’s Policy Research Initiative for a broader study of multi-culturalism.

<sup>294</sup> *Ibid.*

<sup>295</sup> Section 1 of the Canadian Charter reads: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

objective, be rationally connected to that objective and be proportional in its impact on rights, given the importance of the legislative objective.<sup>296</sup>

In determining whether a limit meets the criteria, the legislative goal must constitute a pressing and substantial concern, and furthermore must be proportionate to the effect. Regarding proportionality, the limiting measure must be carefully designed or rationally connected to the objective. Furthermore, the infringement on the right must be in proportion to the legislative object and as least infringing as possible.

The general limitation clause contained in section 1 has brought about a two stage investigation into a limitation imposed on a Charter right. In the first stage the claimant has to show a right and an infringement of such right. In the second stage, the state has to show that the limitation is ‘prescribed by law’ and ‘justified in a free and democratic society’.

The Canadian approach towards religion has been to promote multiculturalism through the state playing a neutral role in accommodating the diversity of religions.<sup>297</sup> In accommodating this diversity the state has to reasonably accommodate the religious belief of minorities in an effort to diminish the imposition of the norms of the dominant majority faith.<sup>298</sup>

---

<sup>296</sup> *R v Oakes*, [1986] 1 S.C.R. 103. *Oakes* requires that (1) the infringing measure has an objective of sufficient importance to warrant overriding a *Canadian Charter* right, and (2) the means chosen are proportional to the objective. In order to assess the second of these criteria, the court must ensure that (a) the means chosen are rationally connected to the objective, (b) the means impair the right as little as possible, and (c) there is proportionality between the effects of the infringing measure and the objective. A failure to prove any of these elements is fatal to the government’s justification and the measure will be deemed unconstitutional.

<sup>297</sup> See generally B Berger ‘The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State.’ (2002) 17 *Canadian Journal of Law and Society* 51.

<sup>298</sup> L Barnett (note 35 above) 26.

### *Accommodating diversity*

A case in which the accommodation of diversity is appropriately displayed is the matter of *Multani v Commission scolaire Marguerite- Bourgeoys*.<sup>299</sup> Following the decision of *Multani* the *kirpan* may be worn at schools as the court found that the *kirpan* ban indeed significantly infringed on Gurbaj Singh's sincerely held religious belief.<sup>300</sup> The decision in *Multani* confirms the opportunity of introducing students to an understanding of diverse cultures and heritages.<sup>301</sup> The court noted that:

---

<sup>299</sup> *Multani v Commission scolaire Marguerite- Bourgeoys*, [2006] 1 S.C.R. 256 (Can.) (*Multani*). The record of the case is as follows: The Quebec Superior Court *Multani (tuteur de) v Commission scolaire Marguerite-Bourgeois*, [2002] J.Q. no. 619 (Que. S.C.), 5, Tellier J granted an interim injunction permitting Gurbaj to wear his kirpan to school under the conditions imposed. In May 2002 Grenier J of the Quebec Superior Court affirmed Gurbaj's right to wear his *kirpan* to school under strict conditions, an acceptable accommodation measure that would render the *kirpan* inoffensive. See *Multani (tuteur de) v Commission scolaire Marguerite-Bourgeois*, [2002] J.Q. no. 1131 (Que. S.C.) 5, Grenier J. The decision was taken on appeal to the Quebec Court of Appeal in *Multani v Commission scolaire Marguerite-Bourgeois* (2004), 241 D.L.R. (4th) 336 (Que. C.A.), 8, Lemelin J (ad hoc), Pelletier and Rochon JJA concurring, allowed the appeal and endorsed the zero tolerance policy on *kirpans*. Following this the Supreme Court overturned the Quebec Court of Appeal's ruling. The majority decided the case applying constitutional law principles. Regarding the case of *Multani* see generally AN Crawford 'Learning Lessons from Multani: Considering Canada's Response Response to Religious Garb Issues in Public Schools' (2007) 36 *Georgia Journal of International and Comparative Law* 159.

<sup>300</sup> The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice. In this regard see *Syndicate Northcrest v Amselem* (see note 288)).

<sup>301</sup> In *Tuli v St. Albert Protestant Separate School* the court found that allowing the *kirpan* would 'provide those who are unfamiliar with the tenet of his faith an opportunity to be introduced to and to develop an understanding of another's culture and heritage'. *Tuli v St. Albert Protestant Separate Sch. Dist. No. 6* [1985] 8 C.H.R.R. D/3906 (Can.) 3906.

[A] total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others.<sup>302</sup>

The court balances the interest at which the ban is aimed at furthering with the infringement on the right to manifest religious belief and finds the infringement disproportionate. In addition the court appreciated the need to promote values such as multiculturalism, diversity, and tolerance, values that would have been suppressed by such an absolute prohibition. Schools that form part of the educational culture have a special duty to seek to develop a culture respectful of the rights of others. The court acknowledged the existence of valid safety concerns but confirmed that banning all potential weapons was not realistic as pencils and baseball bats might serve as weapons too.<sup>303</sup> However where safety is a valid concern, for example during air travel, the *kirpan* has been prohibited,<sup>304</sup> as under these circumstances the infringement was not disproportionate to the aim.

Another example of the accommodation of diversity is illustrated by the decision in the *Hutterian Brethren of Wilson Colony v Alberta*.<sup>305</sup> In this matter the government of Alberta, in terms of an amending regulation,<sup>306</sup> required that every individual who sought a driver's licence had to have a photograph taken. The aim of this requirement was to prevent identity theft, facilitate harmonisation with other provinces and reduce terrorism. Members of the Hutterian Brethren believe that it is a sin to be photographed. The issue for the court to decide was if the requirement could be seen

---

<sup>302</sup> *Multani* (note 299 above) 79.

<sup>303</sup> *Multani* (note 299 above) 46.

<sup>304</sup> *Nijjar v Canada 3000 Airlines Ltd.* [1999] C.H.R.D. No. 3.

<sup>305</sup> *Hutterian Brethren of Wilson Colony v Alberta* 2007 ABCA 160.

<sup>306</sup> Alta. Reg. 320/2002, as amended by Operator Licensing and Vehicle Control Amendment Regulation, Alta. Reg. 137/2003.

as a justified limitation on the Hutterian Brethren religious belief. The Appeal Court confirmed the court *a quo*'s decision that drivers' license cards are not universal, nor are they considered as a form of identification. Therefore the regulation does not serve the objective and the infringement was consequently not justified.

It is clear that the Appeal Court effectively weighs the object that the limitation seeks to address with the infringement of the adherent's belief. The limitation must achieve the object in the least infringing manner, before it can be considered justifiable. The approach of the court is welcomed in that both the right to freedom of religion, as well as the public interest of safety is balanced in a contextual manner.

## **7.7 Conclusion**

A critical assessment of the approaches followed in France, England, Germany, the USA and Canada follows next. In this assessment the manner in which the relationship between the state and religion is structured and the impact thereof on the right to manifest religious belief is evaluated. Thereafter, the way in which the protection of the right to manifest religious belief has been approached by the various courts is evaluated. This evaluation is conducted so as to inform the South African position of best practices. For this reason an appraisal of commendable attributes in the approaches of these five countries is also identified.

### **7.7.1 Critical assessment**

*The need for a case by case approach*

The statutory approach prescribed in terms of the French Law of 2004 denies any opportunity to balance conflicting interests of the right to freedom of religion and the duty to protect the public order in accordance with the principle of secularism. In following this approach the possibility of the conciliation of conflicting interests is not possible and only the values of the principle of secularism are endorsed. This approach fails to appreciate the importance of the right to freedom of religion and that religious freedom is an especially sensitive domain in which a flexible and comprehensive approach is a better solution. The balancing process conducted at the judicial evaluation of the possible justification of a limitation requires, (even if the claim is not accepted by the court), that the existence of the right is acknowledged and an attempt is made to reconcile two conflicting claims.

This unfavourable result is also evident even when no statutory regulation exists and the courts have a consequently have a duty to scrutinise a limiting provision. For example, the jurisprudence of the UK House of Lords and the decision of the USA Court illustrate that the courts did not suitably scrutinise the limiting provisions. In both the *Smith*<sup>307</sup> and *Begum*<sup>308</sup> cases the court did not adequately balance the right to manifest religious belief with the competing interests. In the matter of *Smith* the existence of a generally applicable, neutral law that was not specifically aimed against a particular religious group, was considered by the court not to unjustifiably infringe on the right to freely manifest religious belief. Similarly in the matter of *Begum*, and in the lower court decision of *X v Y*,<sup>309</sup> it was argued that the claimant had a choice which school she wished to attend, and as a result the infringement was voluntary and no further scrutiny of the limiting provision was required. Further, the court in *Begum*

---

<sup>307</sup> *Oregon Department of Human Resources v Smith* 494 U S 872 (1990) (*Smith*).

<sup>308</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (*Begum*).

<sup>309</sup> *R (on the application of X) v Head Teacher and Governors of Y School* [2008] 1 All ER 249 (*X v Y*).

regrettably, although not adjudicating as an international body, continued to apply an approach similar to the international doctrine of the ‘margin of appreciation’ and deferred to the schooling authorities who the court considered best situated to evaluate the appropriateness of uniform requirements. However this ‘deference’ did not allow the court to scrutinise the proportionality of the limitation in seeking to fulfil a legitimate aim as well as furthering a pressing social need.

From the above discussion it can be summarised that the right to freedom of religion is most adequately protected if any limitation thereon is scrutinised on a case by case basis. A statutory approach that does not allow for a case by case analysis is therefore not in the best interest of the right to manifest religious belief. In addition when the court indeed has a duty to scrutinise limiting provisions, the court ought to consider this task with the utmost of consideration. The voluntary nature of a limitation *per se* should not absolve the court from this analysis.

In addition to the need to adequately scrutinise each limitation, on a case by case basis, the following additional factors have been identified which may negatively impact on the ultimate protection afforded to the right to manifest religious belief.

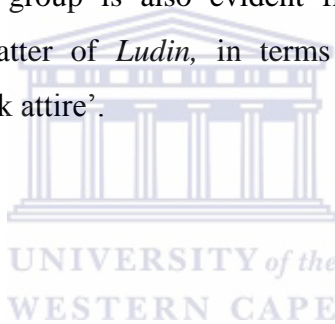
*The interpretation of the concept citizen and the principle of secularism*

In both England and France the need of people of difference to integrate is evident. This requirement is more prevalent in France, as the concept of citizenship is based upon the Republican values which see all citizens as equal and consequently the law does not recognise any differences between citizens. The French and to a lesser extent the English approach is in strong contrast with the approach followed in the USA, Canada and South Africa, where the community is perceived as multicultural and in which the group and culture is placed before individualism.



The manner in which the principle of secularism is interpreted in France is to mean a public space void of religious influence and not a space in which all religions are accommodated equally. This interpretation denies the fact that secularism developed in response to the excesses of religion and resulting religious conflicts as discussed in section 3.3. Further, this interpretation does not acknowledge that a neutral space often bears resemblance to the dictates of the dominant group. For example, the French Law of 2004 implicitly provides for the discrete signs of religious affiliation that are prevalent in the Catholic faith. However, minority religions which prescribe the display of religious symbols are directly affected by the ban. The religious affiliation of the dominant group is also evident from the legislation passed in Germany subject to the matter of *Ludin*, in terms of which a nun's habit was considered to constitute 'work attire'.

*The public – private divide*



The divide between the public and the private is a further factor that negatively impacts on the protection afforded to the right to manifest religious belief. This divide between public and private produces a fragmented consciousness and denies an understanding that religion cannot be restricted to the private sphere as it influences our view on humanity and on the world as a whole. In addition this divide does not advance the opportunity for Muslim women to participate in the public life. It is suggested that the principles of pluralism as well as respect for the rights of others, the right to equality and non-discrimination should endorse the display of the Islamic headscarf-*hijab* in private or public.

The impact of these three factors on the right to freedom of religion and in particular the right to manifest religious belief are further closely related to the manner in which religion is defined.

*Definition of religion as an individual, autonomous choice and a private concern*

Religion is generally defined as an essentially individual, autonomous choice; and a private concern.<sup>310</sup> This approach towards religion as essentially a private choice does not allow for the cultural and public demands of religion to be taken into consideration and to be afforded their full value and effect. It is interesting to observe that religion is defined as an individual, autonomous and private choice in both secular societies as well as communities in which multiculturalism is advanced, such as the UK. In this regard it is important to remember that the notion of secularism, as well as the notion of multiculturalism is embedded in cultural and religious identity. Accordingly, the concept of secularism does not reflect state neutrality towards religion. In addition the concept of a multicultural society is not an indication of a state in which different religious or cultural practices coexist. As both the culture of secularism and the culture of multiculturalism is tied up to French or British culture respectively and therefore associated with Christian culture.

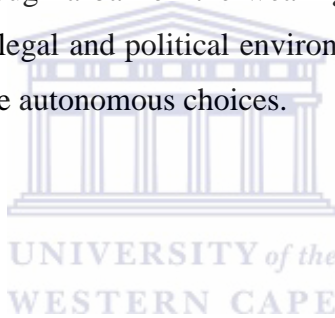
For example, the House of Lords ‘deferred’ to the school authorities, who were of the opinion that the limitation on the right to wear the *jilbab* in *Begum* was necessary to preserve pluralism and the cohesion within the Muslim student population. This approach does not reflect how expressions such as the *jilbab* may indeed enhance pluralism. It is apparent that the stricter interpretation of the Islamic dress as representative of a particular point of view in a multicultural society was not valued.

---

<sup>310</sup> See the discussion of the *Syndicate Northwest v Amselem* (note 288 above).

The manner in which the wearing of the Islamic headscarf is interpreted by the authorities is closely related to the perceived need for integration and uniformity. This expression for integration and uniformity defines how citizens ought to live and dress in the public realm and specifies common values and interests for all citizens. The Islamic headscarf is generally afforded a unilateral meaning in terms of which it has been seen as a sign of inequality and oppression. This one-sided approach is not a true reflection of the diversity of meanings that is attached to the headscarf by those who wear it.

If indeed the autonomous life choices of Muslim women are of concern this cannot adequately be addressed through a ban on the wearing of such dress. A favourable social, economical, cultural, legal and political environment must be created in which women are more able to make autonomous choices.



### 7.7.2 Appraisal

From the above discussion, the inadequacies of the regulatory approach of France, the failure of the House of Lords and the USA Supreme Court to adequately scrutinise the limiting provisions in the decisions of *Begum* and *Smith* have been critiqued. In contrast to these shortcomings discussed above, are the commendable decisions of *Ludin*<sup>311</sup> and *Multani*.<sup>312</sup>

It is exemplary that the Constitutional Court of Germany in the matter of *Ludin* confirmed that the headscarf cannot unilaterally be considered as a sign of suppression

---

<sup>311</sup> *Ludin v Land Baden-Württemberg* Case No 2BvR 1436/02, Judgment of 24 September 2003, (*Ludin*).

<sup>312</sup> *Multani v Commission scolaire Marguerite- Bourgeoys*, [2006] 1 S.C.R. 256 (Can.) (*Multani*).

of women.<sup>313</sup> In addition the Court also confirmed that the religious dress of a teacher does not implicate the neutrality of the state if the state did not instruct the display of such religious dress.<sup>314</sup>

From the Canadian jurisprudence it is commendable that the court in *Multani* does not evaluate the manner in which the adherent interprets the obligations of his faith. The court does not question if this is a ‘mainstream’ interpretation of the requirements of the faith, but merely requires that the adherent must sincerely hold this requirement. In addition the Canadian jurisprudence does not require that the claimant should show that the manifestation is obligatory; voluntary practices are also protected. The court further confirms that to disallow certain practices protection, indicates that these religions and practices, as well as their adherents are less deserving of protection in that:

[A] total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others.<sup>315</sup>

It is argued that the approach followed in the cases of *Ludin* and *Multani* are more in line with the principle of affording the right to manifest religious belief extensive protection. It is imperative that religion is not seen as essentially an individual, autonomous and private choice. The cultural and public demands of religion have to be taken into consideration so that religious rights may be afforded their full value and effect. A secular argument of a neutral public space must be appreciated as reflective of influence of the culture of Christianity and therefore not neutral at all. It is only with awareness of these considerations that the right to manifest religious belief will be afforded true and meaningful protection and development.

---

<sup>313</sup> *Ludin* (note 311 above) 50.

<sup>314</sup> *Ludin* (note 311 above) 54.

<sup>315</sup> *Multani* (note 312 above) 79.

## Chapter 8

### Legal context and application of the right to freedom of religion: South Africa

#### 8.1 Introduction

The South African Constitution<sup>1</sup> is the supreme law of South Africa (SA) and any law inconsistent with the provisions contained therein is invalid.<sup>2</sup> Chapter 2 contains a Bill of Rights which is the cornerstone of the democracy and enshrines the rights of all the people, while affirming the democratic values of human dignity, equality and freedom.<sup>3</sup> The right to freedom of religion is specifically included as a fundamental right of everyone.<sup>4</sup> In addition, the right to freedom of religion is extensively referred to throughout the Constitution.<sup>5</sup>

---

<sup>1</sup> Constitution of the Republic of SA 1996, which was adopted by the Constitutional Assembly on 8 May 1996 and signed into law on 10 December 1996 (herein after referred to as the Constitution of SA).

<sup>2</sup> Section 2 of the Constitution of SA.

<sup>3</sup> See section 7(1) of the Constitution of SA provides: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. The drafting of the SA Constitution was influenced by libertarians focusing on individual liberty while egalitarians emphasised equality as the central value. The tension between a libertarian and an egalitarian approach is also prevalent in the discourse pertaining to the right to freedom of religion and the right to manifest religious beliefs that may be limited.

<sup>4</sup> Section 15 of the Constitution of SA. On an international level SA is a member of the United Nations (UN) and as bound under international law by the Charter of the United Nations, which imposes a duty on all states to promote 'human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. SA has also ratified the International Covenant on Civil and Political Rights (ICCPR), which protects religious human rights in article 18; and the African Charter on Human and

In the brief period since the adoption of a constitutional framework a significant body of jurisprudence has been advanced by the Constitutional Court regarding this right to freedom of religion which will be discussed below. The Constitutional Court's religion jurisprudence has been developed, *inter alia*, in the following cases: *Lawrence v The State and Another*, *Negal The State and Another*, *Solberg v The State and Another*,<sup>6</sup> *Christian Education South Africa v Minister of Education*,<sup>7</sup> *Prince v*

---

Peoples' Rights (African Charter), which provides in article 8 that: 'Freedom of conscience, the profession and free practice of religion shall be tolerated. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms'. See the discussion in section 4.10.

<sup>5</sup> See the Preamble of the Constitution of SA as well as section 3 which includes within the linguistic rights 'Arabic, Hebrew, Sanskrit and other languages used for religious purposes, Section 15 which guarantees the right to freedom of religion', section 16, which contains a general freedom of expression clause, does not apply to advocacy of hatred based on race, ethnicity, gender or religion where it constitutes incitement to cause harm. See also sections 31, 35, 48, 95, 107, 135 and schedule 2 of the Constitution of SA.

<sup>6</sup> *Lawrence v The State and Another, Negal The State and Another, Solberg v The State and Another* 1997 (10) BCLR 1348 (CC) 1997 (4) SA 1176 (CC) (*Lawrence*). This case dealt with religious freedom, contained in section 14 of the 1993 Interim Constitution. The wording of section 14 is similar to the wording of section 15 of the Constitution of SA. The principles regarding section 14 would therefore also apply to section 15 of the Constitution of SA. This matter was an appeal from criminal convictions in terms of the Liquor Act. The Court had to consider whether certain provisions of the Liquor Act, 27 of 1989, that prohibit the sale of liquor on Sundays, were unconstitutional in terms of the provisions of section 14 of the Interim Constitution. The majority of the court held that the provisions were constitutional.

<sup>7</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) 6 (*Christian Education*). The case dealt with a constitutional challenge to section 10 of the South African Schools Act outlawing corporal punishment in schools. The court held that the prohibition limited the individual and community rights of Christian parents and therefore constituted an infringement of section 15 and 31 of the Constitution of SA. However in applying a proportionality analysis and weighing up various factors in the context of the limitations clause, Sachs J in a unanimous decision found the limitation to be justified.

*President, Cape Law Society, and Others*<sup>8</sup> and *MEC for Education: KwaZulu-Natal v Pillay*.<sup>9</sup>

Prior to the commencement of the Interim Constitution,<sup>10</sup> SA followed the principle of parliamentary sovereignty.<sup>11</sup> Accordingly, the courts were tasked with merely

---

<sup>8</sup> *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (*Prince*). This case questioned the constitutional validity of the prohibition on the use or possession of cannabis when its use or possession was inspired by the Rastafarian religion. The majority held that the prohibition restricted the right to freedom of religion but that the limitation was justified. The judgment of the Constitutional Court follows appeals from both the Cape High Court in *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C), in which the Cape Town High Court dismissed the application of Mr Prince to set aside the decision of the Law Society of the Cape of Good Hope. On appeal to the Supreme Court of Appeal confirmed the decision of the High Court, *Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA) and finally referred to the Constitutional Court in *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) in which the court requested further particulars and handed the final decision down in *Prince v President of the Law Society of the Cape of Good Hope*. 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC). Subsequent to the decision of the Constitutional Court, the matter was taken to the African Commission on Human and Peoples Rights. See Decision of African Commission on Human and Peoples' Rights; *Prince v South Africa African Comm Hum & Peoples' Rights*, Comm No 255/2002; (2004) AHRLR 105 (ACHPR 2004) who found no violation. A communication was further addressed to the ICCPR Human Rights Committee (*Prince v South Africa* communication no 1474/2006, views adopted on 31 October 2007 CCPR/C/91/D/1474/2006 14 November 2007). The committee concluded that the communication was admissible, on the merits it ruled that the facts before it did not reveal a breach of articles 18, 26 or 27 of the ICCPR.

<sup>9</sup> *MEC for Education: KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC) (*Pillay*). The case concerns the place of religious and cultural expression in public schools. A school uniform code was challenged in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) with regards to the extent of protection afforded to cultural and religious rights in the public school setting. The court found that the school uniform code did indeed discriminate against the cultural and religious practices of Sunali Pillay.

<sup>10</sup> 27 April 1994.

applying the law and had no power to scrutinise discriminating or restricting legislation. Rights in general, and religious rights in particular, were regulated either in terms of legislation or the common law.<sup>12</sup> Both the common law and statute showed a Christian bias.<sup>13</sup> This Christian bias is still prevalent today and at times may impact negatively on the application of the right to religious and cultural practices. Therefore an appreciation of the history of religious domination is important in understanding the present day approach to the protection of the right to freedom of religion in the South African context. For this reason this chapter will first give a brief overview of the history of religious domination in SA. This will be followed with an overview of both the past and current relationship between the state and religion. It is against this background that the application of the right to manifest religious and cultural practices will be evaluated.

As suggested above, religion in SA has been entwined with the economic, social, and political relations of power that have privileged some, but have excluded many others.<sup>14</sup> The history of Christian dominance commenced during the period of

---

<sup>11</sup> Section 34(3) of the Republic of SA Constitution Act 110 of 1983 determined that the courts could merely comment on whether the procedural requirements of an act had been met.

<sup>12</sup> SA's common law originated from Roman-Dutch law, and was further influenced by English law as well as the jurisprudence of the courts. For a general overview of religious human rights in SA before and shortly after the first democratic elections in 1994 see generally LM du Plessis 'Religious Human Rights in South Africa' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 441; see generally LM du Plessis, 'Religion, Law and State in South Africa' (1997) 4 *European Journal for Church and State Research* 221.

<sup>13</sup> For a detailed overview of the privileged relationship between the state and the Dutch Reformed Church in SA see EE Goodsell 'Constitution, Custom, and Creed: Balancing Human Rights Concerns With Cultural And Religious Freedom in Today's South Africa' (2007) *Brigham Young University Law Review* 109.

<sup>14</sup> D Chidester *Religions of South Africa* (1992) 11.



colonialism and was further entrenched through Christian missionary endeavours.<sup>15</sup> As a result SA was subjected to comprehensive Christian control.<sup>16</sup> The domination of the Christian Protestant faith in particular brought about many incidents of conflict and tension as will be discussed next.

## 8.2 History of religious domination and conflict

The permanent presence of Christianity in SA can be traced to the arrival of the Dutch East India Company in 1652. The Cape Colony, under the Dutch East India Company (1652-1795), prohibited any other religion at the Cape besides the Dutch Reformed – Protestant faith.<sup>17</sup> The period of colonialism was combined with a vigorous Christian mission into southern Africa.<sup>18</sup> During the period of control of the government of the Union of SA the Protestant church become particularly powerful.<sup>19</sup> The history of religious conflict in SA therefore is symbolic of, in particular, the domination of the Protestant faith. Examples of discriminatory behaviour against other faiths are plentiful and the following incidents serve as a case in point. Permission to build the first Muslim mosque was only granted in 1798.<sup>20</sup> The recognition of religious pluralism was extended when permission was granted to build the first Catholic church in 1822,<sup>21</sup> followed by the first Hindu temple in 1868.<sup>22</sup> Traditional African

---

<sup>15</sup> *Ibid* 13.

<sup>16</sup> *Ibid*. At the same time European Christianity itself became the endorsed worldview in Africa. In this regard see Chidester (note 14 above) 37. In addition missionary teachings undermined the political authority of chiefs and subverted the social order of African societies. See Chidester (note 14 above) 44.

<sup>17</sup> Chidester (see note 14 above) 14.

<sup>18</sup> *Ibid* 13.

<sup>19</sup> *Ibid* 14.

<sup>20</sup> *Ibid* 151.

<sup>21</sup> *Ibid* 150 -51.

religion too was not left untouched from the influence of Christian domination, as the Christian mission became a space for the endorsement of a particular European Christian worldview in Africa.<sup>23</sup> The influence thereof on traditional African religion is evident from movements such as the Zion Christian Church.<sup>24</sup>

The bias towards other faiths was also prevalent in the actions of the local authorities. For example, in 1856, municipal authorities in Cape Town banned the annual religious festival of *Khalifa* (also known as *Ratiep*) as ‘dangerous to the law and peace of the community’.<sup>25</sup> During the festival Muslim devotees enacted a show that included self-torture by way of sticking sharp spears or swords through their bodies. The banning of the *Khalifa* festival initiated a new period of government interference in the religious practices of the Islamic community in the Cape.<sup>26</sup>

Sacred burial sites of the Muslim population in Cape Town were also disturbed. In 1857 a Bill<sup>27</sup> was proposed in terms of which burial sites in the city would be removed from the control of religious organisations. Objections of religious groups in the city defeated the proposed legislation. In terms of the Public Health Act of 1883, the Cape Town municipality took action to regulate Muslim burials and the ensuing municipal closing of a Muslim sacred site resulted in a mass demonstration of protest in January 1886.<sup>28</sup>

---

<sup>22</sup> *Ibid* 151.

<sup>23</sup> *Ibid* 37.

<sup>24</sup> *Ibid* 14.

<sup>25</sup> *Ibid* 162.

<sup>26</sup> *Ibid* 163.

<sup>27</sup> The Cape Town Cemeteries Bill of 1857.

<sup>28</sup> Chidester (note 14 above) 164.

In addition to disputes regarding acceptable burial rites and festivities, conflict over health care was also evident. These conflicts all were representative of the larger difference of opinion between two different religious ways of life.<sup>29</sup> Healthcare measures aimed at combating the epidemics of smallpox were developed by the Municipality of Cape Town in the early 1800s. Measures included vaccinations, isolation in hospitals, and sanitation measures. In particular the need to vaccinate caused tension as most Muslims refused to have their bodies pierced by vaccination.<sup>30</sup>

Similar prejudice was also displayed against other religions. For example, in 1912 a South African court ruled that all polygamous marriages, permitted in both Hindu and Muslim practice, were illegal in SA.<sup>31</sup> In 1930 immigration restrictions and quotas were imposed on the entry of eastern European Jews.<sup>32</sup> DF Malan who later became Prime Minister of SA declared that:

Anti-Semitism formed part of an Afrikaner nationalist ideology that promised power and purity to a white, Christian, Afrikaans-speaking nation.<sup>33</sup>

UNIVERSITY of the  
WESTERN CAPE

---

<sup>29</sup> *Ibid.*

<sup>30</sup> See generally A Davids 'The Revolt of the Malays: A Study of the Reactions of the Cape Muslims to the Smallpox Epidemics of the Nineteenth Century Cape Town' (1983) 5 *Studies in the History of Cape Town* 55.

<sup>31</sup> See generally A Kerr 'Back to the Problems of a Hundred or More Years Ago: Public Policy Concerning Contracts Relating to Marriages that are Potentially or Actually Polygamous' (1984) 101 *South African Law Journal* 445. Regarding the illegality of Muslim marriages see *Esop v Union Government (Minister of the Interior)* 1913 CPD 133. In which it was stated that: 'Mariam is in law the concubine and not the wife of the applicant'. Consequently numerous Indian wives were reduced to concubines. Gandhi interpreted the judgement to imply that all marriages not concluded in terms of Christian rites were null and void. In this regard see generally W le Roux 'Conscience against the law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as practising lawyers during the struggle' (2001) XXXXII *CODICILLVS* 36.

<sup>32</sup> Chidester (note 14 above) 180.

<sup>33</sup> *Ibid.*

Further examples of prejudice that had an influence on religious diversity include for example the Bantu Education Act of 1953, in terms of which education was segregated according to racial groups. The government in an attempt to assume greater national control over education<sup>34</sup> cut state subsidies to the Catholic mission schools that at the time were largely responsible for the education of black learners.<sup>35</sup> This reduction in spending impacted negatively on the mission undertakings of the Roman Catholic faith.

In addition to the domination of the Protestant faith over Islam, Judaism and Catholicism, it has been contended that imperial religions and in particular missionary or proselytising religions such as Christianity or Islam further violated the communal expressions of traditional African religions<sup>36</sup> and individual conscience of Africans. African tradition and religion were subverted and in this manner Africans have been deprived of essential elements of the humanity.<sup>37</sup> This paternalistic approach deemed, for example, African dances, marriage ceremonies and actions of worship as incompatible with Christianity. Through a process of continued acculturation African religions have in many instances suffered harm or destruction.<sup>38</sup>

---

<sup>34</sup> *Ibid* 157-8.

<sup>35</sup> *Ibid*.

<sup>36</sup> This paternalistic approach was not only directed towards African religions but targeted in the field of medicine, politics and economics. MW Mutua 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 417,428.

<sup>37</sup> Mutua (note 36 above) 418. See also generally JS Pobee 'Africa's Search for Religious Human Rights Through Returning to the Wells of Living Water' in JD van der Vyver & J Witte Jr *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 391.

<sup>38</sup> Mutua (note 36 above) 419. For an differing perspective see generally L Van der Poll 'The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective' (2009) 13(2) *Law, Democracy & Development* 1.

All of the above incidents illustrate the detrimental effect of dominance of one faith over another. This dominance may be further entrenched in the relationship between the state and religion, a discussion on which follows next.

### **8.3 Historical relationship between the state and religion**

The relationship between the state and religion as indicated previously<sup>39</sup> has a direct impact on the degree to which the right to freedom of religion is protected. As a general rule it is premised that the state should be neutral towards religion. In displaying a neutral disposition it is reasoned that the state will not favour or disfavour any religion and will therefore treat all religions the same. This approach is claimed to ensure extensive protection of the right to manifest religious belief.<sup>40</sup>

For the first phase of colonialism in SA the Dutch Reformed Church was legally established by the government as the only permitted religious organisation in the Cape until 1778.<sup>41</sup> During the rule of the Batavian Republic in 1804 Commissioner General de Mist issued an edict of religious toleration. According to De Mist's *Kerkenordre* equal protection of all religions is provided in that '[a]ll religious societies, which for

---

<sup>39</sup> See section 3.4

<sup>40</sup> See section 3.7.

<sup>41</sup> Chidester (note 14 above) 77. Chidester also states that although Catholics, Muslims, and others lived in the Cape colony, they were prohibited from practicing their religions in public. The exclusion of, in particular, the Catholic faith from the Cape Colony was directly related to the European religious conflict as discussed in section 2.2. In this regard see Chidester (note 14 above) 148. At this time the religion of slaves was determined in terms of an ordinance (1770) that prohibited the buying or selling slaves who had converted to Christianity. In light of this prohibition, slave-owners excluded their slaves from Christian conversion or baptism in order to retain property rights over them. In this regard see Chidester (note 14 above) 35. See generally P Coertzen 'Freedom of religion in South Africa: Then and now 1652 – 2008' (2008) 29 (2) *Verbum Et Ecclesia Journal* 345.

the furtherance of virtue and good morals worshipped an Almighty Being, are to enjoy in this colony equal protection from the laws'.<sup>42</sup> Under British rule, from 1806, the Earl of Caledon in 1806 too was given instructions from London to continue with the practice of religious toleration:

[T]o permit liberty of conscience and the free exercise of religious worship to all persons who inhabit or frequent the settlement provided they be contented with a peaceful enjoyment of the said, without giving offence or scandal to the government.<sup>43</sup>

The Union of SA<sup>44</sup> and the subsequent Republic did not provide for an established church; however the state was biased towards the Protestant - Calvinist tradition as displayed through the relationship between the state and religion.<sup>45</sup> This predominant Afrikaner religion was promoted in particular in the three Afrikaans churches,<sup>46</sup> which offered religious justification for the ideology of apartheid.<sup>47</sup>

---

<sup>42</sup> As ordered by commissioner-general De Mist's *Kerkenordre* of 1804 which allowed only for religious ceremonies and public gatherings of religions that were in existence when the Batavian Republic won control over the Cape Colony. In this regard see JD van der Vyver (1986) 'Religion' in WA Joubert and TJ Scott (eds) *LAWSA* volume 23 paragraph 225.

<sup>43</sup> Chidester (note 14 above) 150.

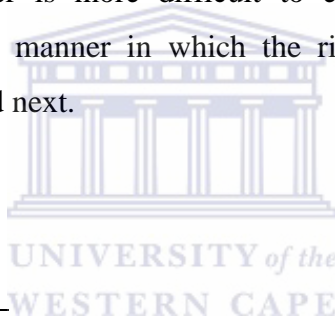
<sup>44</sup> (1910 – 1961).

<sup>45</sup> See generally JD van der Vyver 'Constitutional perspectives of Church –State relations in South Africa' (1999) *Brigham Young University Law Review* 635; GE Devenish 'Freedom of religion, belief and opinion' (1995) 16(1) *Obiter* 15.

<sup>46</sup> The '*Hervormde Kerk* (Dutch Reformed Church), the '*Nederduitsch Hervormde Kerk*' and the '*Gereformeerde Kerk*'. See Chidester (note 14 above) 79.

<sup>47</sup> GC Oosthuizen *Religion, Intergroup Relations and Social Change in South Africa. Work Committee: Religion, Human Science Research Council (HSRC) Investigation into Intergroup Relations* (1985) 38 – 40. Examples of this include the Prohibition of Mixed Marriages Act, Act 55 of 1949 which prohibited marriages between couples from different race groups; the Immorality Amendment Act 21 of 1950; Sexual Offences Act 23 of 1957; the Group Areas Act 77 of 1957; and the Native Laws Amendment Act 36 of 1957 with the so-called church section (section 29(c) in terms of which non-whites could be prohibited from attending church services in white areas). Religion and elements thereof were controlled by the policies of the government.

A close relationship between the Dutch Reformed Church and the state continued in the Union of SA, particularly when the National Party government came to power in 1948.<sup>48</sup> The National Party was resolute that its programmes of Christian Afrikaner nationalism were consistent with Christianity.<sup>49</sup> The National Party government's Constitution of 1983 declared that SA was a Christian country, endorsing a particular Protestant, national understanding of Christianity.<sup>50</sup> This bias was finally addressed with the passing of the Interim Constitution of the Republic of SA 1993<sup>51</sup> and confirmed in the Constitution of the Republic of SA 1996.<sup>52</sup> As a result the religious bias towards the Dutch Reformed faith would no longer be in accordance with the provisions of the Constitution.<sup>53</sup> The permeation of Protestant Christianity into South African tradition is however more difficult to erase and has to some extent continued to impact on the manner in which the right to freedom of religion is protected in SA, as illustrated next.



---

<sup>48</sup> Chidester (note 14 above) 15.

<sup>49</sup> *Ibid.* An initiated separation from the Cape Dutch Reformed Church resulted in the formation of a new church, the *Nederduitsch Hervormde Kerk*. The constitution of the *Nederduitsch Hervormde Kerk* specifically excluded blacks from membership. In this regard see generally See Chidester (note 14 above) 79. This racial division of the Dutch Reformed Church continued throughout the twentieth century. Eventually, the church was divided by racial classifications into four separate churches: the white *Nederduitse Gereformeerde Kerk*, the *Sendingkerk*, the NGK in Africa, and the Indian Reformed Church. The clergy of the Dutch Reformed Church played an active role in formulating the doctrine and policy of apartheid. See generally Chidester (note 14 above) 82.

<sup>50</sup> Chidester (note 14 above) 148.

<sup>51</sup> Section 14 of the Interim Constitution.

<sup>52</sup> Section 15 of the Constitution of SA.

<sup>53</sup> In this regard see generally P Coertzen (note 41 above) 345; P Coertzen, 'Christian freedom and freedom of religion with reference to the South African constitution (1996)' (2005) 46 (3/4) *Dutch Reformed Theological Journal* 351.

#### 8.4 Current relationship between the state and religion: *Lawrence v The State*

As discussed previously, international norms do not prescribe the existence of any specific juridical relationship between the state and religion<sup>54</sup> and are intended to accommodate diverse religious arrangements ranging from an established church on the one hand, to a secular state on the other.<sup>55</sup> In the Constitution there is no strict separation to be found between the state and religion<sup>56</sup> and the insertion of a provision similar to the United States of America's (USA) 'establishment clauses'<sup>57</sup> that creates a 'wall of separation' was rejected by the drafters of the Constitution.<sup>58</sup> SA, in

---

<sup>54</sup> See Section 6.1.

<sup>55</sup> See section 3.5.

<sup>56</sup> In this regard see generally LM du Plessis 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"' (2001) *Brigham Young University Law Review* 439; du Plessis (1996) (note 12 above) 457; JD van der Vyver (note 45 above) 635; du Plessis (1997) (note 12 above) 221; W Freedman 'Church-state relations and the right to religious freedom' (1997) 3 *Tydskrif vir Suid-Afrikaanse Reg* 156; GR McLean 'Freedom of religion and state neutrality: A philosophical problem' (1997) 114 (1) *South African Law Journal* 174; EFJ Malherbe 'Die Grondwetlike Beskerming van Godsdiensvryheid' (1998) 25 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 673; and B Bekink 'The Intrinsic Uneasy Triangle Between Constitutionalism, Secularism and the Right to Freedom of Religion – a South African Perspective' (2008) 3 *Tydskrif vir Suid Afrikaanse Reg* 481.

<sup>57</sup> The phrase 'establishment clause' originates from USA jurisprudence with the constitutional prohibition of the establishment of religion by the state and has been implemented since the 1940's by the USA Supreme Court. The decision in *Everson v Board of Education* 330 US 1 (1946) 18 initiated the wall of separation doctrine in that the court held that: 'The First Amendment has erected a wall between the state and church. That wall must be kept high and impregnable.'

<sup>58</sup> Regarding the intent of the drafters see generally A Sachs *Advancing Human Rights in South Africa* (1992), in which Sachs reminds of the incident in which then President FW de Klerk got into trouble with his supporters for closing his eyes while a Muslim prayer was being said at the Convention for a Democratic SA (CODESA). At CODESA the issue of religious freedom was raised, as to whether SA was a Christian country or a country of many faiths, in which all religions play an equally important role. Sachs further confirms that the approach adopted towards the right to freedom of religion in the



response to its history of discrimination, constructed a new dispensation where considerations of human dignity and equality are supreme. This egalitarian approach set the country on a different course.<sup>59</sup>

The Constitution deals with religion in an equitable manner and the conciliatory preamble to the 1996 Constitution confirms this as follows:

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

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

---

South African Constitution depicts the South African reality. He states that: 'A great majority of South Africans are believers, to whom religion has a deep importance. Religion goes well beyond a question of faith; it is part and parcel of our culture. Believers and non-believers sing *Nkosi Sikelel' iAfrika* - God Bless Africa - with equal passion. The South African Constitution recognises the autonomous spheres of religion and the state, but allows for co-operation between them, rather than absolute separation, while giving no religion a preference over the other'. A Sachs (note 58 above)180. See also generally W Freedman 'The Right to Religious Liberty, the Right to Religious Equality and section 15(1) of the South African Constitution'(2000) 11 (1) *Stellenbosch Law Review* 99 and L du Plessis and H Corder *Understanding South Africa's Transitional Bill of Rights* (1994).

<sup>59</sup> See generally van der Vyver (note 45 above) 671. See generally also K Henrard 'The accommodation of religious diversity in South Africa against the background of the centrality of the equality principle in the new constitutional dispensation' (2001) 45 (1) *Journal of African Law* 51.

May God protect our people. *Nkosi Sikelel' i Afrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*<sup>60</sup>

The Preamble acknowledged the 'injustices of the past', reiterates the need for healing the 'divisions of the past' and seeks to build a 'united and democratic South Africa'. At the end reference is made to the blessing contained in the national anthem, which is once again included in the Postamble, '*Nkosi Sikelel' i Afrika*' (God bless Africa).

According to Sachs the Constitution affirms a secular state, but with religion, in terms of which secular does not mean to be anti-religious, but that there is no official religion, nor favouring of one denomination over another, nor discriminating against non-believers.<sup>61</sup> This point of view is confirmed by du Plessis who states that tolerance of religious diversity entails 'even-handed treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting

---

<sup>60</sup> Preamble to the South African Constitution. When the Constitutional Court was called upon to certify compliance of the 1996 Constitution with the constitutional principles specified in the Interim Constitution, petitions were submitted to the Court raising objections to the preambular references to deity. The Court did not invite the concerned petitioners to submit oral arguments, and indeed did not deal with their objections in the certification judgments. See *In re Certification of the Amended Text of the Constitution of the RSA*, 1997 (1) BCLR 1 (CC); *In re Certification of the Amended Text of the Constitution of the RSA*, 1996 (10) BCLR 1253 (CC). The multiple references to 'God' in the Post- and Preambles of the national Constitutions according to Heyns and Brand are not references to a particular god and consequently only supports (theistic) religion in general and is not necessarily support for a particular religion. In this regard see C Heyns & D Brand 'The Constitutional Protection of Religious Human Rights in Southern Africa' (2000) 14 *Emory international Law Review* 699, 705.

<sup>61</sup> Sachs (note 58 above)180.

interests'.<sup>62</sup> In this regard it can be argued that SA generally follows an accommodationist approach towards religion as discussed previously.<sup>63</sup>

Religion is dealt with under the freedom of religion provisions contained in section[s] 15<sup>64</sup> and 31<sup>65</sup> as well as the equality provisions and education provisions in section[s] 9<sup>66</sup> and 29<sup>67</sup> respectively. Section 15(2) allows for the conduct of religious

---

<sup>62</sup> du Plessis (note 56 above) 439. See generally also Heyns & Brand (note 60 above) 751; see also C Heyns & D Brand 'The Constitutional Protection Of Religious Human Rights In Southern Africa' (2000) 33 *Comparative and International Law Journal of Southern Africa* 53; see also Bekink (note 56 above) 481.

<sup>63</sup> See section 3.6. In this point of view this study is supported by Heyns & Brand (note 62 above) 53 who describe the South African government as 'accommodationist' in its approach to religious groups: it may support such groups, as long as its support is fair and even-handed and it has a valid reason for doing so.

<sup>64</sup> Section 15 (1) of the Constitution of SA provides that: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion'. For a general discussions of the right to freedom of religion and the application thereof in South Africa, see P Farlam 'Freedom of religion, conscience, thought and belief' in S Woolman et al (eds) *Constitutional law of South Africa* (2006); I Currie & J de Waal *The Bill of Rights Handbook* (2005).

<sup>65</sup> Section 31(1) of the Constitution of SA provides that: 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community: a) to enjoy their culture, practise their religion and use their language; and b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. Section 31(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.

<sup>66</sup> Section 9(1) of the Constitution of SA guarantees equality before and equal protection of the law subject to remedial action 'to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. Section 9(3) then proscribes unfair discrimination 'against anyone on one or more grounds' and lists a number of grounds explicitly. Included in this list are culture, religion, conscience, and belief.

<sup>67</sup> Section 29(1) of the Constitution of SA provides that: "Everyone has the right -(a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible'.

observances at state or state-aided institutions, provided that they take place on an equitable basis, rules made by appropriate public authorities are followed and attendance at them are free and voluntary.<sup>68</sup> The right to establish and maintain, at own expense, independent educational institutions, including, for instance religiously and/or denominationally specific schools, is entrenched in section 29(3). Such institutions may not discriminate on the basis of race, must be registered with the state and must maintain standards not inferior to those at comparable public educational institutions. Section 15(3) of the Constitution authorises legislation recognising marriages concluded under systems of religious personal or family law. Both of these sections contain specific limitation provisions that require the weighing of interests and do not merely provide for the full recognition of religious interests over secular interests.

From the above it is clear that the Constitution does not prohibit a relationship between the state and religion. On the contrary, it can be said that the relationship between the state and religion displays the following characteristics: firstly, the state displays at the least an even-handed approach<sup>69</sup> and at the best constructive coexistence towards religion.<sup>70</sup> Secondly, the state acts free from coercion or constraint towards religion;<sup>71</sup> and finally, the state is assigned with the duty to respect, protect, promote and fulfil<sup>72</sup> the right to freedom of religion. Each of these characteristics are discussed next.

---

<sup>68</sup> The requirement of an 'equitable basis' is subject to differing interpretations. For a discussion on the different opinions see G van der Schyff *The Right to Freedom of Religion in South Africa* (2001) LLM Thesis Randse Afrikaanse Universiteit 189 onwards.

<sup>69</sup> *Lawrence* (note 6 above) as per O'Regan J paragraph 122.

<sup>70</sup> See generally Sachs confirming that collaboration between the secular and religion on matters of mutual concern is advisable. In this regard see Sachs (Note 58 above) 46.

<sup>71</sup> *Lawrence* (note 6 above) as per Chaskalson P, paragraph 92.

<sup>72</sup> Section 7(2) of the Constitution of SA.

### 8.4.1 Even-handed and constructive coexistence

The Constitution foresees peaceful and constructive coexistence between the state and religion against a constitutional background. The requirement of equity as well as the non coercive nature of religious observations is prevalent throughout section 15(2) and 15(3). ‘Evenhandedness’ in official dealings related to religion is a prerequisite of all official actions.<sup>73</sup> This requirement for even-handed action by the state towards different religions is in stark contrast with the pre-constitutional era as indicated previously, and was considered in the matter of *Lawrence*.<sup>74</sup>

In the case of *Lawrence* it was argued by the appellants that the purpose of the prohibition to sell liquor on Sundays was to ‘induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays or, perhaps, to compel the observance of the Christian Sabbath and Christian holidays’<sup>75</sup> and that these provisions were therefore unconstitutional. The court held however that the provisions were not unconstitutional.

Sachs J writing in a separate concurring judgment reflects on the absence of state neutrality in the pre-constitutional era.<sup>76</sup> He points toward numerous statutory provisions which clearly sided with Christian faith as well as the imposition of

---

<sup>73</sup> See generally van de Vyver (note 45 above).

<sup>74</sup> *Lawrence* (note 6 above) as per O’Regan J paragraph 122.

<sup>75</sup> *Lawrence* (note 6 above) as per O’Regan J paragraph 85.

<sup>76</sup> *Lawrence* (note 6 above) as per O’Regan J paragraph 149. Van der Vyver confirms this religious favoritism which in essence held that the coupling of Sundays, Good Friday and Christmas Day as ‘closed days’ for the purpose of a grocer’s wine license amounted to endorsement by the state of the Christian Sabbath. JD van der Vyver ‘The Contours of Religious Liberty in South Africa’ (2007) 21 *Emory International Law Review* 77, 99.

Christian values on the regulation of society and the development of law, in particular family law and the validity of marriage.<sup>77</sup>

Another case in which the court was tasked with balancing the secular with the sacred was the matter of *Minister of Home Affairs & Another v Fourie*.<sup>78</sup> The court found both the Marriage Act<sup>79</sup> and the common law definition of marriage unconstitutional as they both discriminated against homosexual couples. In reaching this decision Sachs J offered a balanced understanding of the public realm as a sphere of ‘co-existence’ in which there ought to be mutually respectful co-existence between the secular and the sacred.<sup>80</sup> The function of the court is to recognise the sphere which each inhabits and not to force the one sphere into the other. An open and democratic society should accommodate and manage difference in a reasonable and fair manner, allowing different concepts to inhabit the same public realm in a way that shows equal concern and respect for all.<sup>81</sup>

In the context of *Fourie* the court held that the right of same-sex couples to enjoy the same status, entitlements and responsibilities of marriage is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex unions.<sup>82</sup> Therefore the claims of same-sex couples cannot be negated by invoking the

---

<sup>77</sup> *Lawrence* (note 6 above) paragraph 151.

<sup>78</sup> *Minister of Home Affairs & Another v Fourie & Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC) 2006 (3) BCLR 355 (CC) (*Fourie*). The *Fourie* matter concerned the common-law definition of marriage, which prohibited marriage between members of the same sex as well as a challenge to the constitutionality of sections of the Marriage Act. The court held that both the Marriage Act and the common law definition of marriage were unconstitutional to the extent that they discriminated against homosexual couples.

<sup>79</sup> Marriage Act, Act 25 of 1961.

<sup>80</sup> *Fourie* (note 78 above) as per Sachs J paragraph 94.

<sup>81</sup> *Fourie* (note 78 above) as per Sachs J paragraph 95

<sup>82</sup> *Fourie* (note 78 above) as per Sachs J paragraph 97.

claims of believers. These different claims do not collide; they co-exist in a constitutional realm based on accommodation of diversity.<sup>83</sup>

In the above judgment Sachs does not only call for a relationship of co-existence between the public sphere and religion, but he further asserts how important impartiality is. This is also confirmed in his dissent in *Lawrence* where Sachs J makes reference to how that:

[A]ny endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.<sup>84</sup>

The language of power is used to illustrate that even ‘apparently harmless provisions’ may have severe implications,<sup>85</sup> in that these apparently harmless provisions ‘convey a message of exclusion’.<sup>86</sup> This exclusion may also send a message that people and their different religions or cultures are not welcome.<sup>87</sup> Sachs goes further and demands not only substantive equality, but also calls for respect, diversity, tolerance and mutual accommodation. This openness coupled with diversity according to Sachs J presupposes that:

[P]ersons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.<sup>88</sup>

---

<sup>83</sup> *Fourie* (note 78 above) as per Sachs J paragraph 94–98.

<sup>84</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 152.

<sup>85</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 153.

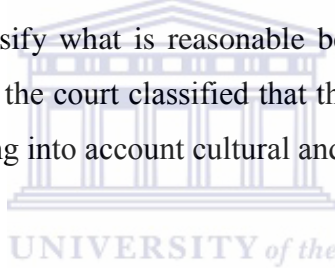
<sup>86</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 170.

<sup>87</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 65, where the Constitutional Court was again tasked with an apparent harmless neutral school uniform code.

<sup>88</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 170.

There is a clear appreciation of difference and the need to accommodate diversity without placing differentiation in a hierarchical framework, in which the state would appear to take sides.<sup>89</sup> In addition to the requirement of evenhandedness, the state's constructive interaction with religion must be free from coercion or may not constrain religious belief. This accommodating stance towards religious difference is supported and it is argued that the application of such an approach will aid in protecting the right to manifest religious belief in a diverse society.

It can be argued that in contrast with the decision of the House of Lords in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*<sup>90</sup> the point of the departure of the Constitutional Court is correct. The court is sensitive to difference and does not classify what is reasonable behaviour. In contrast with the decision in *Fourie* in *Begum* the court classified that the 'school's uniform rules were more than reasonable in taking into account cultural and religious concerns'.<sup>91</sup>



#### **8.4.2 Free from coercion and constraint coupled with equity**

All the rights in the Constitution must be interpreted to promote the underlying values of 'human dignity, equality and freedom'.<sup>92</sup> The values of dignity, equality and freedom enhance and reinforce one another. For example, human dignity has little value without freedom, for without freedom personal development is not possible. To

---

<sup>89</sup> *Lawrence* (note 6 above) paragraph 170.

<sup>90</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (*Begum*).

<sup>91</sup> *Begum* (note 90 above) 11.

<sup>92</sup> Section 7 (2) of the Constitution of SA.



deny people their freedom is to deny them their dignity. Each individual must have the freedom to pursue her own individual ends.<sup>93</sup>

The importance of the value of freedom is confirmed in the *Lawrence* case. Chaskalson P, delivering the majority judgment, makes reference to the definition of freedom of religion in the Canadian case *Big M Drug Mart* where it was stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.<sup>94</sup>

The right to freedom of religion therefore requires an absence of coercion or constraint by the state and the absence of measures that could force people to act in a manner contrary to their religious beliefs.<sup>95</sup> Within the parameters of this definition Chaskalson P held the opinion that the right to freedom of religion can only be impaired under two circumstances, namely if there was coercion to observe the practices of a particular religion or if constraints were placed on the observance of one's own religion by the state. As the relevant provisions of the Liquor Act did not compel any persons *in casu* to observe a certain faith and as these provisions did not 'constrain their right to entertain such religious beliefs as they might choose',<sup>96</sup> they were not inconsistent with the provisions of the Interim Constitution.

Chaskalson P further held that the Interim Constitution does not contain an establishment clause and that such a clause should not be read into the religious liberty provisions. In addition the right to freedom of religion could only be impaired by

---

<sup>93</sup> See S Woolman 'Dignity' in S Woolman et al (eds) *Constitutional Law of South Africa* (2006) 36.

<sup>94</sup> *R v Big M Drug Mart* (1985) 13 CRR 64 97 (*Big M Drug Mart*).

<sup>95</sup> *Lawrence* (note 6 above) as per O'Regan J paragraph 128.

<sup>96</sup> *Lawrence* (note 6 above) as per O'Regan J paragraph 128.

coercive religious endorsement.<sup>97</sup> O'Regan J on the other hand, held that not only coercive state endorsement, but any endorsement of religion by the state, could infringe on the religious liberty guarantees.<sup>98</sup> O'Regan J further observes that voluntariness is not the only precondition and that the observance must be equitable. O'Regan J indicates:

In my view, this additional requirement of fairness or equity reflects an important component of the conception of freedom of religion contained in our Constitution. Our society possesses a rich and diverse range of religions. Although the state is permitted to allow religious observances, it is not permitted to act inequitably.<sup>99</sup>

Chaskalson clearly prefers a narrow definition of the right to freedom of religion, namely that the right is a liberty right. O'Regan, on the other hand prefers a wider definition of the right to freedom of religion, namely as a liberty and an equality right. In terms of this wider definition of the right to freedom of religion, it is not sufficient that the legislature simply refrains from coercion. It is further required that the legislature refrains from favouring one religion over others.<sup>100</sup> This study concurs with the wider definition of O'Regan in terms of which the right to freedom of religion should be defined as both a liberty and an equality right. This approach is also in line with the values which underlie the interpretation of the Constitution, namely the values of human dignity, equality and freedom.<sup>101</sup>

It is therefore contended that the interaction between the state and religion should not violate the duty of the state to non-identification, in terms of which the state has a duty to treat and promote all religious denominations in an equal manner. This approach is

---

<sup>97</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 101.

<sup>98</sup> *Lawrence* (note 6 above) as per O'Regan J paragraph 116.

<sup>99</sup> *Lawrence* (note 6 above) as per O'Regan J paragraph 121.

<sup>100</sup> In this regard see also Freedman (note 58 above) 102 – 08.

<sup>101</sup> Section 39(1) of the Constitution of SA as further discussed in Section 8.4.3.1.

affirmed in the remark of Sachs J who indicates that the identification of the state with one religion, in effect divides the nation ‘into insiders who belong, and outsiders who are tolerated in the multi-faith, heterodox society contemplated by our Constitution’.<sup>102</sup>

Dividing society into insiders and outsiders does not aid in the reconciliation of the nation, as read from the postscript of the Interim Constitution which states that:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.<sup>103</sup>

---

<sup>102</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 179.

<sup>103</sup> Reference made to the importance of the Postscript by Sachs J in *Lawrence* (note 6 above), 147. This historic bridge is encapsulated in the principle of ‘Transformative Constitutionalism’. In this regard see generally KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal of Human Rights* 146. See also H Botha ‘Freedom and Constraint in Constitutional Adjudication’ (2004) 20 *South African Journal of Human Rights* 249, 251. JC Froneman ‘Legal Reasoning and Legal Culture: Our “Vision” of Law’ (2005) 16 (1) *Stellenbosch Law Review* 3, 32. Justice P Langa ‘Transformative Constitutionalism’ (2006) 17 (3) *Stellenbosch Law Review* 351, 353. M Pieterse ‘What Do We Mean When We Talk about Transformative Constitutionalism?’ (2005) 20 *South African Public Law* 155, 161-63. The description of transformative constitutionalism offered by Pieterse incorporates the following ingredients: the attainment of substantive equality, the realisation of

The need for reconciliation to overcome the division of the past emphasises the importance of tolerance and mutual accommodation of diversity.<sup>104</sup> It is argued that through accommodation of this diversity the right to manifest religious belief in a diverse society is best protected.

### **8.4.3 Positive duty to promote**

In addition to requiring an even-handed constructive interaction that is free of coercion or constraint, the state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>105</sup> The duty to respect requires that the state may not violate the right to freedom of religion and should endeavour to respect the full extent of the right to freedom of religion, as envisaged by the Bill of Rights. The duty to protect requires that the state must take steps to prevent violations of the right to freedom of religion. Accordingly, the state has a positive duty to act in the interest of religious freedom by prohibiting religious discrimination by the state and private individuals.<sup>106</sup> The duty to promote and fulfil requires that the state take steps to facilitate the exercise of the right, so that the right to freedom of religion may flourish.

---

social justice, the infusion of the private sphere with human rights standards and the promotion of a 'culture of justification' in public-law interactions.

<sup>104</sup> For a detailed overview of the racial, ethnic and religious diversity of SA see. Goodsell (note 13 above) 114 -115.

<sup>105</sup> Section 7 (2) of the Constitution of SA.

<sup>106</sup> The entrenched rights are not only protected against infringement by organs of the state, but also against infringement by individuals and organisations. Section 8(2) of the Constitution of SA reads as follows: 'A provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

The inclusion of a positive duty to respect, protect, promote and fulfil religious freedom, further affirms that the absolute separation between the state and religion is not envisaged in the Constitution<sup>107</sup> as the state has a duty to promote the right to freedom of religion. In fulfilling the requirement to respect, protect, promote and fulfil the rights in the Constitution certain interpretative duties are encapsulated in the Constitution, which are briefly discussed below.<sup>108</sup>

#### **8.4.3.1 Interpretation of fundamental human rights**

The Constitution requires that religious and other rights be interpreted in context, permeated with the values<sup>109</sup> which are articulated throughout the Constitution. Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must follow a value based approach in that the court ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.<sup>110</sup> Accordingly the interpretation of the Bill of Rights must advance the values enumerated on in section 1 of the Constitution, which include, human dignity,<sup>111</sup> the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism.

---

<sup>107</sup> Malherbe (see note 56 above) 698.

<sup>108</sup> For a more comprehensive discussion of the task of Constitutional interpretation see generally D Davis, M Chaskalson, J de Waal ‘Democracy and constitutionalism: the role of constitutional interpretation’ in D van Wyk, *et al* (eds) *Rights and constitutionalism, the new South African legal order* (1994); JR de Ville *Constitutional and statutory interpretation* (2000); LM du Plessis *Re-interpretation of statutes* (2002); L M du Plessis ‘Legal Academics and the Open Community of Constitutional Interpretation’ (1996) 12 *South African Journal on Human Rights* 214.

<sup>109</sup> The values which are articulated in the Preamble to the Constitution of SA as well as in the founding provisions in chapter 1 (and especially sections 1 and 2) of the Constitution of SA.

<sup>110</sup> Section 39 (a) of the Constitution of SA.

<sup>111</sup> Regarding the interpretation based on dignity see in general LWH Ackermann ‘Menswaardigheid na tien jaar van regstaatlikheid in Suid-Afrika’ (2004) 1 *Potchefstroom Electronic Law Journal* 1; A

Not only must the courts follow a ‘value-based’ approach but section 39(b) further provides that the court ‘must consider international law’.<sup>112</sup> This rule is unconditional. However, the unconditional nature of section 39(b) does not entail that the court must follow international law, but that careful consideration must be given to international law when interpreting the Bill of Rights. International treaties that have been incorporated into South African law must, however, be followed.

The requirement to consider foreign law is not absolute in that section 39(c) provides that the court: ‘may consider foreign law’.<sup>113</sup> In addition to applying a contextual value based approach, the richness of foreign constitutions and the jurisprudence of foreign courts have been consulted to clarify application of the right to freedom of religion in a South African context. Furthermore legislation must be interpreted and the common and customary law developed in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>114</sup>

From the discussion above it can be reasoned that the relationship between the state and religion is a relationship of constructive interaction between religion and the state in which all religions and non-religions are treated with equal respect and concern and in which the state has a positive duty to actively accommodate diversity. It is within this context that the right to manifest religious belief and cultural practices will be evaluated next.

---

Chaskalson ‘The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 *South African Journal on Human Rights* 193, see also H Botha ‘Human Dignity in Comparative Perspective’ (2009) 20 *Stellenbosch Law Review* 171.

<sup>112</sup> See also L du Plessis ‘International Law and the Evolution of (domestic) Human-Rights Law in Post 1994 South Africa’ in J Nijman & A Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (2007) 309-340.

<sup>113</sup> *Ibid.*

<sup>114</sup> See section 39(2) of the Constitution of SA.

## 8.5 The scope of the right to freedom of conscience, religion, thought, belief and opinion

The scope of the right to freedom of conscience, religion, thought, belief and opinion is provided for in the following manner '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'.<sup>115</sup> Therefore belief systems such as agnosticism, atheism and secular humanism enjoy constitutional protection as well.<sup>116</sup> In defining conscience, religion, thought, belief and opinion it is argued that a flexible approach<sup>117</sup> coupled with a broad objective definition<sup>118</sup> of religion is most suitable to

---

<sup>115</sup> Section 15 the Constitution of South Africa 15. Regarding the right to freedom of religion see generally van der Vyver (see note 76 above) 110; Farlam (see note 64 above); S Woolman 'Community rights: Language, culture and religion' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2003), D Meyerson 'Religion and the South African constitution' in P Radan, D Meyerson & R Croucher (eds) *Law and religion* (2005).

<sup>116</sup> This approach is supported by van Dijkhorst J in *Wittmann v Deutscher Schulverein Pretoria*, 1998 (4) SA 423, 449 where he states that: 'The atheist and agnostic is afforded protection under the freedom of thought, belief and opinion part of this section. There is conceptually no room for him under the freedom of religion part.'

<sup>117</sup> In this regard see the argument put forward by L du Plessis 'Doing damage to freedom of religion' (2000) 11 (2) *Stellenbosch Law Review* 295, 304, in which he advocates for a flexible approach to the evaluation of religious beliefs and critiques the court *a quo*'s evaluation in *Christian Education* (note 7 above).

<sup>118</sup> See generally B Dickson 'The United Nations and freedom of religion' (1995) 44 *International and Comparative Law Quarterly* 327. It has been suggested that religious belief may demonstrate some of the following characteristics; a belief in a Supreme being/s; a belief in transcendent reality; a moral code; a worldview that provides an account of humanity's role in the universe and around which individuals organise their lives; sacred rituals, holy days and festivals, worship and prayer; sacred text or scriptures; the existence of a social organisation that promotes the belief system. In this regard see generally the discussion in G van der Schyff 'The Legal Definition of Religion and Its Application' (2002) 119 *South African Law Journal* 288. For a critique on the broad definition of religion as held by Sachs J in the *Fourie* case (note 78 above), in which Sachs J defined religion as inclusive of world-views which people regard as fundamentally important see B Bekink (note 56 above) 481, 497. Bekink

ensuring extensive protection of the right to manifest religious belief. This broad approach is also followed in the international legal context<sup>119</sup> and is supported by Sachs J in the *Christian Education* case when he states that:

This broad approach highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also brings out the fact that freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner contrary to their beliefs. Just as it is difficult to postulate a firm divide between religious thought and action based on religious belief, so it is not easy to separate the individual religious conscience from the collective setting in which it is frequently expressed. Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension and is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial.<sup>120</sup>

The broad approach is therefore not only limited to acknowledging the internal aspect of belief but in appreciating the *forum externum* as well.<sup>121</sup> In addition, this approach appreciates that the right to freedom of religion may be infringed through coercion

---

argues that a definition of religion should not be equated with a world-view of a secular character. This restrictive critique of Bekink is neutralised by CW du Toit 'Religious Freedom and Human Rights in South Africa After 1996: Responses and Challenges' (2006) *Brigham Young University Law Review* 677, 690 where he states that Africans do not recognise a sharp division between the sacred and the secular.

<sup>119</sup> See section 6.2 and 6.3.

<sup>120</sup> *Christian Education* (note 7 above) as per Sachs J 19. For a discussion on the *Christian Education* see generally M Pieterse 'Religious Confusion: *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC)' (2001) 64 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 672.

<sup>121</sup> For a discussion on the recognition of the *forum internum* and the *forum externum* in international law see section 4.3. See also the interpretative guidelines of General Comment 22 discussed in section 4.3.



into acting contrary to a belief or refraining from acting in accordance with a belief.<sup>122</sup> This approach further acknowledges the indivisible nature of religion and the inherent difficulty in separating religious thoughts from religious action as well as the individual and collective processes of religion. The indivisible nature of the right to freedom of religion is confirmed by Langa J in the matter of *Prince* where he mentions that:

[S]ections 15(1) and 31(1)(a) complement one another. Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practice their religion.<sup>123</sup>

Section 31 recognises that people belonging to a cultural and religious community may not be denied the right to enjoy their culture, practise their religion or form, join, and maintain cultural and religious associations, provided that they do so in a manner that is consistent with the other provisions of the Bill of Rights.<sup>124</sup> Part of the recognition is through the body of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, tasked with promoting respect for the rights of cultural, religious and linguistic communities.<sup>125</sup> It

---

<sup>122</sup> For a distinction between coercion and restriction on the right to manifest religious belief see section 6.2.3.2. See also PM Taylor ‘*Freedom of Religion UN and European Human Rights Law and Practice*’ (2005) 133, where he discusses performing acts incompatible with the dictates of a religion, such as taking the oath or the conscientious objection to military service.

<sup>123</sup> *Prince* (note 8 above) as per Langa CJ paragraph 39. For a general discussion on *Prince* see generally P de Vos ‘Freedom of religion v drug traffic control: The Rastafarian, the law, society and the right to smoke the “holy weed”’ (2001) 5 *Law Democracy and Development* 85.

<sup>124</sup> See generally L Du Plessis ‘Religious freedom and equality as celebration of difference: a significant development in recent South African Constitutional case-law’ (2009) 12 (4). *Potchefstroom Electronic Review* 10. See also J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* (2001) 265.

<sup>125</sup> Section 181(1)(c) of the Constitution of South Africa identifies The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CPPRCRLC). Chapter 9 of the Constitution of SA provides for ‘State Institutions Supporting Constitutional Democracy’ and

can therefore be summarised that the right to freedom of religion is entrenched as an individual right, a collective right and an institutional right.<sup>126</sup>

In addition to the entrenchment of the right to freedom of religion in the above discussed provisions of the Constitution, a Charter of Religious Rights for South Africa was entered into in October 2010 by members of churches and religious communities.<sup>127</sup> Of particular relevance are the following rights indentified in the Charter, namely the right to observe and exercise one's religion and the right to religious dignity.

---

sets out a series of institutions one of which is 'the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities'. The institutions are independent and must report their activities to the legislature once a year. Section 185 sets out the functions of the Commission which are listed as being (a) to promote respect for the rights of cultural, religious and linguistic communities; (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association.... The Commission is designed to assist Parliament by reviewing all legislation that might affect one of the interest groups (cultural, religious or linguistic) under its purview.

<sup>126</sup> In this regard see generally A Krishnaswami *Study of Discrimination in the Matter of Religious Rights and Practices* (1960) 20; D Cole 'Perspectives on Religious Liberty: A Comparative Framework' in JD van der Vyver & J Witte Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 1, 29; as well as the collective dimension expressed in various international instruments as discussed in section 4.3.3. The right to freedom of conscience, religion, thought, belief and opinion includes the right to religious autonomy and religious choice, which includes aspects of the relationship between the state and religion, as well as the right to regulate one's own religious affairs through, for example, establishing own bodies or organisations and the rules of these organisations, and the functioning of these religious organisations in the legal world. This study will not provide a comprehensive overview of these components of the right to freedom of religion. In this regards see van der Schyff (note 68 above) 79 onwards.

<sup>127</sup> South African Charter of Religious Rights and Freedoms 21 October 2010 available at <<http://academic.sun.ac.za/theology/religious-charter/>>last accessed on 29 November 2010.

The equality clause further explicitly prohibits unfair discrimination, either directly or indirectly, based on religion, conscience, belief, culture, language and birth.<sup>128</sup> The right to freedom of religion consequently is a right that functions both as a liberty right, on an individual and collective basis, and as an equality right.<sup>129</sup> In view of these approaches, the values of equality and freedom that permeate the Constitution are taken into consideration. The remaining value of dignity however also warrants consideration.

It is important to view the right to freedom of religion in such a way that the indivisible nature of religious thoughts and actions are appreciated. For it is only in following this approach, that the right to manifest religious belief is ensured extensive protection in a diverse society. However, before proceeding with a discussion of right to manifest religious belief, it is important to note that all the rights contained in the Bill of Rights are not absolute and therefore may be limited. The Constitution sets out a general limitations test in section 36. What follows next is a brief evaluation of the general limitations test.<sup>130</sup>

---

<sup>128</sup> Section 9(3) of the Constitution of SA stipulates that: ‘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’.

<sup>129</sup> See Freedman (note 58 above) 100. Such a viewpoint is supplemented by section 9(2) of the Constitution of South Africa, which guarantees the equal enjoyment of all rights and freedoms, and sections 9(3) and (4) of the Constitution of South Africa which prohibits unfair discrimination on the grounds of religion.

<sup>130</sup> For a more comprehensive discussion of the limitation of rights in general see I Currie & J de Waal ‘Limitation of rights’ in I Currie & J de Waal (eds) *The Bill of Rights Handbook* (2005) 163 – 188; H Cheadle ‘Limitation of Rights’ in H Cheadle (et al) *South African Constitutional Law : The Bill of Rights* (2002) 696. Regarding the limitation of the right to freedom of religion in particular see D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997); S Woolman & H Botha ‘Limitations’ in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2009).

## 8.6 Limitation of the right to freedom of religion

As shown above, the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion and that persons belonging to a cultural or religious community may not be denied the right to enjoy their culture or practice their religion in so far as such a practice is not inconsistent with any provision of the Bill of Rights. When considering the diverse nature of communities it is inevitable that a practice that seems benign and natural in the eyes of one adherent might draw out feelings of aversion in another. The question that may arise is the extent to which the personal religious preference of an individual should be tolerated and respected in instances of conflict. For example, should a Muslim girl be required to relinquish her religious practices as a precondition for attending school or are schools obligated to meet her demands through religious accommodation? And further, if accommodation is obliged, to which extent ought the manifestation of religious belief be afforded constitutional protection?

All the rights entrenched in the Bill of Rights may be limited subject to the provisions contained in the general limitations clause<sup>131</sup> or in terms of provisions contained elsewhere in the Bill of Rights.<sup>132</sup> In the event of a limitation, the complainant will have to prove that she is the bearer of the right to freedom of religion and that her right

---

<sup>131</sup> Section 36 of the SA Constitution. A specific limitation clause, applicable to a particular right merely qualifies the general limitation test, with regard to specific aspects and does not replace the general test. The right to observe religious rites, dietary practices or cultivate a religious appearance however, is not subject to a specific limitation clause and accordingly a further discussion of specific limitation clauses is not warranted.

<sup>132</sup> See section 7(3) of the Constitution of SA which states that: 'The rights in the Bill of Rights are subject to limitations contained or referred to in section 36, or elsewhere in the Bill.' For example religious and related rights can also be suspended during a duly declared state of emergency in terms of section 37(4) of the Constitution of SA.

has been violated. This forms part of the first stage of the two staged approached enquiry.<sup>133</sup>

It is contended that it is not the function of the court to pronounce on the truth or credibility of a religion. In addition, the two-way approach followed by the High Court in *Christian Education*<sup>134</sup> in establishing the applicability of section 15 is a sound approach. This approach consists of both an objective and a subjective component. The objective component requires that the belief or doctrine relied upon qualifies as a religion while the subjective component requires that the claimant sincerely believes in the religion. The subjective component of religion is best illustrated by the following extract of the *Prince* case:

Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.<sup>135</sup>

---

<sup>133</sup> Currie and de Waal (note 130 above) 163, 166.

<sup>134</sup> *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE); 1999 (9) BCLR 951 (SE).

<sup>135</sup> *Prince* (note 8 above) as per Ngcobo J paragraph 42. The approach in *Prince* is in contrast with the matter of *Dlamini and Others v Green Four Security* (2006) 27 ILJ 2098 (LC) and confirmed in *Dlamini & others v Green Four Security* CCPR/C/91/D/1474/2006 14 November 2007. In *Dlamini* the claimants belonged to the Baptised Nazareth Group which, they submitted, did not allow them to trim their beards. As a result they were dismissed for failing to comply with uniform requirements of the employer. The Court concluded that the rule that security guards should be clean-shaven did not differentiate amongst employees. The applicants had failed to prove that the no shave rule was an essential tenet of the Nazareth faith and therefore found no discrimination based on religion. For a

Once the claimant has successfully proven that her right to freedom of religion has been infringed, the violator is required to show a justification for the infringement in the second stage of the analysis.<sup>136</sup> If the infringement cannot be justified the religious practice will have to be accommodated. Legal acceptance or accommodation depends on a variety of factors,<sup>137</sup> but is most often rooted in a constitutional proportionality test that balances the right to freedom of religion against the possible impairment as discussed under the limitations provisions discussed next.

### 8.6.1 General limitations test

As indicated above in the first stage of the limitations analysis the claimant needs to establish that a sincerely held religious belief has been infringed. Following this, the violator will have to prove that the infringement is constitutionally justified in terms of the requirements of the general limitations test. Section 36, the general limitations test provision, reads as follows:

The rights in the Bill of Rights may be limited only in terms of a 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 and purpose of the limitation;
- (c) the nature and extent of the limitation;

---

more detailed discussion of the matter see A Govindjee ‘Beards, Nose Studs and Questions of Religion and Equality: *Pillay v KwaZulu-Natal MEC of Education and Others; Dlamini & others v Green Four Security*’ (2007) 28 (2) *Obiter* 357, 373. The approach of the court in *Dlamini* is in contrast with the position of the court in *Pillay*, in which the court did not question the centrality of the belief of the nose stud to the cultural practices.

<sup>136</sup> Currie and de Waal (note 130 above) 163, 166.

<sup>137</sup> Reasonable accommodation is discussed in more detail in section 8.6.2.

- (d) the relation between the limitation and its purpose, and
- (e) less restrictive means to achieve the purpose.

Only a law of general application may therefore limit the right to manifest religious belief. In addition the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The justification represents the substantive test<sup>138</sup> which implies that a balance between the limitation and its purpose worthy of a democratic society be reached, known as the so-called proportionality test.<sup>139</sup> In terms of the proportionality test a democratic society takes cognisance of the position of the individual and the virtues of tolerance and religious diversity. This process of weighing competing interests and rights in evaluating the constitutionality of an infringement of the right to freedom of religion does not occur in a vacuum, but takes place against the background of a tolerant, diverse and democratic society. The process of balancing and evaluation takes place mindful of past injustices. The balancing process is aptly summarised as follows:

In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.<sup>140</sup>

---

<sup>138</sup> N Smith 'Freedom of religion under the Final Constitution' (1997) *South African Law Journal* 217, 223.

<sup>139</sup> See *S v Makwanyane*, 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), 104 in which Chaskalson P held that section 36(1) requires 'the weighing of competing values, and ultimately on an assessment based on proportionality.' It was in the matter of *S v Makwanyane* that the death penalty was declared unconstitutional. See also *Lawrence* (note 6 above) as per O'Regan J paragraph 130, *Christian Education* (see note 7 above) as per Sachs J paragraph 31–35, 50–51.

<sup>140</sup> *S v Bhulwana*, *S v Gwadiiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC), concerning the constitutionality of the presumption contained in section 21(1)(a)(I) of the Drugs and Drug Trafficking Act.

Section 36 contains a set of relevant factors that need to be taken into consideration when determining the reasonableness and justifiability of a limitation. What follows next is a brief consideration of the five factors listed in section 36 (1) (a) – (e). These factors are aids to assist in the application of the general substantive limitation test as discussed above.

*(a) The nature of the right*

The nature of the right of religious liberty is unmistakably evident from the unanimous decision of the Constitutional Court in the *Christian Education* matter as written by Sachs J:

There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.<sup>141</sup>

---

<sup>141</sup> *Christian Education* (note 7 above) as per Sachs J paragraph 36. Also included in *Prince* (note 8 above) as per Sachs J paragraph 151.



From the above quotation in the *Christian Education* case, the nature of the right to freedom of religion is seen as one of the ‘key ingredients’ of a person’s dignity. Furthermore the quotation refers to both the ‘community’ and the ‘social stability’. It is argued that this reference is indicative of the interrelated nature of the right to religion and culture. Therefore the importance of the right to freedom of religion is especially evident in the relationship between the person and her community.<sup>142</sup> In light of the above discussed importance of the nature of the right to manifest religious belief, it is evident that the purpose of the limitation would therefore need to be in proportion to the importance of the nature of the right.

*(b) The importance and purpose of the limitation*

The purpose and importance of the limitation must be established and measured against an open democratic society based on human dignity, equality and freedom. This requirement supports the weighing of competing values and interests. In light of the importance attached to the right to freedom of religion, it is clear that the limitation would need to address an equally important goal. In addition, the right to freedom may only be limited in pursuit of a legitimate goal. The following goals could possibly serve as ground for limitation of the right, ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’.<sup>143</sup>

The limitation should be ‘necessary’ in an open and democratic society based on religious tolerance which seeks to promote the utmost enjoyment of the right to religious freedom.<sup>144</sup> In addition, the importance of the limitation could influence the

---

<sup>142</sup> See discussion on religion and culture in section 8.7.

<sup>143</sup> See article 18 (3) or the ICCPR as discussed in section 4.3.1.

<sup>144</sup> Smith claims that ‘Perhaps one can simply say that it would be unreasonable to limit freedom of religion in an open and democratic society unless it was really necessary.’ See Smith (note 138 above) 217, 223.

strictness of the application of the substantive limitation test.<sup>145</sup> Following an examination of the purpose and importance of the nature of the right *vis a vis* the importance and purpose of the limitation the following enquiry is directed at evaluating the nature and extent of the limitation.

*(c) The nature and extent of the limitation*

The nature and extent of the limitation refers to the means of limitation and the manner in which the limitation is employed. The nature and extent of the limitation is important in determining the possibility of less restricting ways in which the goal could be achieved. For example, in the matter of *Prince*<sup>146</sup> the Constitutional Court held that the importance of the limitation in countering the international concern of drug trafficking was in proportion to the restriction on the right to manifest religious rites, such as the use of cannabis.

The relation between the nature of the right, the importance of the limitation and the extent of the limitation are aptly drawn together by Sachs J when he comments in the *Lawrence* matter as follows:

The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification. Conversely, the lighter the transgression, the less stringent the requirement of justification. Thus, I have no doubt that any state action which interfered directly with or compelled a particular form of religious observance would rarely pass the tests of reasonableness and necessity, if at all, and then only if the most compelling justificatory circumstances were established. Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality

---

<sup>145</sup> For example Rautenbach has argued that the more important the measure the less stringent the substantive test to be applied see IM Rautenbach *General Provisions of the South African Bill of Rights* (1995) 112.

<sup>146</sup> *Prince* (note 8 above).

that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state.<sup>147</sup>

The above comment of Sachs J emphasises the pivotal nature of religious liberty to the dignity inherent in human personality. Accordingly, any infringement of the right to freedom of religion must meet the most compelling of justificatory pre-conditions. In this regard Meyerson argues that in a society based on the values of dignity, equality and freedom the state may only justifiably limit religious conduct if the reasons are acceptable to all reasonable persons, independent of a particular religious viewpoint. The proof of ‘neutral harm’ on which ‘all reasonable people’ can agree should be used as a test to determine the sustainability of limitations on the right to freedom of expression and religious rights.<sup>148</sup>

*(d) The relation between the limitation and its purpose*

The relation between the limitation of the right and the purpose of the limitation necessitates an enquiry into the extent to which the limitation achieves the purpose. Accordingly the effectiveness of the limitation is assessed. A distinction is often drawn between under-inclusive limitations and over-inclusive limitations.<sup>149</sup> An under-inclusive limitation achieves the purpose in an inadequate manner while an over-inclusive limitation achieves the purpose in an excessive manner. A balance needs to be struck between the limitation and its purpose and the limitation should fit the purpose as precisely as is possible. This balancing exercise supports the principle

---

<sup>147</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 168.

<sup>148</sup> See generally D Meyerson (note 130 above). She claims that reliance on this test will maximise the free exercise of these rights. See also JE Buckingham ‘The Limits of Rights Limited’ (2000) 11 *Stellenbosch Law Review* 133 criticising Meyerson’s proposals as being too freedom-centered.

<sup>149</sup> See generally RP Bezanson ‘Some Thoughts on the Emerging Irrebuttable Presumption Doctrine’ (1974) 7 *Indiana Law Review* 644.

of proportionality between the limitation and its purpose as well and identifies if a less restrictive means to achieve the purpose exists.

*(e) Less restrictive means to achieve the purpose*

In determining if a less restrictive means could have been utilised to achieve the purpose, it is considered if a similar or comparable purpose could have been attained through the imposition of a reduced limitation on the right to religious liberty. The limitation is therefore examined to determine if the purpose could have been achieved by ‘more or less effectively by less drastic means’.<sup>150</sup>

Application of the general limitations provision therefore depends on a context-sensitive balancing exercise between various competing rights and interests in that:

[L]imitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose. Though there might be special problems attendant on undertaking the limitations analysis in respect of religious practices, the standard to be applied is the nuanced and contextual one required by section 36 and not the rigid one of strict scrutiny.<sup>151</sup>

An investigation into determining if the claimant could have been exempted also forms part of this balancing exercise and the question of reasonable accommodation arises. The essential function of reasonable accommodation is to prevent the social marginalisation of groups and to accommodate and celebrate cultural and religious

---

<sup>150</sup> See generally E Brems ‘Human Rights Minimum and Maximum Perspectives’ (2009) 9 (3) *Human Rights Law Review* 349.

<sup>151</sup> *Christian Education* (note 7 above) as per Sachs J paragraph 31.

diversity. The right to manifest religious belief necessitate accommodation in a diverse society so that the right may be protected in full.

### 8.6.2 Reasonable accommodation

In societies committed to a multicultural conception of citizenship, accommodating religious and cultural difference is not only acceptable but desirable, as a public measure of facilitating equal citizenship. Reasonable accommodation is therefore seen as a way in which religious and other minorities are enabled to express their cultural particularity.<sup>152</sup>

A diverse society such as in SA requires not only tolerance but also mutual accommodation as well. This diversity according to Sachs J presupposes that:

[P]ersons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.<sup>153</sup>

Accommodation therefore is not unfair, in particular if the group is a minority or a vulnerable group, as laws and regulations are often framed in a way that is consistent with the beliefs and values of the dominant, mainstream cultural groups. For example, historically privileged forms of adornment cater for the dominant mainstream group

---

<sup>152</sup> Regarding Canada and SA's commitment to multicultural citizenship see generally R Hirschl & A Shachar 'The New Wall of Separation: Permitting Diversity, Restricting Competition' (2009) 30 *Cardozo Law Review* 2535. Hirschl and Shachar comments that in SA with its inclusive approach accommodation has been slow in the realms of customary law and the application of religious private law.

<sup>153</sup> *Lawrence* (note 6 above) as per Sachs J paragraph 170.

but not for the vulnerable, minority groups.<sup>154</sup> Genuine equality of opportunity, of the liberal multiculturalist conception, requires, for example an exemption to permit Muslim female pupils to wear headscarves in school to eliminate the excessive costs attached to compliance with the uniform regulations.<sup>155</sup>

The South African Constitution is in many respects is designed to encourage accommodation. The Preamble suggests the significance of national reconciliation. The need for reconciliation to overcome the division of the past emphasises the importance of tolerance and mutual accommodation of diversity.<sup>156</sup> Through accommodation of this diversity the right to manifest religious belief in a diverse society may be best protected.

The protection of the right to freedom of religion and the right to religious equality therefore all form part of the aim to cultivate tolerance and to respect diversity.<sup>157</sup> Tolerance requires even-handed treatment of diverse religions.<sup>158</sup> Reasonable accommodation of difference requires that positive steps must be taken to promote the rights and display of difference in the South African society, allowing even those outside of the 'mainstream' to swim freely in the water.<sup>159</sup> To this end society can be described as follows:

---

<sup>154</sup> See generally P Lenta 'Cultural and religious accommodations to school uniform regulations' (2008) S Woolman & T Roux (eds) *Constitutional Law of South Africa* 259.

<sup>155</sup> Lenta (note 154 above) 261. This is in contrast with the demand that all must comply with generally applicable laws as expressed by J Locke 'A letter concerning toleration' in I Shapiro (ed) *Two Treatises of Government and a Letter Concerning Toleration* (2003) 243.

<sup>156</sup> For a detailed overview of the racial, ethnic and religious diversity of SA see EE Goodsell (note 13 above) 109, 114 -115.

<sup>157</sup> du Plessis (note 56 above) 422.

<sup>158</sup> *Ibid* 451.

<sup>159</sup> Pillay (note 9 above) as per Langa CJ paragraph 76.

[S]ociety which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed.<sup>160</sup>

The question that remains is how far does this requirement of reasonable accommodation reach? Does it require not more than an ‘undue hardship’ together with not more than a *de minimis* cost<sup>161</sup> or is ‘more than mere negligible effort ... required to satisfy the duty to accommodate’?<sup>162</sup> The Constitutional Court has indicated that:

There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved.<sup>163</sup>

The Constitution affirms diversity and the values of dignity, equality and freedom and therefore more than a mere *de minimis* cost is required in accommodating this diversity. The need to accommodate diversity is even more acute if the discrimination arises from a rule that appears to be neutral, but which nevertheless marginalises certain portions of society.<sup>164</sup> The more vulnerable the portion of society, the more

---

<sup>160</sup> Pillay (note 9 above) paragraph 75.

<sup>161</sup> As required in the *United States of America - Trans World Airlines Inc v Hardison* 432 US 63 (1977) 84.

<sup>162</sup> As required by the Canadian Supreme Court in *Central Okanagan School District No 23 v Renaud* (1992) 2 SCR 970, 983g-985a.

<sup>163</sup> Pillay (note 9 above) as per Langa CJ paragraph 78.

<sup>164</sup> *Ibid.* Regarding neutral rules which may marginalise certain portions of society see the case of *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society*, 1999 2 SA 268 (C). In this matter the applicant, a developer, sold property to the respondent for the purpose of erecting a mosque. In terms of the agreement the respondent would not conduct any activities that would be the source of nuisance or disturbance and the use of sound amplification was prohibited. The respondent installed sound equipment to facilitate the *atha'an* (call to prayer), a fundamental principle of the Islamic

important the protection afforded by the Bill of Right.<sup>165</sup> It is important to be reminded that in the South African context, reasonable accommodation is not simply a matter of jurisprudential technique, but central to the constitutional enterprise of promoting the values contained in the Constitution.

Overall, there should be a presumption in favour of accommodating religious difference.<sup>166</sup> This presumption is even more compelling in the event of

---

faith similar to the tolling of church bells. An order interdicting the respondent to use the sound amplification equipment was requested and granted. The court held that the prohibition did not infringe the right to freedom of religion of Muslims as it merely regulated, by consensus, a particular ritual practised at a particular place in the interests of other members of the community.

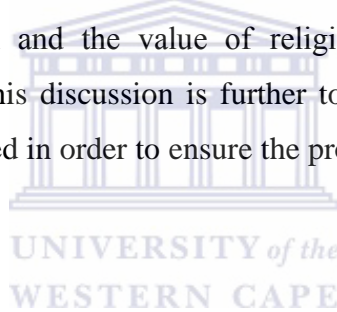
<sup>165</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), 25 and as referred to in *Prince* (note 8 above) as per Sachs J paragraph 157. The *National Coalition for Gay and Lesbian Equality v Minister of Justice* dealt with the application of the sodomy laws and the compatibility thereof with the right to equality, the right to human dignity and the right to privacy. The Constitutional Court confirmed all orders of the High Court and confirmed the offence of sodomy unconstitutional.

<sup>166</sup> Regarding the right of scholars and employees to wear the Islamic headscarf see P Lenta 'Muslim Headscarves in the Workplace and in Schools' (2007) 124 (2) *South African Law Journal* 296, 319. Lenta comments on two incidents of conflict between the religious obligation to wear a headscarf and regulations at the workplace and at schools that proscribe the wearing of headscarves. The first is a matter brought before the Labour Court in which a social worker challenged her dismissal from employment at the Worcester Prison. The Department of Correctional Services held that she violated the 'corporate identity' by wearing a headscarf as required in terms of her Muslim faith and refusing to tuck her shirt into her skirt, in contravention with the official uniform for employees. The employee was subsequently reinstated. Another incident involved a Muslim schoolgirl, ordered by the Johannesburg school she attended to remove her headscarf, as the wear thereof was in breach of the school's uniform requirements. Lenta maintains that a more appropriate response would be to view religious adherents, wearing religious symbols as citizens in a multicultural society living according to the beliefs of their culture (at 309) and that there is an duty to accommodate. Any other ruling on this question would risk disregarding anti-discrimination legislation, as well as violating the religious liberty of the claimants (at 312). In contrast with Lenta, Ngwena suggests that the state does not have an



accommodating the religious and cultural needs of the marginalised. The consequence of the past injustices also need to be considered in seeking to build a just and equitable community. The accommodation therefore requires a sensitive balancing of rights on a case by case basis as illustrated next in the jurisprudence of the courts.<sup>167</sup>

The scope and application of the right to manifest religious belief will be analysed on a case by case basis in light of the aforementioned limitation test as well as the duty to ensure reasonable accommodation. In this case by case evaluation the features of the right to freedom of religion as identified above will be utilised. Consequently the emphasis in this discussion will be on the interrelated aspects of the right to freedom of religion, that is to say the collective nature of religion as culture, the right to religious non-discrimination and the value of religious faith for the individuals' dignity. The emphasis in this discussion is further to evaluate how the interrelated aspects all should be protected in order to ensure the protection of the right to manifest religious belief.



---

unlimited duty to accommodate. For example, where there is a 'compelling need' for a particular service and the accommodation of the beliefs of religious people would cause 'undue hardship' to other people, that the state does not have a unlimited duty accommodate religious and other beliefs. In this regard see C Ngwenya 'Conscientious objection and legal abortion in South Africa: Delineating the parameters' (2003) 28 *Journal for Juridical Science* 1, 10. This approach is supported by Bonthuys where she maintains that the objections permitted in the performing of civil unions are indicates that homophobia is still permitted. By allowing marriage officers to object only on the ground of sexual orientation, the state not only condones homophobia but is complicit in the exclusion of same-sex couples from the social and symbolic recognition afforded to opposite-sex couples. In this regards see generally E Bonthuys 'Irrational accommodation: Conscience, Religion and Same-Sex Marriages in South Africa' (2008) 24 (2) *South African Law Journal* 125.

<sup>167</sup> In this regard see generally LWH Ackermann 'Some Reflections on the Constitutional Court's Freedom of Religion Jurisprudence' (2002) 43 *Dutch Reformed Theological Journal* 183; Farlam (note 64 above) 41; Du Plessis (note 124 above) 9.

## 8.7. Collective nature of religion and culture

Religion and culture encapsulate similarities and differences.<sup>168</sup> Belief, on the one hand, by its very nature is something personal to the individual. It belongs to the conscience, but belief also has a social dimension, a cultural dimension, and even a national dimension.<sup>169</sup> Culture, on the other hand is describes as follows ‘it is who we are, how we see each other. ... It includes our languages, our body movements, the way we sit down next to each other, even the differing textures, rustles and fragrances of our clothes’.<sup>170</sup> Culture is therefore interpreted more broadly than religion, embracing everything that makes people social beings.<sup>171</sup>

Section 15 protects an individual's freedom to hold whatever religion, while section 31 embraces a community's freedom to practice a said religion or culture.<sup>172</sup> As indicated above, the individual and cultural aspects complement each another. In addition the cultural diversity of the South African population is recognised in various provisions of the Constitution<sup>173</sup> and it is consequently of particular relevance within the South

---

<sup>168</sup> See J Amoah & T Bennett ‘The Freedoms of Religion and Culture Under The South African Constitution: Do Traditional African Religions Enjoy Equal Treatment? (2008) 24 *Journal of Law and Religion* 1, 7

<sup>169</sup> Sachs (note 58 above) 180.

<sup>170</sup> Sachs (note 58 above) 158.

<sup>171</sup> Amoah and Bennett (note 168 above) 6. See generally also GE Devenish ‘Minority rights and cultural pluralism – the protection of language and cultural identity in the 1996 Constitution’ (1999) *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 201; GJ Van Niekerk ‘Legal Pluralism’ in JC Bekker, & C Rautenbach & NMI Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006).

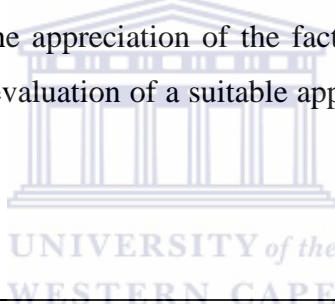
<sup>172</sup> This distinction was taken from the Canadian case, *R v Big M Drug Mart* [1985] 1 SCR 295, 336 and incorporated into the Constitutional Court’s jurisprudence by Chaskalson J in *Lawrence* (see note 6 above) 92. It was followed in *Prince* (note 8 above) as per Langa J 38 and *Christian Education* (see note 7 above) as per Sachs J 19.

<sup>173</sup> See the Constitution of SA: sections 9, 30, 31, 181, 184-186, 235 as well as schedules 4 and 5 refer to culture, cultural life, cultural community and cultural heritage. Sections 9, 15-16, 31 and 37 refer to

African context. The term cultural diversity is however not defined, calling for an analysis of the manner in which culture has been applied to create some clarification.<sup>174</sup>

Rautenbach *et al* identifies three ways in which the term culture is used in the Constitution. First, as a ‘specific tradition based on ethics’;<sup>175</sup> second, as ‘a collective term for aesthetical expression’,<sup>176</sup> for example, art or literature and third, the term ‘identifies and binds a specific group of people’,<sup>177</sup> based on a number of characteristics such a language, religion, beliefs and traditions.<sup>178</sup>

Within this latter meaning it is evident that the term culture includes concepts such as religion. It is argued that the appreciation of the fact that religion and culture may intersect is important in the evaluation of a suitable approach to protecting the right to manifest religious belief.



---

religion, conscience, thought, belief and opinion while sections 15, 143, 211-212, 219 as well as schedules 4 and 5 refer to tradition or traditional leaders.

<sup>174</sup> See generally C Rautenbach, F Jansen van Rensburg & G Pienaar ‘Culture (And Religion) In Constitutional Adjudication’ (2003) 6 (1) *Potchefstroom Electronic Law Journal* 1.

<sup>175</sup> See Rautenbach, Jansen van Rensburg & Pienaar (note 174 above) 3. See for example *Islamic Unity Convention v Independent Broadcasting Authority*: 2002 (4) SA 294 (CC) 27. ‘[A] society based on a constitutionally protected culture of openness and democracy and universal human rights for South Africans.’

<sup>176</sup> See Rautenbach, Jansen van Rensburg & Pienaar (note 174 above) 4.

<sup>177</sup> *Ibid.*

<sup>178</sup> Sections 30 and 31 of the Constitution of SA do not refer to culture in general but to ‘cultural life’ and ‘their culture’. According to I Currie ‘Minority Rights: Education, Culture, and Language’ in A Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1995) 35, 19 this indicates that culture in this context refers to a number of synonymous terms such as tradition, customs, civilisation, race, nation and folkways.

Furthermore, within the South African context the role of traditional African religion and culture has often been considered less deserving of protection than dominant Christian religion or culture.<sup>179</sup> This point of view is further stimulated through the course of urbanisation that affords less importance to the traditional way of life. Often this viewpoint is coupled with a tendency to regard traditional religions and culture as something less than 'proper' in terms of Western thinking. This was the dominant mode of thinking in the colonial past and is still present in the current day.<sup>180</sup> For these reasons African culture is often not valued equally to other religions or cultures. As a result conflict has arisen with regards to, for example, animal sacrifice, which may offend municipal health regulations and animal rights activists<sup>181</sup> and burial sites, which may infringe the rights of property owners.<sup>182</sup> The balancing that needs to take place when the right to freedom of religion conflicts with other rights, such as the right to private property, will be discussed in more detail below.

The inhibited recognition of African traditional customary law is also noticeable with regards to other religions and cultures that differ from the dominant religion and culture. For example, limited applicability is also noticeable in the area of Muslim

---

<sup>179</sup> Chidester (note 14 above) 44-5.

<sup>180</sup> See generally Amoah and Bennett (note 168 above) 13-14.

<sup>181</sup> In January 2007, Tony Yengeni, former Chief Whip of South Africa's governing party in Parliament, the African National Congress (ANC), celebrated his early release from a four-year prison sentence by slaughtering a bull at his father's house in the Cape Town township of Gugulethu. This time-honored African ritual was performed in order to appease the Yengeni family ancestors. Animal rights activists, however, decried the sacrifice as an act of unnecessary cruelty to the bull, and a public outcry ensued. In this regard see press release 'Yengeni animal slaughter not criminal – South African Human Rights Commission' (23 January 2007). Available at

[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=qw1169538120458B262](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1169538120458B262)

last accessed on 24/01/2007.

<sup>182</sup> *Nkosi & Another v Bührmann* 2002 (1) SA 372 (SCA) (*Nkosi v Bührmann*). The case was in relation to conflict arising with regard to burial sites, which may infringe the rights of property owners.

Personal Law and African traditional Customary Law particularly with regards to the subject of marriage and succession.<sup>183</sup>

---

<sup>183</sup> A possible ground being that the customary and religious laws are infused with gender inequality. In this regard see D Ackermann 'Women, Religion and Culture: A Feminist Perspective on 'Freedom of Religion' (1994) 22 (3) *Missionalia* 212, 225: 'For women, freedom of religion means freedom from both religious and cultural constraints which impinge negatively on our experience . . . [A]s women struggle with the ambiguity of our relationship to the idea of 'freedom of religion', while at the same time recognising our legitimate claims for a religious and cultural identity, we need to challenge those aspects of both religion and culture which are oppressive to us and learn to live with the pain of ambiguity creatively.' See also the discussion of PE Andrews, 'Big Love'? The Recognition of Customary Marriages in South Africa' (2007) 64 *Washington & Lee Law Review* 1485, 1486 as well as the trilogy of cases in *Mthembu: Mthembu v Letsela* 1997 (2) SA 936 (TPD); *Mthembu v Letsela & Another* 1998 (2) SA 675 (T); *Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA) permitting the application of discriminatory customary law provisions, and the opposite ruling in *Bhe & Others v Magistrate, Khayelitsha, & Others* 2005 (1) SA 580 (CC), in which the Constitutional Court upheld a constitutional challenge to the rule of male primogeniture as it applies in the customary law of succession. In *Bhe*, Langa DCJ writing the majority decision held that the African customary law rule of male primogeniture discriminated unfairly against women and illegitimate children and was, therefore, unconstitutional and invalid. For an comparative perspective on how to deal with diverse cultural succession arrangements, see generally C Rautenbach 'Indian succession laws with special reference to the position of females: a model for South Africa' (2008) 41 (1) *Comparative and International Law Journal of Southern Africa* 105. With regard to the position of marriage see also *Gumede v President of the Republic of South. Africa & Others* 2009 (3) BCLR 243 (CC). Not only has the incorporation of customary law proven problematic, religious law, Muslim Personal Law and the limited recognition of Muslim marriages in particular has also not been without question. In the case of *Ryland v Edros*, 1997 (1) BCLR 77 (C) dealing with a divorced Muslim woman's claim for maintenance. The court held that the transitional Constitution had the effect of soothing conventional prejudices about Muslim marriages, especially as the parties were married (although not according to South African law) and their union was in fact monogamous, therefore there was nothing repugnant about their union. However, the court called into question a 'public policy' that reflects the preferences and prejudices of the predominant Christian society. For a proposal that Muslim Personal Law be recognised in terms of section 15(3) (a) of the Constitution of SA, so that its provisions can be brought into conformity with the constitutional Bill of Rights see generally N Moosa 'The Interim and Final

The above point of view that certain religions or cultures seemingly do not comply with the dictates of the dominant perspective and are therefore something less than 'proper' has justly been criticised by the Constitutional Court in the matter of *Pillay*. In support of the decision in *Pillay* it is argued that there can be no universal scale of 'correctness'.<sup>184</sup> It is argued that equal treatment of all cultures and religions and non-discrimination is imperative if we wish to ensure diversity. The requirement of equal treatment is of particular importance with regard to the right to manifest diverse religious or cultural practices. To evaluate the impact of a dominant perspective on the display of cultural and religious practices and to identify a suitable approach in terms of which these rights can be best protected in a diverse community, an analysis of the matter of *Pillay case* follows next.

---

Constitutions and Muslim Personal Law: Implications for South African Muslim Women' (1998) 9 *Stellenbosch Law Review* 196. A true victory was the unanimous judgment of the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) in which Mahomed CJ held that the political and constitutional changes that had taken place were all evidence of the 'new ethos of tolerance, pluralism and religious freedom' (paragraph 20) that pointed to the legal recognition of a *de facto* monogamous Muslim marriage. Mofokeng argues that South African courts have failed to 'promote the values of human dignity, equality and freedom' by not recognising that religious personal law (or at least religious family law) has become part of the mainstream legal system in SA. In this regard see generally LL Mofokeng 'The right to freedom of religion: an apparently misunderstood aspect of legal diversity in South Africa' (2007) 11 *Law Democracy and Development* 121. In contrast with South Africa, India recognises all forms of personal laws in private matters. While commercial, civil, and criminal matters are regulated according to secular law. Family law matters, such as marriage and divorce, inheritance and succession are regulated in accordance with religious personal laws. For a more recent discussion regarding the role of Muslim Personal Law in South Africa see generally C Rautenbach 'Some comments on the current (and future) status of Muslim personal law in South Africa' (2004) (2) *Potchefstroom Electronic Law Journal* 1; N Pillay 'Women's rights in human rights systems: Past, present and future' (2009) 13(2) *Law, Democracy & Development* 36; and A Claassens & S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25(3) *South African Journal on Human Rights* 491.

<sup>184</sup> W Menski *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006) 414, 415. The determination of 'rightness; or 'correctness' is established by the religion concerned.

### 8.7.1. *MEC for Education: KwaZulu-Natal v Pillay*

Sunali Pillay, in expressing her cultural identity, chose to wear a nose stud as part of a family tradition which honoured her as a responsible young adult and indicated that she had become eligible for marriage.<sup>185</sup> As a result she faced disciplinary proceedings at her school for failing to remove the stud, the wearing of which was in contravention with the school code.<sup>186</sup> The matter was referred to the Equality Court which held that although a *prima facie* case of discrimination had been made out, the discrimination was not unfair, as the code had been drawn up in consultation with the learners, representative council, parents and the governing body. The Equality Court accepted the purpose of the code as being ‘to promote uniformity and acceptable convention amongst the learners’.<sup>187</sup> On appeal to the Pietermaritzburg High Court<sup>188</sup> the court held that the conduct of the school was indeed unfair, as the prohibition served to prolong discrimination against a vulnerable and marginalised group,<sup>189</sup> and as the prohibition denied her the importance of her religion and culture it had a demeaning effect on her identity. The court further held that the school had

---

<sup>185</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 7. For a discussion on the *Pillay* case see generally C Rautenbach ‘Godsdienstige en Kulturele Simbole in Openbare Skole: Sigbaarwording en Groei van Regspluralisme in Suid-Afrika’ (2008) *Journal of Contemporary Roman Dutch Law* 25-37; Lenta (note 154 above) 259; I Benson, ‘The case for religious inclusivism and the judicial recognition of religious associational rights: A response to Lenta’ (2008) 1 *Constitutional Court Review* 295.

<sup>186</sup> The school uniform code stipulated as follows: ‘Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn’. See *Pillay* (note 9 above) paragraph 5.

<sup>187</sup> *Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC) 14. The judgments of the Equality Court and the High Court were analysed by Rautenbach (note 185 above) 25.

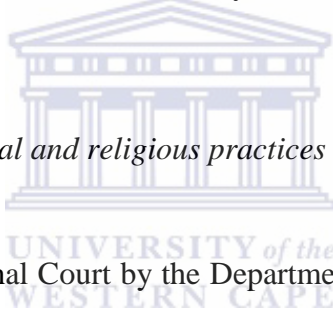
<sup>188</sup> *Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (10) BCLR 1237 (N).

<sup>189</sup> Indians and in particular South Indian Tamil Hindus.

failed to dismantle structures of discrimination and that the aims of the uniform code could have been achieved in a less infringing manner.

Three themes in particular emerge from the decision in *Pillay* and are relevant for purposes of this evaluation: Firstly, appreciation of the influence of historically privileged cultural and religious practices; secondly interpreting religious and cultural practices in a broad and flexible manner; and finally awareness of the intersection between culture and religion that is evident from this case. It is argued that the approach of the court with regards to these three themes is commendable and that indeed the appreciation of these three themes enhanced the right to manifest religious belief and cultural practices in a diverse society. These three themes are analysed in more detail below.

#### *Historically privileged cultural and religious practices*



On appeal to the Constitutional Court by the Department of Education and others, the court was faced with the question of whether the effect of the code was discriminatory. The court in the majority decision of Langa J held that the code indeed was discriminatory in so far as:

The norm embodied by the Code was not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs, ...at the expense of the minority and historically excluded forms. [Further continuing] It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.<sup>190</sup>

---

<sup>190</sup> *Pillay* (note 9 above) paragraph 44.



The court identified that certain rules may have the appearance of neutrality but that these so-called neutral norms often merely represent historical privileges. The impact of this dominance is further acknowledged when the court further stated that:

The protection of the Constitution extends to all ... not only to those who happen to speak with the most powerful voice in the present cultural conversation.<sup>191</sup>

The approach of the court in questioning the neutrality of rules and being perceptive to power imbalance is welcomed. The Constitutional Court's awareness of the fact that neutral norms often reflect the historical power imbalances, as well as the court's accommodation of subjective practices in affirming diversity, are carried through in the court's dismissal of the argument that there was consultation in formulating the uniform code. Although the court is appreciative of the value of consultation<sup>192</sup> and affirms that consultation and public participation are worthy in promoting and deepening democracy,<sup>193</sup> the court does not agree that consultation could immunise these decisions from constitutional scrutiny. The reality is that many individual communities still retain historically unequal power relations which may make it more likely that decisions will infringe on the rights of disfavoured groups.<sup>194</sup>

The court here in contrast with the decision of the House of Lords in *Begum* is mindful of the impact that historical unequal power relations may have on the possibility of true consensus and the possibility of voluntary waiving a right. The South African Constitutional Court was further aware of the need to accommodate difference and to accept people as they are, in that:

---

<sup>191</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 54.

<sup>192</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 80.

<sup>193</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 83.

<sup>194</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 83.

The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are.<sup>195</sup>

The court not only appreciated the impact of historical privilege on religions and cultures that are different from the dominant religion or culture, but further enhanced the protection afforded to the right to practice diverse religious and cultural practices through the interpretation of the right to religion and culture in a broad and flexible manner as discussed next.

### *Broad and flexible interpretation of the right*

The approach of the court in interpreting the right to freedom of religion in a broad and flexible is commendable.<sup>196</sup> The court refrains from drawing a distinction between voluntary and obligatory practices. Affording mandatory practices protection only, merely tolerates diversity and does not promote and celebrate the existence of diversity in any other way.<sup>197</sup> The court adopted an approach to truly celebrate difference when Langa J held that:

The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project

---

<sup>195</sup> *Fourie* (note 78 above) as per Sachs J paragraph 60.

<sup>196</sup> The approach of the court is also in line with the broad and flexible interpretation of the right to freedom of religion as discussed in section 8.5.

<sup>197</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 65.

which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains<sup>198</sup>.

In addition, the court also does not inquire as to the objective importance of the practice. It is suggested that the court should not be concerned with the objective importance or centrality of a belief to a particular religion or culture, in so far as that:

If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way<sup>199</sup>.

The approach followed by the court also avoids the difficulties that have arisen, for example from the House of Lords endorsement of the ‘mainstream’ acceptability of the *shalwar kameeze* as appropriate dress<sup>200</sup> and therefore finding that there was no infringement of the right to manifest religious belief. Furthermore the court was not concerned with only permitted symbols that are not conspicuous as applied in France in terms of the French Law of 2004.<sup>201</sup> The difficulties of these approaches have been critiqued previously.<sup>202</sup>

The Constitutional Court affirmed that the display of religion and culture in public is not a ‘parade of horrors’ but a pageant of diversity which will enrich our schools and in turn our country.<sup>203</sup> One of the concerns of the school was that a judgment in favour of Ms Pillay would be that many more learners would come to school for example displaying dreadlocks.<sup>204</sup> The display by Rastafari of dreadlocks has

---

<sup>198</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 64.

<sup>199</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 87.

<sup>200</sup> See discussion of *Begum* in section 7.3.2.2.

<sup>201</sup> See section 7.2.2.

<sup>202</sup> See section 6.3 and 6.2.3.

<sup>203</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 107.

<sup>204</sup> *Ibid.*

officially been recognised in the jurisprudence of SA<sup>205</sup> and Zimbabwe.<sup>206</sup> Recognition of practices other than the display of dreadlocks by members of the

---

<sup>205</sup> The right of a Rastafari student to wear dreadlocks in a public school was affirmed in the High Court of SA decision in *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 TPD (*Antonie*). In *Antonie*, the High Court set aside the decision of a school governing body to suspend a Rastafari student who refused to cut her dreadlocks upon instructions from the school principal. The school characterised her refusal not to wear dreadlocks as disruptive and amounting to 'serious misconduct'. According to a recent interpretation of the South African National Department of Education Manifesto in Education and Values it would be absurd in SA to expel, or even suspend a learner for breaking a school rule by wearing a Rastafari hairstyle to school, as this would not be in line with the values of tolerance reflected in the Manifesto. In this regard see generally WJ van Vollenhoven & S Blignaut 'Muslim learners religion expression through attire in cultural diverse public school in South Africa: A cul-de-sac?' (2007) 35 *Journal of Family Ecology and Consumer Sciences* 1, 7. Most recently the dismissal of several male employees, who insisted on wearing dreadlocks as a form of manifestation of their religious or cultural practices, was found to constitute unfair discrimination in terms of section 6 of the Employment Equity Act, 55 of 1998. In this regard see *Police and Prison Rights Union and Others v Department of Correctional Services and Another* (C544/2007) [2010] ZALC 68; 2010 (9) BCLR 921 (LC)

<sup>206</sup> Mr Chickeche, a devout Rastafari was considered by the presiding judge as unkempt and not properly dressed in his appearance to be admitted as a legal practitioner before the High Court. The judge objected to the plaintiff's hair, which he wore in dreadlocks. The Supreme Court of Zimbabwe held that the wearing of dreadlocks was a symbolic expression of the beliefs of Rastafarianism and fell within the protection of freedom of conscience afforded by Section 19 (1) of the Zimbabwean Constitution. See *Re Chickeche* (1995) 2 LRC 93. In Malawi, Rastafari students are prevented from attending public schools on account of their dreadlocks. For a discussion of the conformity of this prohibition with international obligations see generally MO Mhango 'The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari' Students' (2008) 52 *Journal of African Law* 218. Mhango reflects on the unanimous Supreme Court of Zimbabwe decision in *Farai Dzvova v Minister of Education, Sports and Culture and Others*, in which the court ruled that the expulsion of six year-old Farai Dzvova from the Ruvheneko Government Primary School because of his expression of his religious belief through wearing dreadlocks, is a contravention of section 19 of the Constitution of Zimbabwe. See also *Farai Dzvova v Minister of Education, Sports and Culture and Others*, SC 26/07 (2007) ZNSC 26; see also MO Mhango 'Upholding the Rastafari religion in Zimbabwe: Farai Dzvova v

Rastafarian religion has also been evaluated by the Constitutional Court in the matter of *Prince*, discussed in more detail below.<sup>207</sup>

It is argued that the court through interpreting the right in this broad and flexible manner indeed promoted and encouraged the respect and protection of the right to manifest religious and cultural practices. The flexible interpretation of the court is further enhanced, in that the court is appreciative of the intersection between religion and culture as seen from the discussion below.

#### *Intersection between religion and culture*

Regarding the differences and similarities between culture and religion the court in *Pillay* pointed out that it does not really make a difference whether the discrimination was on religious or cultural grounds, especially since Sunali Pillay was part of the South Indian, Tamil and Hindu group. This group was defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition.<sup>208</sup> In addition, it was possible for 'a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural'.<sup>209</sup> It is maintained that through acknowledging this interrelated nature of religion and culture the court ensured comprehensive protection of the right to manifest diverse religious and cultural practices. However in acknowledging the interrelated nature of religion and culture it is reasoned that these rights should not *per se* be regarded as similar. What follows next are some of the observations of the minority judgment in relation to the differences and similarities between culture and religion.

---

Minister of Education, Sports and Culture and Others' (2008) 8 *African Human Rights Law Journal* 221.

<sup>207</sup> See section 8.7.1.1.

<sup>208</sup> *Pillay* (note 9 above) as per Langa J paragraph 50.

<sup>209</sup> *Pillay* (note 9 above) as per Langa J paragraph 47.

O'Regan J identified the following difference between the right to freedom of religion, on the one hand, and the associative religious and cultural practices, on the other hand.<sup>210</sup> Religion is associated with belief and conscience, which implies an individual state of mind. Therefore religion is to be understood in an individualistic sense.<sup>211</sup> However, culture involves associative practices and requires the participation of 'other members in the group'.<sup>212</sup> The right to culture requires that the right must be an associative right, protected because of its shared meaning. Therefore the associative quality of the right to culture is important.<sup>213</sup>

Although appreciating this difference O'Regan accepted that it may not always be possible to distinguish between culture and religion. In addition the Constitution recognises two distinct rights, culture and religion, and therefore these two rights should not always be treated the same.<sup>214</sup> The exclusion of culture from section 15 and the inclusion of culture in sections 30 and 31 suggest that culture is different.<sup>215</sup>

Despite emphasising the associative quality of the right to culture, O'Regan also identified that the value of cultural rights is based on the value of human dignity. Cultural rights are valued because cultural practices 'afford individuals the possibility and choice to live a meaningful life'.<sup>216</sup> The value of culture is further emphasised in the fact that an individual cannot achieve her full potential without relating to

---

<sup>210</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 148.

<sup>211</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 143.

<sup>212</sup> See section 31 of the Constitution of South Africa.

<sup>213</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 157.

<sup>214</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 143.

<sup>215</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 144.

<sup>216</sup> *Pillay* (note 9 above) as per O'Regan J paragraph 157.

others,<sup>217</sup> and ‘cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement’.<sup>218</sup> For these reasons it is apparent that associative practices and the community is as important to the individual identity<sup>219</sup> and therefore to human dignity.<sup>220</sup> In addition to the value of culture in relation to human dignity, the protection of cultural rights is directly related to the constitutional purpose to establish unity and solidarity in our diverse society. This unity and solidarity requires not mere toleration of difference, but institutional commitment.<sup>221</sup>

It is agreed that at times a distinction ought to be drawn between culture and religion. However religion should not be seen as more important. It is the value of culture in relation to human dignity that is of particular relevance. Cultural practices may be as important to those who hold them as religious beliefs are to others.<sup>222</sup> The importance of associative practices is also central to African thought in the notion that ‘we are not islands unto ourselves’.<sup>223</sup> Therefore religion and cultural practices can be equally

---

<sup>217</sup> K Gyekye *Person and Community: Ghanaian Philosophical Studies* (1992) reprinted as ‘Person and Community in African Thought’ in PH Coetzee and APJ Roux (eds) *Philosophy from Africa: A Text with Readings* (1998) 321.

<sup>218</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 53.

<sup>219</sup> See discussion in section 7.6.3 in which the approach of defining religion as an essentially private choice is criticised as the courts in doing so do not acknowledge the cultural and public demands of religion

<sup>220</sup> The relationship between the right to freedom of religion and human dignity is explored in more detail in section 8.7.3.

<sup>221</sup> *Pillay* (note 9 above) as per O’Regan J paragraph 157.

<sup>222</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 53.

<sup>223</sup> Often expressed as *umuntu ngumuntu ngabantu* which emphasises communality and the inter-dependence of the members of a community’ as included in the *Pillay* (note 9 above) 53. A recognition of the importance of the community to the individual is not exclusive to African theory, in this regard see, for example, W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) 89-90; M Chanock ‘Human Rights and Cultural Branding: Who Speaks and How’ in An-Na’im

important to a person's identity. It is therefore not important in which category it is placed but what is of importance is the meaning to the person involved, as 'categorisation reinforces ideas about the importance of religion and culture in peoples' lives and fails to accommodate those who do not conform to that stereotype'.<sup>224</sup>

The approach of the Constitutional Court not to force grounds of discrimination into 'neatly self-contained categories'<sup>225</sup> is welcomed and the acknowledgement that culture and religion may at times 'sing with the same voice'<sup>226</sup> is endorsed in this study. Another matter in which the right of a minority religion was analysed by the Constitutional Court is the matter of *Prince* discussed next.

### **8.7.2 *Prince v President of the Law Society of the Cape of Good Hope***

In the matter of *Prince* the constitutional validity of the prohibition on the use or possession of cannabis<sup>227</sup> inspired by religion was questioned by the Constitutional Court. The Law Society of the Cape of Good Hope had refused to register Mr

---

*Cultural Transformation and Human Rights in Africa* (2002) 41. See also S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002) 3, 9.

<sup>224</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 91. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture. See AC Carmella 'Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion' (1998) 73 (5) *Notre Dame Law Review* 1191, 1195.

<sup>225</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), paragraph 50; 1997 (11) BCLR 1489 (CC), paragraph 49. The matter of *Harksen* considered an application for an declaration of constitutional invalidity of certain sections of the Insolvency Act on the basis of right to property and equality. The majority of the court found the provisions constitutional.

<sup>226</sup> *Pillay* (note 9 above) as per Langa CJ paragraph 60.

<sup>227</sup> In terms of the provisions of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965.



Prince's contract of community service as a candidate attorney because of his religious habit of smoking marijuana. The majority,<sup>228</sup> held that Rastafarianism was a religion and therefore the legislation impacted on the Rastafarian's individual right (section 14 of the Interim Constitution) and collective rights (section 31 of the Interim Constitution) to practice their religion. To allow harmful drugs to be used by certain people for religious purposes, would impair the state's ability to enforce its drug legislation.<sup>229</sup>

In a separate dissenting judgment, Sachs J emphasised that the legislation appeared benign but indeed forced a 'constitutionally intolerable choice between their faith and the law'.<sup>230</sup> Therefore the majority judgment did not adequately consider the burden imposed on the right to freedom of religion and indeed values the ease of law enforcement above the demands of 'tolerance and respect for diversity that our Constitution demands for and from all in society'.<sup>231</sup>

The judgement of Sachs J in the *Prince* case clearly illustrates an awareness of the needs of the religious 'other'. He emphasised the vulnerability of Rastafarians – their 'experience of otherness',<sup>232</sup> in comparison to mainstream religions. He acknowledged the dignity and vulnerability of the Rastafarians over expediency, obliging 'the State

---

<sup>228</sup> The majority (in a judgment written by Chaskalson CJ, Ackermann and Kriegler JJ) Goldstone and Jacob J concurring. Dissenting judgments were put forward by Ngcobo J with Sachs J, Mokgoro J and Madlanga AJ concurring, in which it was argued that the regulation of cannabis for religious purposes would not unduly burden the state. Sachs J, with Mokgoro J concurring, put forward an additional separate dissent in which he added 'some observations of a general kind'. Only nine of the eleven judges participated in this case.

<sup>229</sup> For an overview of the Rastafarian movement see generally SP Pretorius 'The significance of the use of ganja as a religious ritual in the Rastafari movement' (2006) 27(3) *Verbum Et Ecclesia Journal* 1012.

<sup>230</sup> *Prince* (note 8 above) as per Sachs J paragraph 145.

<sup>231</sup> *Prince* (note 8 above) as per Sachs J paragraph 147.

<sup>232</sup> *Prince* (note 8 above) as per Sachs J paragraph 157.

to walk the extra mile<sup>233</sup> to meet its obligation to respect difference. Sachs J was appreciative of difference in religious beliefs and sought to accommodate such difference in a non-hierarchical framework of equality and non-discrimination. He further confirmed that an obligation exists to dismantle religious stereotypes that impact on the right to equality.<sup>234</sup>

The point of view of Sachs J in the matter of *Prince*, that difference should not be viewed as a basis for unequal treatment is supported. The quest for substantive equality and demands for cultural or religious accommodation is imperative in a pluralistic society.<sup>235</sup> The need to appreciate difference and to accommodate such difference in a non-hierarchical framework of equality and non-discrimination is vivid in the dissenting judgment of Sachs J. The claim for the recognition of diversity is reinforced through the language of the celebration of ‘the right to be different’ in the following manner:

Given our dictatorial past in which those in power sought incessantly to command the behaviour, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order.<sup>236</sup>

Accommodation of the right to freedom of religion was the main concern in the matter of *Prince* and *Pillay*. In these matters the issue was whether a particular party should have been exempted from complying with generally applicable rules in order to

---

<sup>233</sup> *Prince* (note 8 above) as per Sachs J paragraph 149.

<sup>234</sup> McLean argues that any acceptable concept of freedom of religion cannot be based on the idea that the government should be neutral and should not endorse a particular world view or belief system. He argues that state neutrality is impossible because when we decide what religious beliefs and practices are acceptable for our society and which are not, we invariably base it on our religious or other beliefs and we can therefore never pretend to make such decisions from a neutral and objective point of view. In this regard see generally GR McLean (note 56 above) 174.

<sup>235</sup> *Prince* (note 8 above) as per Sachs J paragraph 155.

<sup>236</sup> *Prince* (note 8 above) as per Sachs J paragraph 170.

accommodate such party's religious beliefs or their rights to practise their culture. It is interesting to note that even when the court's approach seemed progressive and open-minded, the practical results of the majority decision in for example the *Prince* case was to affirm the normality or stability of traditional views. The view of what constitutes a religion and what is protected as religious freedom is an affirmation of traditional views and ideas.<sup>237</sup> The majority court endorses what a 'good life' should entail and excludes 'the other'.<sup>238</sup> This approach does not purposefully endeavour to accommodate diversity and is not in the interest of protecting diverse religious beliefs and cultural practices. It is contended that the approach of the minority in *Prince* better serves the rights of the marginalised other in a diverse society.

The historically privileged cultural and religious practices indeed may devalue the importance of religion and culture to minorities. The point of view of Sachs J in the matter of *Prince* is brought to its full culmination in *Pillay*, where the historical typecasting of certain religions as preferred or acceptable and therefore superior are indeed dismantled so that the rights of all and not only the historically privileged and powerful are equally protected. It is suggested that this emphasis on the dignity and vulnerability of the 'other' in the dissent of *Prince* paved the way forward for a more inclusive jurisprudence regarding the protection of religious difference. This was particularly seen in the decision of *Pillay* where the court in no uncertain terms endorsed the 'rich tapestry' of cultural and religious difference in society in that:

---

<sup>237</sup> IJ Kroeze 'God's Kingdom in the Law's Republic: Religious Freedom In South African Constitutional Jurisprudence' (2003) 470 *South African Journal of Human Rights* 19, 20. This political choice is affirmed by van der Walt when he indicates that a political choice is 'to affirm or deny, confirm or reject, include or exclude something'. See AJ Van der Walt 'Modernity, normality, and meaning: the struggle between progress and stability and the politics of interpretation' (2000) 11 (2) *Stellenbosch Law Review* 21,48.

<sup>238</sup> Kroeze (note 237 above) 21.

[A]ffirm[s] the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight[s] the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’.<sup>239</sup>

Du Plessis argues that the jurisprudence in *Pillay* has the makings of a jurisprudence of difference.<sup>240</sup> This jurisprudence of difference has a particular understanding of the concept of ‘quality equality’ which includes the full participation and inclusion of everyone to realise their own choices.<sup>241</sup> The right to be different is essential to the well being of the members of society.<sup>242</sup> It is important to appreciate the concept of ‘quality equality’ for through such appreciation, the right to manifest religious belief and cultural practices is afforded extensive protection. An evaluation of the concept of ‘quality equality’ follows next.

### 8.7.3 Religion and substantive equality

The Constitution provides for the protection of the right to freedom of religion<sup>243</sup> as well as a prohibition on discrimination based on religion.<sup>244</sup> Religious freedom can

---

<sup>239</sup> *Christian Education* (note 7 above) paragraph 24 and *Prince* (see note 8 above) paragraph 171.

<sup>240</sup> Du Plessis (note 124 above) 7. See also Lenta (note 154 above) 282.

<sup>241</sup> IM Young *Justice and the Politics of Difference* (1990) 173. For Young, ‘[g]roups cannot be socially equal unless their specific experience, culture and social contributions are publicly affirmed’ at 86. In drawing on the work of Young, van Marle refers to an ethical interpretation of equality. In this regard see generally K van Marle ‘Equality: An Ethical Interpretation’ (2000) 63 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 595.

<sup>242</sup> P Lenta ‘Religious Liberty and Cultural Accommodation’ (2006) *South African Law Journal* 352, 375. See also generally J Raz ‘Multiculturalism: a liberal perspective’ in his *Ethics in the Public Domain* (1994); B Parekh *Rethinking Multiculturalism. Cultural Diversity and Political Theory* (2000).

<sup>243</sup> Section 15 of the Constitution of South Africa.

<sup>244</sup> Section 9(3) of the Constitution of South Africa.

therefore operate both as a liberty right and as an equality right. As a liberty right, freedom of religion entails the freedom to practice without interference and as an equality right, freedom of religion encapsulates that government may not favour one religion over another or religion over non-religion.<sup>245</sup>

The Constitutional Court related equality to the equal worth of all human beings in the matter of *President of the RSA v Hugo*<sup>246</sup> in which the court referred to equality in the following manner:

Equality ... means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.<sup>247</sup>

From the above it is apparent that equality cannot be pursued in isolation from freedom and human dignity. Therefore equality can never mean 'uniformity', and should mean 'equal worth'. The equal worth of all human beings must be respected and should accommodate peoples' difference. Equality therefore requires not merely formal equality,<sup>248</sup> (meaning that people in the same position should be treated the

---

<sup>245</sup> Freedman (note 58 above) 100.

<sup>246</sup> *President of the RSA v Hugo* 1997 (4) SA 1 (CC) (*Hugo*). This case dealt with the constitutionality of a presidential act in terms of which the sentences of prisoners who were mothers of children under 12 years on 10 May 1994 were reduced. The respondent challenged the presidential act on basis of equality, argued on the basis of gender and sex discrimination. The majority judgment held that there was no unfair discrimination. While a dissent by Krieger J held that the discrimination was unfair.

<sup>247</sup> *Hugo* (note 246 above) paragraph 41.

<sup>248</sup> Formal equality, based on the notion of fairness that requires like to be treated alike, thereby reducing the application of equality to an equation that only 'likes' qualify for equal treatment. In this regard see generally S Fredman *Discrimination Law* (2002). Formal quality arguments presuppose that people deserve to be similarly treated if they can show themselves to be sufficiently alike. Accordingly

same) but it also indicates that people in different situations should be treated differently.<sup>249</sup> The right to equality, also known as the equality principle, protects the equal worth of all people.<sup>250</sup>

The interpretation of the equality principle as protecting the equal worth of people is endorsed by the approach of Dworkin, who requires that people should be treated equally in the sense that they are entitled to the state's equal concern and respect.<sup>251</sup> A fundamental difference between equal treatment and treatment as equals lies in the fact that equal treatment requires an evaluation of whether two people are sufficiently 'the same' that they warrant similar treatment. Treatment as equals implies a more concrete conception of equality, not concerning itself with whether deviation is permitted but more particularly 'what reasons for deviation are consistent with equal concern and respect'.<sup>252</sup>

---

members of a disfavoured group can only bring themselves within the scope of anti-discrimination protection if they show themselves to be comparable to members of the dominant group. The consequence thereof is that distinctive attributes must be rendered as an equivalent to characteristics of the dominant group. Thereby equality reinforces existing norms specific to formal equality.

<sup>249</sup> The demand for different treatment is also referred to as substantive equality, which includes equality of results, aimed at opposing the effects of formal equal treatment which nonetheless has a negative impact on the individual, as well as equality of opportunity. In this regard see generally Fredman *ibid.*

<sup>250</sup> For a discussion on the interpretation of the equality provisions see generally IM Rautenbach 'Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid' (2001) 9 (2) *Tydskrif vir Suid Afrikaanse Reg* 329, 334; IM Rautenbach & EFJ Malherbe *Constitutional Law* (2004) 333.

<sup>251</sup> R Dworkin *A Matter of Principle* (1986) 190-198.

<sup>252</sup> R Dworkin *Sovereign Virtue: The Theory of Practice and Equality* (2000) 209. See generally also P Bikhu *Rethinking Multiculturalism* (2000) who indicates that equality demands that cultural disadvantages may be reduced as much as possible. See also Lenta (note 242 above) 352 who states that to hold that equality may require differential rather than uniform treatment is justified on the basis that by complying with legislation of general application religious observers may experience hardship of a kind that others who are aggrieved by the same provisions would not feel. This concern is

Sachs claims that one of the most important areas for asserting the simultaneity of the right to be the same and the right to be different, is the right to freedom of religion. All have the same right to freedom of religion; however this right includes the right to be different, as we can choose if we wish to believe or not to believe, and if we believe how we will practice our belief.<sup>253</sup> Consequently, equality does not mean homogeneity. It presumes just the opposite. Equality becomes the foundation for diversity.<sup>254</sup>

From an overview of the jurisprudence of the Constitutional Court regarding the right to freedom of religion it is evident that before adjudicating the matter of *Pillay* the ‘tendency has been to put all the eggs of judicial argumentation in support of the protection of religious rights in the freedom basket’.<sup>255</sup> In the matter of *Pillay* the focus of the court however shifted to the application of the provisions of equality, and in particular in relation to non-discrimination based on culture. It is contended that the right to manifest diverse religious and cultural practices was afforded ultimate recognition in the right to freedom of religion as both a liberty and equality right.

---

expressed by Sachs J in the following manner in the *Prince* case: that the legislation in question forced Rastafari, a small and vulnerable religious group, into a ‘constitutionally intolerable choice between their faith and the law’. *Prince* (see note 8 above) paragraph 145. Lenta supports the dissenting judgment in *Prince* as it does not force the Rastafari to choose between obeying the law and following the dictates of their religion. See Lenta (note 242 above) 373.

<sup>253</sup> Sachs (note 58 above) 180.

<sup>254</sup> Sachs (note 58 above) 51.

<sup>255</sup> LM du Plessis ‘Freedom of Religion or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in “the New South Africa,”’ (2001) *Brigham Young University Law Review*. 439, 450-451. For example in the matter of *Christian Education* (note 7 above). The applicants began by arguing that a right to use corporal punishment in schools was based on both the right to religion and the right to culture. The applicants later abandoned their claim to culture and proceeded on the sole ground of freedom of religion.

In *Pillay* the court scrutinised the school uniform code in terms of the provisions of section 14 of the Equality Act<sup>256</sup> that deals with the determination of unfairness. A discrimination that impairs or is likely to impair human dignity is considered unfair discrimination.<sup>257</sup> The position of the complainant in society, whether she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns is also taken into consideration.<sup>258</sup> The question as to if less restrictive and less disadvantageous means to achieve the purpose as well as to accommodate diversity is also considered.<sup>259</sup>

Regarding the objective to accommodate diversity, it was held that the school must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.<sup>260</sup> The need to allow all people to enjoy their rights equally is of particular importance in a diverse society where dominant norms may indeed unduly benefit the dominant religion and culture. This preference will consequently unjustifiably restrict the rights of minority cultures and religions.<sup>261</sup> A suitable remedy

---

<sup>256</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The Equality Acts' main aim is to flesh out the equal protection and non-discrimination provisions of the Constitution of SA. For a discussion on the Equality Act 4 of 2000 see generally CH Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (2001) 41. See also generally G Carpenter 'The Equality Act in the Constitutional Court' (2008) 23(2) *South African Public Law* 185.

<sup>257</sup> Section 14(3)(a) of the Equality Act, 4 of 2000.

<sup>258</sup> Section 14(3)(c) of the Equality Act, 4 of 2000.

<sup>259</sup> Section 14(3) (h)(iii) of the Equality Act , 4 of 2000.

<sup>260</sup> *Pillay* (note 9 above) paragraph 73.

<sup>261</sup> For a discussion of the role of dominance in plural communities see generally H Botha 'Equality, plurality and structural power' (2009) 25(1) *South African Journal on Human Rights* 1.



to inhibit such privilege is through the adopting of a duty to accommodate diversity as discussed in more detail below.

However, before proceeding to a discussion of the duty to accommodate diverse religious and cultural practices, the importance of the right to freedom of religion and the right to religious and cultural practice in relation to their centrality 'to human identity and hence to human dignity'<sup>262</sup> is discussed next.

#### **8.7.4 Religion and dignity**

The right to human dignity may function not only as a contextual right with regards to the right to freedom of religion, but as an independent right as well.<sup>263</sup> In this way the right to dignity may be viewed with regards to the inherent dignity of all human beings and not merely with regard to the dignity of bearers of the right to religious freedom.<sup>264</sup> The right to dignity however, requires religious autonomy in terms of which each individual is able to make the choices best suited to the development of an identity and personality. O'Regan identified that individual dignity is directly related to being afforded 'the possibility and choice to live a meaningful life'.<sup>265</sup>

Therefore the state has a duty to ensure that positive measures are taken to ensure the advancement of the right to freedom of religion, and the right to dignity, which should enjoy protection to advance the right to religious freedom. The right to freedom of

---

<sup>262</sup> Pillay (note 9 above) paragraph 62.

<sup>263</sup> For a discussion on the dignity as a independent right see Woolman (note 93 above) 36; see also generally Botha (note 111 above) 171; D Cornell, 'Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann' (2008) *Acta Juridica* 18.

<sup>264</sup> In this regard see GJ Pienaar 'The effect of equality and human dignity on the right to religious freedom' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 579.

<sup>265</sup> Pillay (note 9 above) paragraph 157.

religion advances the inherent individual and collective identity of religious believers. It protects the interests of religious believers, allowing them to develop their own identities in line with their own persuasions. The right to manifest religious belief require that individuals are afforded the freedom to make their own choices to live their own conception of a meaningful and dignified life.

From the above discussion it is clear that the right to freedom of religion and in particular the right to manifest religious belief and cultural practices should be interpreted with full appreciation of the interrelated nature of the right as a collective right. It is through an application of this broad interpretation of the right to freedom of religion, coupled with the right not to be discriminated against on the basis of one's religious or cultural beliefs, that the full appreciation of the importance that the human dignity of the adherent is ensured.

At times the right to manifest religious belief may need to be limited to ensure that the rights of other individuals are not infringed.<sup>266</sup> What follows next is the need to balance the right to freedom of religion of adherents with the possible infringement on the fundamental rights of others, for example others' right to dignity. The balancing of these conflicting rights is evaluated next.

## **8.8 Protection of the fundamental rights of others**

The individual rights of others may from time to time be infringed through the religious or cultural practices of another. What follows next is a discussion of the need to balance these rights that may be in tension with one another. The possible

---

<sup>266</sup> Section 39(3) states that only laws conforming to the test for a valid limitation in section 36(1) can legitimately restrict rights while adding that rights can be justifiably limited in terms of 'any other provision of the Constitution'.

infringement of the following three independent rights, the right to dignity, the right to private property and the right to a fair trial, have been considered by the SA judiciary and are therefore evaluated next.

### **8.8.1 The right to dignity: *Christian Education of South Africa v Minister of Education***

In the *Christian Education* case, section 10 of the South African Schools Act,<sup>267</sup> outlawing corporal punishment in schools, was challenged on the basis that the prohibition infringed individual religious beliefs as protected in terms of section 15 of the Constitution, as well as community rights of Christian parents as entrenched in section 31 of the Constitution.<sup>268</sup>

Sachs J, on behalf of the court, illustrated the conflicting nature of the interests in the matter. On the one hand, the interest of a community to foster its culture and religious practices and on the other hand the need to protect society against practices that may infringe on the right of others as entrenched in the Bill of Rights.

The need to be accepting of cultural diversity and to create an environment in which believers are able to add meaning to their self-worth and dignity in an open and democratic society was emphasised.<sup>269</sup> The right to be different was referred to in the following manner:

There are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and

---

<sup>267</sup> South African Schools Act, 84 of 1996.

<sup>268</sup> The applicants contended that their religious beliefs enjoined corporal punishment, referring by way of evidence to injunctions in the Book of Proverbs chapters 9, 22 and 23.

<sup>269</sup> *Christian Education* (note 7 above) paragraph 36.

pluralism in our society .... Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.<sup>270</sup>

In applying an approach towards reasonable accommodation, the importance of considering if the religious practice is in contravention of the law<sup>271</sup> or if the practice infringes on the fundamental rights of others was emphasised.<sup>272</sup> It was argued that in the matter of *Christian Education* the religious and cultural practice was in contravention of the law and infringed on the right to dignity and security of the person of the minor school children.<sup>273</sup> The Constitutional Court held that religious and cultural practices cannot be employed as a shield to protect practices that are in conflict with the Bill of Rights and as the legislation in question gave effect to the rights of children to be protected from abuse, no exemption should be granted. The court in a unanimous decision found that the limitation imposed by the South African Schools Act was therefore justified.

### **8.8.2 The right to property: *Bührmann v Nkosi and others***

The first case in which there was a call to balance an individual’s right to religious and cultural beliefs with the right of ownership of another was the matter of *Bührmann v*

---

<sup>270</sup> *Christian Education* (note 7 above) paragraph 24.

<sup>271</sup> Lenta (note 166) paragraph 311.

<sup>272</sup> Lenta (note 242 above) 352, 376.

<sup>273</sup> *Christian Education* (note 7 above) paragraph 7.

*Nkosi*.<sup>274</sup> In brief the case involved the rights of farm-workers who lived and worked on farmland not belonging to them.<sup>275</sup> The rights of farm-workers to ‘reside and use’<sup>276</sup> land in accordance with their culture<sup>277</sup> and ‘freedom of religion, belief, opinion and expression’<sup>278</sup> is secured in terms of the Extension of Security of Tenure Act (ESTA).<sup>279</sup> This case related to the question as to whether the son of Grace Nkosi’s could be buried on the farm where he was born on in 1968 and on which he was living legally with his mother at the time of his death in 1999. One of Grace’s grandsons and seven other family members were already buried on the farm with permission of the current landowners’ father. Mrs Nkosi alleged that according to her custom and religious belief a deceased family member is only physically separated from those left behind and needs to communicate with those left behind. The burial space was a ‘home for the ancestors’ from which such communication could take place.

Both the full bench of the Transvaal Provincial Division (TPD) of the High Court and the majority bench in the Supreme Court of Appeal had no difficulty in concluding that the right to property weighed heavier and that the right to freedom of religion has ‘internal limits’.<sup>280</sup> Satchwell J in the TPD balanced the rights of the landowner with the religious and cultural rights of the secure tenant in the following manner:

---

<sup>274</sup> *Bührmann v Nkosi and Another* 2001 (1) SA 1145 T (*Bührmann v Nkosi*) subsequent on appeal to the Supreme Court of Appeal in *Nkosi v Bührmann* (note 182 above).

<sup>275</sup> *In casu* Grace Nkosi and her family worked and lived on the farm De Emigratie from 1966 to 1981 where after they moved to a neighbouring farm. At all times the farm was owned by the Bührmanns. After the death of her husband, Grace returned with her sons to the farm De Emigratie in 1986 with permission of Bührmann.

<sup>276</sup> Section 6(1) of ESTA, 62 of 1997.

<sup>277</sup> Section 6(2)(d) of ESTA, 62 of 1997.

<sup>278</sup> Section 5(d) of ESTA, 62 of 1997.

<sup>279</sup> ESTA, 62 of 1997.

<sup>280</sup> *Nkosi v Bührmann* (note 182 above) paragraph 49.

The Constitution clearly envisages that the second respondent is free to hold and act upon her religious convictions ... However, ... I know of ... [no authority] which imposes on an individual a positive obligation to promote the religious practices and beliefs of another at one's own expense. If such were envisaged by the Constitution or the Extension of Security of Tenure Act, each occupier ... would be entitled to require of the landowner that he permit the erection of a church or tabernacle ... .<sup>281</sup>

The judgment of Satchwell J exaggerates the possible infringement on the farm owners' right to property for the following reasons: Grace Nkosi was not asking for a church to be built, but for an area the size of a grave on land where others had already been buried. In the opinion of Ngoepe JP this does not represent such a drastic curtailment as suggested by Satchwell J above.<sup>282</sup> I concur with the sentiment as expressed by Ngoepe JP. In stating the infringement in this way, Satchwell J does not enable the court to undertake a true balancing analysis of conflicting rights.<sup>283</sup>

### **8.8.3 The right to a fair trial: *Crossley v National Commissioner of South African Police Service***

---

<sup>281</sup> *Bührmann v Nkosi* (note 274 above) 1155 D – F.

<sup>282</sup> *Bührmann v Nkosi* (note 274 above) 1161 F – G. Regarding the decision in *Bührmann v Nkosi* see generally L M du Plessis 'Die Grondwet as Gedenkteken en die Werkdadigheid van Onopvallende, Grondwetlike Kragte' (2005) 70(3) *Koers* 535-554; LM du Plessis, 'The South African Constitution as a Monument and Memorial, and the Commemoration of the Dead' in R Christensen & B Pieroth (eds) *Rechtstheorie in Rechtspraktischer Absicht* (2008) 189 -205. See also LM du Plessis 'Affirmation and Celebration of the 'Religious Other' in South Africa's Constitutional Jurisprudence on Religious and Related Rights: Memorial Constitutionalism in Action' (2008) 8 (2) *African Human Rights Law Journal* 376.

<sup>283</sup> Subsequently ESTA has been amended to include permission to bury in accordance with cultural and religious belief on the condition that an established practice of burial on the land exists. See section 6(2)(dA) of ESTA, 62 of 1997.

Another case in which an individual's right to religious and cultural beliefs needed to be balanced with the right of another to a fair trial is the matter of *Crossley*.<sup>284</sup> In this case charges were laid against a white farmer, Mark Scott-Crossley, and three of his workers for the murder of Nelson Chisale. Chisale was dismissed by Scott-Crossley and on return to collect his belongings on the farm, was allegedly severely assaulted and thrown in an encampment that was home to a pride of lions. Subsequently only the remains of a skull, broken bones and a finger were found that the family planned to bury at a family burial service on Saturday the 13 March 2004. On Friday 12 March 2004 Scott-Crossley and the other accused sought an urgent interdict to stay the funeral. The applicants wanted the remains to be examined in order to be able to challenge the forensic evidence at the trial. Patel J dismissed the application because the applicants failed to establish urgency.

Consequently it was not necessary for the court to decide on how to reconcile the religious and cultural rights of the family to a family burial with Scott-Crossley's right to a fair trial. Nevertheless Patel J held that the right to dignity of the deceased and his family take precedence over the right of the applicant to a fair trial. In this conclusion Patel J advanced the African saying *umuntu ngumntu ngabayne abantu*<sup>285</sup> while expressing an appreciation for the principle of *ubuntu* as follows:

*Ubuntu* embraces humanness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation.<sup>286</sup>

Du Plessis<sup>287</sup> evaluates the different outcomes in the matters of *Bührmann v Nkosi* and *Crossley* and concludes that in the matter of *Crossley* the Constitution was interpreted

---

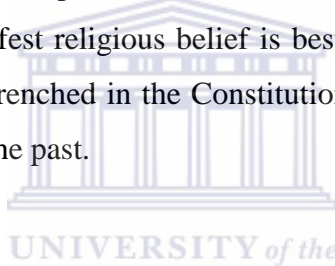
<sup>284</sup> *Crossley and Others v National Commissioner of South African Police Service and Others* [2004] 3 All SA 436 (T).

<sup>285</sup> A person is a person through other people – See also the discussion on *ubuntu* in section 5.6.

<sup>286</sup> *Crossley* (note 284 above) 18.

as a memorial of past injustice. Past injustices in this case included the severe abuse inflicted on Chisale in that he was dismissed, assaulted and thrown to the lions while still alive. The court therefore allows the family a measure of compassion and humanity in allowed them to proceed with the burial even though the burial may impact negatively on the right to a fair trial. The judgment stands as a memorial in consideration of past injustice, inequality and discrimination.

Through interpreting the right to manifest religious belief the court should reflect on past injustice, inequality and discrimination and should make every effort to show respect and appreciation of these past injustices. It is only through the interpretation of the right as memorial of the past that reconciliation and quality equality can be achieved. The right to manifest religious belief is best protected in being mindful of the reality that the rights entrenched in the Constitution are entrenched in memory of the past and the injustice of the past.



#### **8.8.4 The right to freedom of religion: *Woodways v Vallie***

More recently the Western Cape High Court in the matter of *Woodways*<sup>288</sup> confirmed a decision of the Equality Court that an instruction to remove a *fez*<sup>289</sup> worn by male Muslims upon entering premises, indeed constituted discrimination based on religion. In the appeal to the High Court Mr and Mrs Hearn argued that they were expressing their faith through dissuading Mr Vallie, a Muslim male, from manifesting his religious beliefs. In confirming the decision of the Equality Court the High Court

---

<sup>287</sup> See generally du Plessis (note 282 above) 189. For the role of *ubuntu* in reconciliation see also See D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation' (2004) 19 *South African Public Law* 661. See also the discussion on *ubuntu* in section 5.6.

<sup>288</sup> *Woodways CC v Vallie* 2010 (6) SA 136 (WCC) (31 August 2009) (*Woodways*).

<sup>289</sup> Worn by male Muslims to cover their heads, just as the headscarf is worn by female Muslims



focused on the impairment that the request had on the right to dignity and the right to identity of Mr Vallie. The court emphasised that:

The fact of the matter is not about injury to Vallie's religious feelings. It is about the extent to which a request impaired his dignity and identity. The wearing of a fez to Vallie is an expression of his religious belief which is central to his identity and dignity. It is his identity and dignity which are implicated in this matter.<sup>290</sup>

The impact of the instruction on the dignity and right to identity was balanced against the right of the appellants to not be subjected to blasphemous belief. Throughout this balancing process the court remained mindful of the history of dominance and marginalisation and took these injustices into consideration in balancing these conflicting rights. Zondi J consequently emphasised the fact that Mr Vallie was a 'member of a historically disadvantaged group but also belongs to a religion which has suffered marginalisation in the past'.<sup>291</sup> In light of these past injustices the court evaluates the instruction that further impairs on the dignity and identity of a historically disadvantaged individual and finds the award of damages in light of the discriminating action justified.

The interpretation of these conflicting rights is balanced in the spirit of reconciliation. The emphasis on reconciliation is in line with the view that the Constitution should be viewed as a memorial of past injustices as discussed in the matter of *Crossley*. Therefore the judgment is aimed at reconciliation and at addressing the indignity that people suffered because in the past as a result of discrimination.

This decision is illustrative the right to manifest religious belief in a diverse society is best served through a judiciary that remains mindful of past discriminatory practices and of the injustice that was experienced by the historically disadvantaged. In seeking

---

<sup>290</sup> *Woodways* (note 288 above) per Zondi J paragraph 62.

<sup>291</sup> *Woodways* (note 288 above) per Zondi J paragraph 72.

to build integration and harmony the rights of these marginalised and disadvantaged groups requires particular care so that their dignity may be repaired.

## **8.9 Conclusion**

What emanates from this overview of the legal context and application of the right to manifest religious belief in the South African context are the following aspects.

First, the relationship between the state and religion requires even-handed interaction between the state and religion. In the interpretation of this even-handed interaction, the right to freedom of religion should be interpreted as a liberty and an equality right. The state should therefore refrain from favouring one religion over others and should react impartially towards all religions. The state furthermore has a duty of non-identification and to treat and promote all religious denominations in an equal manner. Even apparently neutral provisions should be scrutinised to determine if they convey a message of exclusion.

Second, coupled with the duty of evenhandedness and non-identification, the state has a duty to respect, protect, promote and fulfil the rights entrenched in the Bill of Rights. The state, therefore, has both a negative duty of non-interference in terms of which the state has to respect and protect rights, as well as a positive duty to act in the interest of religious freedom. The duty to promote and fulfil requires that the state take steps to facilitate the exercise of the right, so that the right to freedom of religion may flourish.

Third, the importance of the right to freedom of religion as well as the interrelated nature of the right is firmly acknowledged by the courts. The right is entrenched as an individual right, a collective right and as an institutional right. The equality clause further explicitly prohibits unfair discrimination, either directly or indirectly, based on

religion. The right to freedom of religion consequently operates both as a liberty right, on an individual and collective basis, and as an equality right.

Fourth, in addition to the interrelated nature of the right as an individual and collective, liberty and equality right, the importance of the right to freedom of religion to the individuals' sense of self worth, identity and dignity is acknowledged. Respect for human dignity is further related to the whole constitutional purpose of establishing unity and solidarity in our diverse society. This unity and solidarity requires not mere toleration of difference but institutional commitment towards accommodating difference.

Fifth, any limitation of the right will have to be balanced in the context of a lived and experienced historical reality in which the rights of vulnerable and marginalised people in particular are protected. In protecting the right to manifest religious belief the need for reconciliation and remembrance of the injustice of the past must also be prevalent and any limitation on the rights of the vulnerable and previously marginalised therefore must be strictly scrutinised.

Lastly, this high level of protection as provided by the South African courts in accommodating religious and cultural practices that signifies and emphasises the value of multiculturalism and diversity must be honoured with regards to all cultural and religious practices and not only mainstream dominant practices.

In comparing the approach of the South African courts towards the application of the right to manifest religious belief with the interpretation of the courts evaluated in the previous chapter, the following commendable attributes can be drawn from the South African jurisprudence.

The requirement of state neutrality aimed at achieving equality between religious and cultural practices is interpreted mindful of the fact that the religious and cultural equality may at times best be achieved through the implementation of positive measures that enable a specific religion or culture to flourish. For this reason the South African courts may from time to time positively promote a particular religious or cultural point of view. This promotion will however not be seen as an endorsement that is in conflict with state neutrality. The promotion will in actual fact be considered as a means of ensuring 'quality equality'. 'Quality equality' celebrates the equal worth of all and enhances the application of rights that by the very nature protect difference, such as the right to freedom of religion.

In striving for quality equality the state not only has a duty to promote and fulfil the right to manifest religious belief. The state further has a duty to consider even seemingly neutral rules that may perpetuate discrimination and inequality. The court therefore considers the impact of legislative measures that may maintain the historical privileges of the past or unduly burden an individual or group. Through this approach the court is specifically focussed on addressing the needs of the vulnerable and marginalised.

In promoting and protecting the rights of the vulnerable and marginalised the court is mindful of the injustices of the past and is focused on addressing these injustices while at the same time striving towards facilitating reconciliation and social justice.

The South African courts are in general conscious of the injustice and suffering of the past as a result of discrimination and the non-recognition of human rights. The need to overcome the divisions and marginalisation of the past has made the court aware of the need to go the extra mile in ensuring that all people are treated with equal concern and respect. In doing so the courts endeavour to promote and celebrate diversity through the acceptance of people with all their differences.

This approach is in stark contrast with the approaches evaluated in the previous chapter and it is therefore contended that the South African jurisprudential approach provides more extensive protection of the right to manifest religious belief and is preferable.



## Chapter 9

### Conclusion

#### 9.1 Introduction

The central aim of this thesis, as set out in Chapter 1, has been to evaluate the constitutional, juridical and philosophical framework in terms of which the right to manifest religious belief is optimally protected.

To this end, a historical overview of certain religious conflicts was provided. It was shown that it was in response to these conflicts that various instruments aimed at protecting the right to freedom of religion were developed.<sup>1</sup> This examination sought to appreciate the need, effectiveness and approach of these instruments in protecting the right to manifest religious belief. From this overview it was however clear that the main purpose of these instruments was not to observe the right to freedom of religion but to constrain religious conflict. Therefore these instruments merely granted reluctant recognition to different religions and not equivalent treatment of these different religions in relation to others.<sup>2</sup> Another way in which religious conflict has generally been managed has been through imposing a restriction on religious practices that do not conform to the norms of the dominant religion.<sup>3</sup>

From this historical overview of the development of the right to freedom of religion it is clear that religious freedom has been traditionally been protected either by means of reluctant recognition or by means of a limitations imposed on the right.<sup>4</sup> The approach

---

<sup>1</sup> See section 2.2, 2.3, 2.4 and 2.5.

<sup>2</sup> See section 2.3 and 2.4.

<sup>3</sup> See section 6.2.

<sup>4</sup> See section 2.3.

to religious freedom has not been to find ways in terms of which the interests of all diverse religious adherents concerned can be accommodated. It can therefore be argued that the international protection of the right to manifest religious belief was not designed to address the need for equal protection of all religions. Furthermore the manner in which conflict has generally been dealt with has been through limitation and not accommodation.<sup>5</sup>

The historical overview of religious conflict further revealed that the protection of the right to freedom of religion has also been addressed through the separation of the state from religion.<sup>6</sup> Therefore the relationship between the state and religion was evaluated next. The aim of this evaluation was to foreground the impact of this relationship on the protection of the right to freedom of religion.<sup>7</sup> Here, too, it was identified that the ways in which this relationship is structured had been in response to religious conflict or religious domination.<sup>8</sup> A critical analysis of various manners in which the relationship can be structured revealed the following insights.

In principal three main categories of relationship between state and religion were identified.<sup>9</sup> First, religious states or states with an established or recognised religion.<sup>10</sup> Second, states with a degree of separation between the state and religion<sup>11</sup> and third secular states.<sup>12</sup> None of these arrangements were evaluated to be ideally suited to ensuring the ultimate protection of the right to freedom of religion. However, it was

---

<sup>5</sup> See section 2.7.

<sup>6</sup> See section 3.2 and 3.3.

<sup>7</sup> See section 3.3.2, 3.3.3 and 3.7.

<sup>8</sup> See section 3.3.2, 3.3.3

<sup>9</sup> See section 3.4 and 3.5.

<sup>10</sup> See section 3.5.1.

<sup>11</sup> See section 3.5.2.

<sup>12</sup> See section 3.5.3.

concluded that a secular state was most suited to enhance the protection of the right to manifest religious belief as the secular state does not *per se* positively identify or arbitrarily promote a particular religion.<sup>13</sup>

The manner in which the secular state constructs the separation between the state and religion was identified as an area of cause for concern. The concern was related to the protection of the right manifest religious belief for the following reasons: First, absolute disestablishment ought to be questioned, as the state should not separate a nation from religion.<sup>14</sup> Therefore separation should not result in freedom from religion - where religion is actively excluded from the public domain. Second, the original aim of separation, namely to ensure a state in which one or certain religions are not favoured above other religions but all religions are treated equally, must be kept in mind.<sup>15</sup> Accordingly, religions that have a public dimension, in terms of which religion is considered a way of life, should be afforded equal protection and adherents of these religions should not be relegated to living their religious lives in the private sphere. Third, the state must be aware that in treating all religions equally even apparently neutral norms may impose an undue disadvantage on certain minorities or marginalised religions.

From the evaluation of the above two phases, first, the development of instruments aimed at protecting the right to freedom of religion<sup>16</sup> and second, the structuring of the relationship between the state and religion, the following two main conclusions have been drawn. First, the international framework in terms of which the individual right to freedom of religion is protected has in general accommodated diversity through limiting the right to manifest religious belief. Second, the secular state has in general

---

<sup>13</sup> See section 3.7 and 3.8.

<sup>14</sup> See section 3.5.3, 3.6 and 3.7.

<sup>15</sup> See section 3.6.

<sup>16</sup> See section 2.3, 2.4 and 2.5.



not been able to adequately address the needs of religious adherents, in particular the need of those adherents of religions that have a public dimension.

These two conclusions were supported not only in the overview of the above two phases but also in the jurisprudence of the international,<sup>17</sup> regional<sup>18</sup> and selected national bodies<sup>19</sup> concerning the right to manifest religious belief.

---

<sup>17</sup> Matters heard by the International Covenant on Civil and Political Rights judicial bodies include the following: *Singh Binder v Canada*, Comm No 208/ 1986 (UN Human Rights Committee); *Assembly of the Church of the Universe v Canada - MAB, WAT and J AYT v Canada* Comm No 570/1993 (UN Human Rights Committee); *Clement Boodoo v Trinidad and Tobago* Comm No 721/1996 (UN Human Rights Committee); *Raihon Hudoyberganova v Uzbekistan*, Comm No. 931/2000 and heard by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) *Rahime Kayhan v Turkey*, Comm No 8/2005, CEDAW/C/34/D/8/2005 (2006).

<sup>18</sup> Matters heard by the European Court on Human Rights (ECtHR) included the following: *Ahmad v United Kingdom* App No 8160/78 (4 Eur Comm HR 126 (1981) inadmissibility decision; *X v United Kingdom* App No 8231/78 (EComHR 28 Decisions and Reports 5, 28, 1982) inadmissibility decision; *Karaduman v Turkey* App No. 16278/90 (EComHR 74, DR 93, 1993) inadmissibility decision; *Bulut v Turkey* App No 18783/91 inadmissibility decision; *Kokkinakis v Greece* 17 EHRR 397 (1994); *Hoffmann v Austria*, 17 EHRR 293 (1994); *Stedman v United Kingdom* App. No.29107/95, *Kurtulmuş v Turkey* application No 65500/01; *Dahlab v Switzerland*, application No. 42393/98; *Refah Partisi (The Welfare Party) and Others v Turkey*, Judgment of 13 February 2003; *Dogru v France* application No 27058/05; *Kervanci v France* application No 31645/04; *Leyla Sahin v Turkey* application No 44774/98, Grand Chambers, Judgment of 10 November 2005, 19 BHCR 590, (2006) ELR; *Mann Singh v France* application No 24479/07; *Atkas v France* application No. 43563/08; *Ahmet Arslan v Turkey* ECtHR, application No. 41135/98; *Lautsi v Italy* – application number 30814/06 (2009).

<sup>19</sup> Selected matters heard in national jurisdictions concerning the right to freedom of religion and culture included the following: Germany: *Ludin v Land Baden-Württemberg* Case No 2BvR 1436/02, Judgment of 24 September 2003, 50. Canada: *Multani v Commission scolaire Marguerite- Bourgeoys* [2006] 1 S.C.R. 256 (Can.)79; *Big M Drug Mart Ltd.*; *R.B. v Children's Aid Society of Metropolitan Toronto* [1995]; *Zylberburg v Sudbury Board of Education* [1988] 52 D.L.R. (4th); *Syndicat Northcrest v Amselem* (2005) 29 S.C.L.R., 39; *Hutterian Brethren of Wilson Colony v Alberta*, 2007 ABCA 160. United Kingdom – England: *Suleiman v Juffali* 1 FLE 479, 490 (2002); *Singh v British Rail Engineering Ltd.* [1986] ICR 22; *Panesar v Nestle Co. Ltd.* [1980] I.C.R. 144; *Singh v Rowntree*

## 9.2 Approach in general followed in international and other jurisdictions

The jurisprudence of the international<sup>20</sup> and national judicial bodies, in France,<sup>21</sup> United Kingdom (UK) – England,<sup>22</sup> Germany,<sup>23</sup> the United States of America (USA)<sup>24</sup> and Canada<sup>25</sup> were evaluated. In this evaluation the following conclusions regarding the interpretation and application of the right to manifest religious belief the following conclusions can be made.

---

*Mackintosh Ltd.* [1979] I.R.L.R. 199; *Kabal Singh v R.H.M. Bakeries (Southern) Ltd.*, EAT 818/77; *Singh v Lyons Maid Ltd.* [1975] IRLR 328; *Mandla v Lee* [1983] IRLR 209; *Seide v Gillette Industries Ltd.* [1980], IRLR 427; *Dawkins v Dept. of Environment* [1993] IRLR 284, CA 528 -29; *R v Paul Simon Taylor* [2001] EWCA Crim. 2263 (Criminal Division); *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; *R (on the application of X) v Head Teacher and Governors of Y School* [2008] 1 All ER 249; *R (on the application of Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin); *Aishah Azmi v Headfield School and Kirklees Metropolitan Borough Council* (271) Employment Tribunal, case number 1801450/2006, 6 October 2006; United States of America: *Van Orden v Perry* 545 U.S. 677, *Lee v Weisman*, 505 U.S. 577, 631 (1992); *County of Allegheny v ACLU*, 492 U.S. 573,657 (1989); *Lemon v Kurtzman* 403 U.S. 602, 612-13(1971); *Mitchell v Helms* 530 U.S. 793,809 (2000); *Lynch v Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *Sherbert v Verner* 374 US 398, 404 (1963); *Wisconsin v Yoder* 406 U S 205 (1972); *Goldman v Weinberger* 475 U S 503 (1986); *Lyng v Northwest Indian Cemetery Protective Association* 485 U S 439 (1988); *Oregon Department of Human Resources v Smith* 494 U S 872 (1990); *State v McBride* 955 P 2d 133 (Kan Ct App (1998)); *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006); *City of Boerne v Flores* 521 US 506 (1997); *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah* 723 F. Supp. 1467, 1469 (S.D. Fla. 1989), *afl'dmem.*, 936 F.2d 586 (11 th Cir. 1991), *cert. granted*, No. 91-948, 1992 U.S. LEXIS 1707 (U.S. Mar. 23, 1992).

<sup>20</sup> See section 6.2, 6.3 and 6.4.

<sup>21</sup> See section 7.2.

<sup>22</sup> See section 7.3.

<sup>23</sup> See section 7.4.

<sup>24</sup> See section 7.5

<sup>25</sup> See section 7.6.

In general it can be reasoned that the approach of these bodies has largely contributed to the restricted enjoyment of the right to manifest religious belief. In principal the following factors in particular have contributed to this limited interpretation.

First, the nature of the state and the manner in which the secular relationship between the state and religion has been interpreted has contributed to a limited interpretation of the right to freedom of religion. In general the notion of a secular state has been interpreted in an extensive manner.<sup>26</sup> In this way the public interest requirement of public order has been construed in such a manner as to demand the exclusion of religion from the public sphere. This approach has resulted in the devaluation of religious convictions and manifestations in the public domain. As a result, support for religious diversity has been neglected. States that have limited the right to freedom of religion on the basis of maintaining the public order of the secular state have accordingly not been subjected to having their actions overseen by the judiciary.<sup>27</sup>

Second, the function of the judiciary to scrutinise limiting provisions and to justify the necessity of the limiting provisions and the proportionality thereof to serve a legitimate public interest has not been examined in the following instances. Firstly, instances in which the judiciary argued that the religious adherent had voluntarily consented to the waiving of her right;<sup>28</sup> secondly instances in which the adherent had another option or choice in terms of which her right would not have been infringed; thirdly, instances in which the adherents manifestation was not in accordance with the dictates of mainstream religious opinion. The judicial bodies in the latter instance appear oblivious of the fact that secularism may indeed just be a perpetuation of the dominant religion.<sup>29</sup> It is contended that in finding that in these instances there was no

---

<sup>26</sup> See section 6.3.

<sup>27</sup> See section 6.3 and 77.

<sup>28</sup> See section 6.3.2.2 and 7.3.3.3.

<sup>29</sup> See section 6.3.

limitation, the judicial bodies erred in so far as these bodies did not consider the burden that was placed on adherents to make a decision that was not required from other believers. The courts further did not consider the vulnerable and marginalised position of these believers *vis a vis* the position of adherents of the dominant faith.<sup>30</sup>

Judicial bodies therefore have failed to adequately scrutinise limiting provisions imposed on the right to freely manifest religious belief, if these limitations supposedly were imposed to ensure the neutrality of a secular state or if the religious adherent purportedly had a choice to avert a limitation on her right to manifest religious belief.

Third, in addition to these two points raised above, the ECtHR has through its application of the ‘margin of appreciation’ doctrine permitted deference to the national authorities to determine the most suitable approach in imposing limitations on the right to freely manifest religious belief. This deference to the national authorities has had a cumulative negative effect on the right to manifest religious belief. Particularly in so far as this deference has resulted in limitations on the right to manifest religious belief not adequately being scrutinised by the ECtHR.<sup>31</sup> In following this approach the judicial bodies have failed to proportionately balance the limitation with the public interest sought on a case by case basis.

Fourth, it is apparent that in general, the judicial bodies, in their interpretation of the right to manifest religious belief, have not been receptive to the notion that the duty of the state in a diverse society is to foster religious diversity in that an ‘indissociable’ union exists between democratic society and religious diversity. Furthermore, they have not acknowledged that religious pluralism necessitates the full and equal rights of

---

<sup>30</sup> See section 6.2, 5.3 and 6.3.4.6.

<sup>31</sup> See section 6.2.2.1.

adherents to all faiths to choose their own way of a good life, as long as their choice does not interfere with the rights of others.

Finally, the judicial bodies have largely contributed to a restricted enjoyment of the right to manifest religious belief as well as perpetuation of the conception of the individual as a fragmented being in which the private individual is separated from the individual who participates in the public domain. In terms of this approach, religion is simply seen as a system of belief, and not as a way of life that is central to all activities of the adherent. The importance of religion to dignity and identity, both individual and collective, is not valued in following this approach. In conclusion it is contended that the approach of the courts in the various jurisdictions did not allow for the maximum enjoyment of the right to manifest religious belief.<sup>32</sup>

From the discussion above it can be deduced that the South African jurisprudence, in contrast with the general approach of the international and selected national bodies, is to be preferred for the following reasons.

### **9.3 The approach of the South African courts**

The arrival of the South African Constitution, like other human rights instruments elsewhere in the world, has over the relatively short span of 15 years produced a large array of constitutional litigation in which the right to manifest religious belief or cultural practices has collided with the practices of (for example) the workplace or education policy or the rights of others.<sup>33</sup> From an evaluation of these and other cases

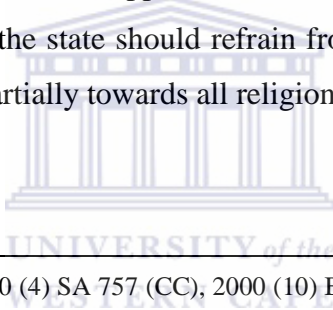
---

<sup>32</sup> See section 6.5 and 7.7.

<sup>33</sup> The Constitutional Court has in general addressed the right to freedom of religion and culture in the following matters: *Lawrence v The State and Another*, *Negal The State and Another*, *Solberg v The State and Another* 1997 (10) BCLR 1348 (CC) 1997 (4) SA 1176 (CC); *Christian Education South*

the following considerations regarding the approach of the South African courts regarding religious and cultural rights were drawn.

The South African Constitution enshrines a secular state. However, ‘secular’ is interpreted in the following manner: The state may indeed accommodate religion in so far as such accommodation is on an equitable basis and is free and voluntary.<sup>34</sup> In addition, religious and/or denominationally specific schools are allowed and marriages concluded under systems of religious personal or family law may be acknowledged. It is therefore clear that the South African Constitution does not prohibit a relationship between the state and religion. It can be said that the relationship between the state and religion displays an even-handed approach that may at times even be constructive towards religion. However, the state should refrain from favouring one religion over another but should react impartially towards all religions.<sup>35</sup>



---

*Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC); *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC); *MEC for Education: KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC). Higher courts have in general addressed the right to freedom of religion and culture in the following matters: *Ryland v Edros* 1997 (1) BCLR 77 (C); *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 2 SA 268 (C); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA); *Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA); *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC); *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 TPD; *Nkosi & Another v Bührmann* 2002 (1) SA 372 (SCA); *Crossley and Others v National Commissioner of South African Police Service and Others* [2004] 3 All SA 436 (T); *Dlamini and Others v Green Four Security* (2006) 27 ILJ 2098 (LC); *Gumede v President of the Republic of South Africa & Others* 2009 (3) BCLR 243 (CC); *Police and Prisoners Rights Union and Others v Department of Correctional Services and Another* 2010 (9) BCLR 921 (LC) and *Woodways CC v Vallie* 2010 (6) SA 136 (WCC).

<sup>34</sup> See section 8.4.

<sup>35</sup> See section 8.4.

The overall approach of the South African courts in managing conflicts over the right to manifest religious belief can be described as follows: Firstly, the courts have considered the right to freedom of religion not only as a negative right in terms of which the state has a duty to refrain from interfering with the right to freedom of religion of its citizens. The state has interpreted the right as a positive right as well. In terms of this interpretation the state has appreciated that it has a duty to positively promote the right freedom of religion.<sup>36</sup>

Second, the courts have interpreted the right to freedom of religion in a broad and interrelated manner. The right to freedom of religion has been understood as an individual right and as a collective right. The court has furthermore been appreciative of the intersection between the right to freedom of religion and culture. Freedom of religion is important to the individuals' sense of self worth, and influences both the individual and collective identity. The collective and cultural importance of the right to freedom of religion is therefore firmly acknowledged by the South African courts.<sup>37</sup>

Third, the courts have appreciated the interrelation between the right to freedom of religion of the individual and the right to dignity. The importance of the right to freedom of religion to the individuals' sense of self-worth, identity and dignity is firmly acknowledged.<sup>38</sup> The respect for human dignity is also further related to the whole constitutional purpose of establishing unity and solidarity in South Africa.<sup>39</sup> In this regard it is affirmed by the courts that unity and solidarity requires not only toleration of difference but institutional commitment towards accommodating and even celebrating difference.

---

<sup>36</sup> See section 8.4.3.

<sup>37</sup> See section 8.5 and 8.7.1.

<sup>38</sup> See section 8.7.1 and 8.7.2.

<sup>39</sup> See section 5.6.

Fourth, the right to freedom of religion is considered as both as a liberty right, on an individual and collective basis, and as an equality right. In terms thereof unfair discrimination, either directly or indirectly, based on religion is prohibited.<sup>40</sup> The court has shown sensitivity to the fact that even apparently neutral norms may be representative of a system of entrenched dominance and therefore may impose harm on marginalised or vulnerable religions that may not be readily observed. It can therefore be contended that the South African courts have been active in furthering the principle of ‘quality equality’.<sup>41</sup>

Fifth, closely associated with the broad interpretation of the right to freedom of religion as a collective and equality right, as well as the interrelation between religion and the self-worth, dignity and identity of the individual, is an awareness by the South African courts of the historical context. In this regard the courts have been attentive to the creation of an environment aimed at establishing unity and solidarity amongst all, including the marginalised. Therefore, the South African courts have been aware of protecting the rights of the vulnerable and have truly sought to promote recognition of the diversity of all the South African people.<sup>42</sup>

Finally, the courts have not only acknowledged the complex nature of the right to freedom of religion and the need for a transformative jurisprudence. The courts have further aligned these ideals with the African concept of *ubuntu*.<sup>43</sup>

This thesis had further investigated the scope and contents of the right to freedom of religion in the international<sup>44</sup> and regional context.<sup>45</sup> In balancing the approach of the

---

<sup>40</sup> See section 8.7.2 and 789

<sup>41</sup> See section 8.7.2.

<sup>42</sup> See section 8.9.

<sup>43</sup> See section 8.8 and 5.6.

<sup>44</sup> See section 4.2.1, 4.4 and 4.3.3.



South African courts with the international framework discussed, it is concluded that the approach of the South African courts is in conformity with the ethos of the international instruments for the following reasons.

#### **9.4 Conformity of the South African approach with international instruments**

It is contended that an inference can be drawn that the South African approach is in conformity with the philosophy of the international and regional frameworks based on the following aspects: Firstly, in particular during the drafting of the UDHR, it was apparent that the drafters were more influenced by a dignitarian approach than the furtherance of individualistic rights. The dignitarian approach places more emphasis on the aspect that the individual bearer of rights is situated within a family and a community. Everyone is considered a unique individual but is constituted in relation to others, in terms of the premise that everyone acts towards one another ‘in a spirit of brotherhood’.<sup>46</sup> It is inferred that the approach of the South African judiciary encapsulates the notion of *ubuntu* and is mindful of the premise that individuals are constituted in relation to others.<sup>47</sup>

Second, the duty to promote rights is also advanced in the international framework. The ICCPR Human Rights Committee by means of a General Comment 23<sup>48</sup> has determined that states have a proactive obligation to ensure the maintenance of religious identities. Accordingly, states have a duty to stimulate an environment in which believers may fully express their religious identities. Here to it is understood that the active approach of the South African courts in furthering the principle of

---

<sup>45</sup> See section 4.8.3 and 4.10.

<sup>46</sup> As indicated in article 1 of the UDHR.

<sup>47</sup> See section 8.8 and 5.6

<sup>48</sup> See section 4.3.3 and 4.8.3.

‘quality equality’ has indeed created an environment in which diverse religious adherents are able to express their religious identities. The South African Constitutional Court has indeed celebrated difference.<sup>49</sup>

Third, the interrelation between individual and collective rights is also acknowledged in terms of the African Charter in particular. It is contended that the approach of the South African courts in being sensitive to the collective and cultural aspects of the right to manifest religious belief indeed is in accordance with this regional obligation. Therefore it is contended that the emphasis of the courts on the dignity of the individual as part of a community as well as the appreciation by the courts that a positive duty to promote an environment in which believers may express their religious identities is in conformity with the ethos of the regional legal context.<sup>50</sup>

### **9.5 A postmodern approach**

In comparing the methodology of the South African courts with the international and other national enforcement bodies it is apparent that the South African framework is more desirable in that it moves the protection of the right to manifest diverse religious belief from merely tolerating different religious practices to truly celebrating these practices. The methodology of the South African courts may be comparable to a postmodern transformative approach.

A postmodern approach reconceptualises the protection of the right to manifest religious belief and views this right as a dimension that involves interaction from the

---

<sup>49</sup> See section 8.7.1.1.

<sup>50</sup> See section 4.10.

individual, the community and the state.<sup>51</sup> With regards to the role of the state, the post modern approach interprets a neutral state as a state in which all voices are heard.<sup>52</sup> A neutral state is aware of the fact that seemingly neutral rules may disproportionately negatively affect minority vulnerable religions and that this discrimination does not serve the purpose of the neutral state. For this reason such a neutral state will be sensitive to these forms of dominance and oppression and actively seek to further equal opportunities for all. This sensitivity is also in line with the obligation of states to respect, protect, promote and fulfil the right to freedom of religion. In complying with these obligations the purpose of neutrality is to ensure 'quality equality'. The state therefore has a duty to proactively support of an environment in which religious adherents can achieve full religious recognition.<sup>53</sup>

With regards to the individual, a postmodern approach is appreciative of the fact that religious people view life as a whole and accordingly seek to manifest their beliefs in their private and public lives. In addition the right to freedom of religion is intrinsically linked to the individual sense of self-worth and identity as religion defines the very essence of a person's being which is further enhanced in the individual's sense of belonging. Therefore the right to manifest religious belief incorporates the individuals' sense of belonging to a religious community. A postmodern approach acknowledges the collective dimension of religion.

---

<sup>51</sup> See section 5.1.

<sup>52</sup> See section 5.2.2.

<sup>53</sup> See section 5.5.

## 9.6 Overall conclusion

It is concluded that a state is best able to ensure the protection of diverse religions if the relationship between the state and religion is structured in accordance with the principle of secularism. This is so, as a neutral state is best situated to treat all religions equally. However, the requirement for neutrality must not be interpreted to indicate a public domain void of religion. For this reason, this thesis maintains that the optimal protection of the right to freedom of religion and in particular the right to manifest religious belief requires the return of religion to the public domain.

This thesis strongly avers that the denial of a space for religion in the public domain is a denial of the core aspect of religion. It is evident that for many believers religion is not only part of their internal belief but is indeed a way of life, religion determines their whole being, their sense of self-worth and dignity. It is only when all these facets of the importance of religion are valued that the right to freedom of religion is indeed optimally protected. The very nature of religion dictates a manifestation in community with others and this manifestation cannot merely occur in the realm of the private. It is asserted that the very nature of manifestation necessitates a display in the public domain.

Religion is further also related to the identity of the individual. This identity is affirmed if the individual is able to reveal her life choices and have these choices acknowledged in the community in which she finds herself. In a diverse society the need for affirmation of identity may even be more prevalent as this is a way in which the individual may exert her uniqueness and individual worth. The increase in challenges to the international and national judicial bodies relating to the right to manifest religious belief as evaluated in this thesis confirms this prevalence.

It is maintained that a postmodern approach that enables the return of religion to the public domain is the best approach to ensure the protection of the right to freedom of religion and to acknowledge the unique identity of all. It is through this return that difference is not merely tolerated or accommodated but indeed celebrated. It can be concluded that the South African jurisprudence that incorporates as postmodern and transformative approach provides the best case study of the full protection of the right to manifest religious belief.



## BIBLIOGRAPHY

### Books

Adhar R and Leigh I *Religious Freedom in the Liberal State* Oxford University Press: Oxford 2005.

Albertyn CH *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Act 4 of 2000* Witwatersrand University Press: Johannesburg 2001.

Alcalá A *The Spanish Inquisition and the Inquisitorial Mind* Columbia University Press: New York 1987.

Allport GW *The Nature of Prejudice* Addison Wesley Publishers: Reading M.A 1979.

Ammerman N (ed) *Everyday Religion: Observing Modern Religious Lives* Oxford University Press: New York 2007.

An-Na'im AA in *Cultural Transformation and Human Rights in Africa* Zed Books: London 2002.

Appiah KA and Gutman (eds) *A Color Conscious: The Political Morality of Race* Rutgers University Press: New Brunswick: New York 1998.

Arendt H *On Revolution* Viking: New York 1963.

Arendt H *The Human Condition* University of Chicago Press: Chicago 1958.

Armstrong K *Holy War: The Crusades and Their Impact on Today's World* Random House: New York 2001.

T Asad *Formations of the Secular: Christianity Islam Modernity* Stanford University Press: Stanford 2003.

Audi R and Wolterstorff N (eds) *Religion in the Public Square: The Place of Religious Convictions in Political Debate* Rowman and Littlefield Publishers: Lanham 1997.

Banerjee BN *Hindu Culture, Custom, and Ceremony* Agam Kala Prakashan: Delhi 1978.

Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2nd ed LexisNexis Butterworths: Durban 2006.

Benhabib S *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* Routledge: New York 1992.

Benhabib S (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* Princeton University Press: Princeton: New York 1996.

Benhabib S *The Claims of Culture: Equality and Diversity in the Global Era* Princeton University Press: Princeton 2002.

Berger PL and Huntington PS *Many Globalizations: Cultural Diversity in the Contemporary World* Oxford University Press: Oxford 2002.

Berger PL, Davie G and Fokas E *Religious America Secular Europe? A Theme and Variations* Ashgate Press: London 2008.

Berger PL (ed) *The Desecularization of the World Resurgent Religion and World Politics* William B. Eerdmans Publishing Co: Grand Rapids Michigan 1999.

Berlin I (ed) *Four Essays on Liberty* Oxford University Press: Oxford 1969.

Berlin I *The Proper Study of Mankind* Chatto & Windus: London 1997.

Bettenson H (ed) *Documents of the Christian Church* Oxford University Press: Oxford 1989.

Bhikhu P *Rethinking Multiculturalism: Cultural Diversity and Political Theory* 2<sup>nd</sup> edition  
Palgrave Macmillan: Hampshire 2006.

Bikhu P *Rethinking Multiculturalism* Palgrave Macmillan: New York 2000.

Birnbaum KE *The Politics Of East-West Communication In Europe* Saxon House: Westmead  
1979.

Bloed A (ed.) *From Helsinki To Vienna: Basic Documents Of The Helsinki Process* Martinus  
Nijhoff: Dordrecht 1990.

Boele-Woelki K (ed.) *Debates in Family Law around the Globe at the Dawn of the 21<sup>st</sup>  
Century* Antwerp: Intersentia 2009.

Bohman J and Rehg W (eds) *Deliberative Democracy: Essays on Politics and Reason* MIT  
press: Cambridge Massachusetts 1997.

Boyle M, Harris DJ and Warbrick C *Law of the European Convention on Human Rights*  
Butterworths: London/Dublin/Edinburgh 1995.

Bradford A *The Affaire du Foulard: a new French identity?* San Francisco State University:  
San Francisco 2007.

Brand D and C Heyns C *Socio (eds) Economic Rights in South Africa* Pretoria University Law  
Press: Pretoria 2005.

Brems E *Human Rights: Universality and Diversity* Martinus Nijhoff: The Hague 2001.



Brown CG and Snape M *Secularisation in the Christian World* Ashgate publishers: Burlington 2010.

Bruce S (ed) *Religion and Modernization* Clarendon: Oxford 1992.

Byrnes TA and Katzenstein PJ (ed) *Religion in an Expanding Europe* Cambridge University Press: Cambridge 2006.

Calvin J *Institution of Christian Religion* Westminster Press: Philadelphia 1536.

Carroll S *Noble Power During the French Wars of Religion: The Guise Affinity and the Catholic Cause in Normandy* Cambridge University Press: Cambridge 2005.

Carter SL *The Culture of Disbelief How American Law and Politics Trivialize Religious Devotion* Doubleday: New York 1994.

Casanova J *Public Religions in the Modern World* Chicago University Press: Chicago 1994.

Chaskalson *et al* (eds) *Constitutional Law of South Africa* Juta: Cape Town 1995.

Cheadle H (et al) *South African Constitutional Law: The Bill of Rights* Butterworths: Durban 2002.

Chidester D *Religions of South Africa* Routledge Publishers: London 1992.

Chidester D (et al) *Religion in Public Education: Options for a New South Africa* University of Cape Town: Rondebosch 1994.

Chidester D *Global Citizenship, Cultural Citizenship and World Religions in Religion Education* Human Science Research Council Publishers: Cape Town 2002.

Christensen R and B Pieroth (eds) *Rechtstheorie in rechtspraktischer Absicht* Duncker & Humblot: Berlin 2008.

Craig P and De Búrca G *EU law: Text, Cases, and Materials* Oxford University Press: Oxford 2008.

Currie I and de Waal J (ed) *The Bill of Rights Handbook* Juta & Co Publishers: Lansdowne 2005.

Coetzee PH and Roux APJ (eds) *Philosophy from Africa: A Text with Readings* International Thomson Publishing: Johannesburg 1998.

Cornell D *The Philosophy of the Limit* Routledge: London 1992.

The Dalai Lama *Towards the true kinship of faith. How the world's religions can come together* Abacus Publishers 2010.

Davis D *Democracy and Deliberation: Transformation and the South African Legal Order* Juta: Cape Town 1999.

De Burca G and Weiler JH (eds.) *The European Court of Justice* Oxford University Press: Oxford 2001.

Dersso SA *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* Pretoria University Law Press: Pretoria 2010.

Detrick S *A Commentary on the United Nations Convention on the Rights of the Child* The Martinus Nijhoff Publishers: Hague/Boston/London 1999.

Devlin P *The Enforcement of Morals* Oxford University Press: Oxford 1965.

Doomernik J & JMichael (Ed) *Modes of Migration Regulation and Control in Europe* Amsterdam: Amsterdam University Press 2008.

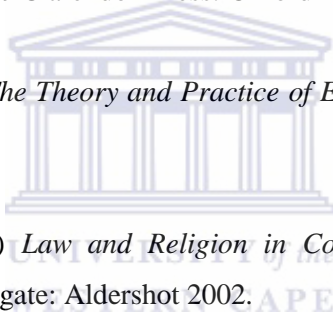
Dupré L *The Enlightenment and the Intellectual Culture of Modernity* Yale University Press: New Haven 2004.

Dworkin R *A Matter of Principle* Harvard University Press: Cambridge 1985.

Dworkin R *Liberalism and its Critics* Blackwell: Oxford 1984.

Dworkin R *A Matter of Principle* Clarendon Press: Oxford 1986.

Dworkin R *Sovereign Virtue: The Theory and Practice of Equality* Harvard University Press: Cambridge 2000.



Edge PW and Harvey G (ed) *Law and Religion in Contemporary Society: Communities, Individualism and the State* Ashgate: Aldershot 2002.

Edwards BM *The Israeli-Palestinian Conflict: a People's War* Routledge: New York 2009.

Eide A and Gudmunder A(ed) *The Universal Declaration of Human Rights: A Common Standard of Achievement* Martinus Nijhoff Publishers: The Hague 1999.

Eide A et al (eds) *Economic, Social and Cultural Rights: A Textbook* Martinus Nijhoff: Dordrecht/Boston/London 2001.

Engle K *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* Duke University Press: Durham 2010.

Evans C *Freedom of Religion under the European Convention on Human Rights* Oxford University Press: Oxford 2001.

Evans MD *Religious Liberty and International Law in Europe* Cambridge University Press: Cambridge 2009.

Evans MD *Religious Liberty and International Law in Europe* Cambridge University Press: Cambridge 1997.

Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights* Cambridge University Press: Cambridge 2002.

Evans T *Human Rights fifty years on: a Reappraisal* (ed) Manchester University Press: Manchester 1998.

Falola T *Violence in Nigeria: The Crisis of Religious Politics and Secular Ideologies* University of Rochester Press: Rochester NY 1998.

Fink C *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection* Cambridge University Press: New York 2004.

Firestone CL and Palmquist S *Kant and the New Philosophy of Religion* Indiana University Press: Indianapolis 2006.

Fredman S *Discrimination Law* Oxford University Press: Oxford 2002.

Fuchs LH *The American Kaleidoscope: Race, Ethnicity and the Civic Culture* (1990) Wesleyan University Press: Middletown C.T 1990.

Gaddis JL *The Cold War: A New History* Penguin Books: New York 2006.

Galton AH *Church and State in France 1300 – 1870* London: Edward Arnold 1907.

Galston WA *Liberal Pluralism: The Implication of Value Pluralism for Political Theory and Practice* Cambridge University Press: New York 2002.

Gill A *The Political Origins of Religious Liberty* Cambridge University Press: New York 2007.

Gill R *Moral Leadership in a Postmodern Age* T&T Clark: Edinburgh 1997.

Glendon MA *Rights Talk: The Impoverishment of Political Discourse* Free Press: New York 1991.

Glendon MA *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* Random House: New York 2001.

Gourevitch P *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* Farrar Straus & Giroux: New York 1998.

De Gruchy JW and S Martin (eds) *Religion and the Reconstruction of Civil Society* University of South Africa Press: Pretoria 1995.

Gutmann A *Identity in Democracy* Princeton University Press: Princeton 2003.

Gutman A (ed) *Multiculturalism* Princeton University Press: Princeton 1994.

Habermas J *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* MIT Press: Cambridge Massachusetts 1991.

Habermas J *Inclusion of the Other: Studies in Political Theory* C. Cronin and P. De Greif (eds.) MIT Press: Cambridge Massachusetts 1998.

Habermas J *The Future of Human Nature* MIT Press: Cambridge Massachusetts 2003.

Habermas J and Ratzinger J *The Dialectics of Secularization: On reason and Religion* Ignatius: San Francisco 2006.

Harris D and Joseph S *The International Covenant on Civil and Political Rights and United Kingdom Law* Oxford: Clarendon Press 1995.

Haynes J *Religion in Global Politics* Longman: London and New York 1998.

Heyns C (ed) *Human Rights Law in Africa* Marthinus Nijhoff; Leiden 2004.

Hick J *An Interpretation of Religion: Human Responses to the Transcendent* Yale University Press: New Haven CT 1989.

Hick J and Knitter PF *The Myth of Christian Uniqueness: Toward a Pluralistic Theology of Religions* Maryknoll: New York 1987.

Hillerbrand HJ *The Protestant Reformation* Harper Perennial: New York 2009.

Hooey ZF *The Nazarite Vow* Tate Publishing: London 2008.

Holt MP *The French Wars of Religion 1562–1629* Cambridge University Press: Cambridge 1995.

Holyoake G *Secularism, the Practical Philosophy of the People* London 1854.

Hugo R *Church and State in Early Christianity* Ignatius Press: San Francisco CA 1961.

Imber C *The Ottoman Empire, 1300–1650: The Structure of Power* Palgrave Macmillan: New York 2002.

Jacobsohn GJ *The Wheel Of Law: India's Secularism In Comparative Constitutional Context* Princeton University Press: Princeton (2003).

Kavanagh A *Constitutional review under the UK Human Rights Act* Cambridge University Press: Cambridge 2009.

Keating M *The New Regionalism in Western Europe: Territorial Restructuring and Political Change* Edward Elgar Publishing: Aldershot 2000.

Kelly C *The Roman Empire: a very short introduction* Oxford University Press: Oxford 2006.

Khabela MG and Mzoneli Z (Eds.) *Perspectives on 'Ubuntu': A Tribute to Fedsen Lovedale* Press: Alice 1998.

Knock TJ *To End All Wars: Woodrow Wilson and the Quest for a New World Order* Oxford University Press: Oxford 1992.



Kymlicka W *The Rights of Minority Cultures* Oxford University Press: Oxford and New York 1995.

Kymlicka W *Multicultural Citizenship: A Liberal Theory of Minority Rights* Oxford University Press: Oxford 1995.

Kymlicka W *Liberalism, Community and Culture* Oxford University Press: New York 1989.

Lerner N *Group Rights and Discrimination in International Law* 2<sup>nd</sup> edition Kluwer Law International: The Hague 1991.

Lerner N *Religion, Secular beliefs and Human Rights: 25 years after the 1981 Declaration* Martinus Nijhoff Publishers: Leiden/Boston 2006.

Lindholm T, Durham WC and Tahzib-Lier BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: Leiden 2001.

Lindholm T, Durham WC and Tahzib-Lier BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: Leiden 2004.

Locke J *A Letter Concerning Toleration* Routledge: New York 1990.

Macpherson CB *Democratic Theory :Essays in Retrieval* Oxford: Oxford University Press: Oxford 1973.

Macedo S *Liberal Virtues, Citizenship, Virtue and Community in Liberal Constitutionalism* Clarendon Press: Oxford 1990.

Malcolm ED *Religious Liberty and International Law in Europe* Cambridge University Press: Cambridge 1997.



D Marquand & RL Nettler (ed) *Religion and Democracy* Blackwell Publishers: Oxford 2000.

Martin D *On Secularization Towards a Revised General Theory* Ashgate: Aldershot 2005.

Marx AW *Faith in Nation: Exclusionary Origins of Nationalism* Oxford University Press: Oxford 2003.

McGarry J and B O'Leary *The Northern Ireland conflict: Consociational Engagements* Oxford University Press: Oxford 2004.

McGoldrick D *Human Rights and Religion: The Islamic Headscarf Debate in Europe* Hart Publishing: Oxford 2006.



Mendus S *Toleration and the Limits of Liberalism* Macmillan: London 1989.

Menski W *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* Cambridge University Press: Cambridge 2006.

Meyerson D *Rights Limited Freedom of Expression, Religion and the South African Constitution* Juta and Co Publishers: Kenwyn 1997.

Mill JS (ed) *On Liberty* Collini Cambridge University Press: Cambridge 1989.

Mitchell C *Religion, Identity and Politics in Northern Ireland* Ashgate: Aldershot 2005.

Mitra S and Kumar B *Encyclopedia of Women in South Asia: Afghanistan* Kalpaz publishers: Delhi 2004.

Monsma SV and Soper JC *The Challenge of Pluralism Church and State in Five Democracies* Rowman and Littlefield Publishers: Lanham 1997.

Monsma SV *Church-State Relations in Crisis, Debating Neutrality* Rowman & Littlefield: Lanham 2002.

Morsink J *The Universal Declaration of Human Rights: Origins, Drafting and Intent* University of Pennsylvania Press: University Park 1999.

Mouffe C *Dimensions of Radical Democracy Pluralism, Citizenship, Community* Verso: London 1992.

Mouffe C *The Return of the Political* Verso: London 1993.

Mouffe C *The democratic paradox* Verso: London 2000.

Mouffe C *On the Political* Routledge: London 2005.

Murray R *Human Rights in Africa From the OAU to the African Union* Cambridge University Press: Cambridge 2004.

Nietzsche F *The Gay Science: With a Prelude in Rhymes and an Appendix of Songs* Random House/Vintage: New York 1974.

Nijman J and Nollkaemper A (eds) *New Perspectives on the Divide Between National and International Law* Oxford University Press: Oxford 2007.

Nowak M *UN Covenant on Civil and Political Rights: ICCPR Commentary* 2<sup>nd</sup> edition Kehl am Rhein: Strasbourg 2005.

Nowak M *Introduction to the International Human Rights Regime* Marthinus Nijhoff Publishers: Leiden/Boston 2003.



Oosthuizen GC *Religion, Intergroup Relations and Social Change in South Africa. Work Committee: Religion, Human Science Research Council (HSRC) Investigation into Intergroup Relations* Human Sciences Research Council: Pretoria 1985.

Orji CU *Ethnic and Religious Conflict in Africa: an Analysis of Bias, Decline, and Conversion based on the works of Bernard Lonergan* Marquette University Press: Milwaukee 2008.

Ouguerouz F *The African Charter on Human and Peoples' Rights: A Comprehensive agenda for Human Rights* Kluwer Law International: The Hague/London/Boston 2003.

Ovey C and White RCA *The European Convention on Human Rights* Oxford University Press: Oxford 2002.

Parekh P *Rethinking multiculturalism. Cultural Diversity and Political Theory* Macmillan: London 2000.

Parker G *The Thirty years' War* Routledge: London 1997.

Perica V *Balkan Idols: Religion and Nationalism in Yugoslav States* Oxford University Press: Oxford 2004.

Phillips A *Democracy and Difference* Penn State University Press: University Park 1993.

Du Plessis LM *Re-interpretation of statutes* Butterworths: Durban 2006.

Radan P, Meyerson D and Croucher R (eds) *Law and religion* Routledge: London and New York 2005.

Rautenbach IM *General Provisions of the South African Bill of Rights* Butterworths: Durban 1995.

Rautenbach IM and Malherbe EFJ *Constitutional Law* 4<sup>th</sup> edition Lexis Nexis Butterworths: Durban 2004.

Rawls J *The Law of Peoples with "The Idea of Public Reason Revisited"* Harvard University Press: Cambridge Massachusetts 1999.

Rawls J *Political Liberalism* New York: Columbia University Press 1996.

Rawls J *A Theory of Justice*: Harvard University Press: Cambridge MA 1971.

Raz J *The Morality of Freedom* Oxford University Press: Oxford 1986.

Raz J *The Morality of Freedom* Clarendon Press: Oxford 1988.

Raz J *Ethics in the Public Domain* Clarendon Press: Oxford 1994.

Rémond R *Religion and Society in Modern Europe* Blackwell: Oxford 1999.

Robbins T and Robertson R (eds) *Church-State Relations* (1987) New Brunswick Transaction Inc: New Brunswick New Jersey 1987.

Rothschild J and Wingfield NM *Return to Diversity: A Political History of East Central Europe Since World War II* Oxford University Press: New York 2008.

Runciman S *A history of the Crusades Volume One The First Crusade and the Foundation of the Kingdom of Jerusalem* Cambridge University Press: Cambridge 1962.

Runciman S *A history of the Crusades Volume Two The Kingdom Of Jerusalem and the Frankish East* Cambridge University Press 1952.

Sachs A *Protecting Human Rights in a New South Africa* Oxford University Press: Cape Town 1990.

Sachs A *Advancing human rights in South Africa* Oxford University Press: Cape Town 1992.

Sardar AS *Gender and Human Rights in Islam and International Law Equal Before Allah, Unequal before Man* Kluwer Law International: The Hague 2000.

Schuler MA (ed) *From Basic Needs to Basic Rights: Women's Claims to Human Rights* Institute for Women Law and Development: Washington DC 1995.

Scott SG *The Seeds of Secularization Calvinism, Culture and Pluralism in America 1870 – 1915* Christian University Press: Grand Rapids 1985.

Scott JW *Politics of the Veil* Princeton: Princeton University Press 2007.

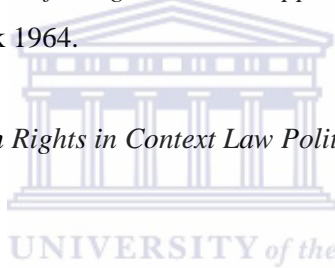
Sells M *The Bridge Betrayed: Religion and Genocide in Bosnia* University of California Press: Berkeley 1998.

Shapiro I (ed) *Two Treatises of Government and a Letter Concerning Toleration* Yale University Press: New Haven 2003.

Smit D and Conradie EM *Essays In Public Theology: Collected Essays* Sun Press: Stellenbosch 2007.

Smith WC *The Meaning and End of Religion: a New Approach to the Religious Traditions of Mankind* MacMillan: New York 1964.

Steiner HJ *International Human Rights in Context Law Politics and Morals* Oxford University Press: Oxford 2007.



Steiner HJ and Alston P (et al) *International Human Rights in Context Law Politics and Morals* 3<sup>rd</sup> edition Oxford: Oxford University Press 2007.

Steiner HJ and Alston P *International Human Rights in Context, Law, Politics, Morals* Oxford University Press: Oxford 2008.

Steven G *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* Council of Europe: Strasbourg 2000.

Stokes G *From Stalinism to Pluralism: A Documentary History of Eastern Europe Since 1945* Oxford University Press: Oxford 1996.

Tahzib BG *Freedom of Religion and Belief: Ensuring Effective International Legal Protection* Martinus Nijhoff Publishers: Boston 1996.

Taylor C *Sources of the Self: The Making of Modern Identity* Harvard University Press: Harvard. 1989.

Taylor C *A Secular Age* Harvard University Press Cambridge Massachusetts 2007.

Taylor PM *Freedom of Religion UN and European Human Rights Law and Practice* Cambridge University Press: New York 2005.

Tessler MA *A History of the Israeli-Palestinian conflict* Indiana University Press: Indianapolis 1994.

Tobler C *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law* Intersentia: Antwerpen-Oxford 2005.

De Tocqueville A *The Old Regime and the Revolution* University of Chicago Press: Chicago 1998.

Van Blerk AE *Jurisprudence An Introduction* Butterworths: Durban 1996.

Van Bueren G *The International Law on the Rights of the Child* Martinus Nijhoff Publishers: Dordrecht The Netherlands 1995.

Van Dijk P and van Hoof GJH *Theory and practice of the European Convention on Human Rights* Kluwer Law International: The Hague 1998.

Van't Spijker W *Calvin: A Brief Guide To His Life And Thought* Westminster John Knox Press: Louisville 2009.

Van Kley DK *The Religious Origins of the French Revolution From Calvin to the Civil Constitution 1560 – 1791* Yale University Press: New Haven – London 1996.

Van der Vyver JD and Witte J Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* Kluwer Law International: Leiden 1996.

De Ville J *Constitutional and Statutory Interpretation* Interdoc Consultants: Cape Town 2000.

Walzer M *On Toleration* Yale University Press: New Haven 1997.

Weller M (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* Oxford University Press: Oxford 2005.

White RC and Zimmerman AG (eds) *An Unsettled Arena Religion and the Bill of Rights* Eerdmans: Grand Rapids MI 1989.

Witte Jr J *Religion and the American Constitutional Experiment* 2nd edition Westview Press: Boulder Co 2005.

Witte J Jr. and Alexander FS (eds) *The Teachings of Modern Christianity on Law, Politics, and Human Nature* Columbia University Press: New York 2006.

Westerlund D (ed) *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics* Hurst: London 1996.

Woolman S *et al* (eds) *Constitutional law of South Africa* Original Service 2003.

Woolman S *et al* (eds) *Constitutional law of South Africa* Original Service 2005.

Woolman S *et al* (eds) *Constitutional law of South Africa* 2<sup>nd</sup> edition Original Service 2006.

Woolman S Roux T and Bishop M (eds) *Constitutional Law of South Africa* Juta: Cape Town 2009.

Young IM *Justice and the Politics of Difference* Princeton University Press: Princeton 1990.

### **Chapters in books**

Amor A 'Foreword By the United Nations Special Rapporteur of Religion or Belief' in Lindholm T, Durham WC, Tahzib-Lier BG *Facilitating Freedom of Religion or Belief: A Deskbook* (eds.) Martinus Nijhoff Publishers: Leiden 2001.

Archbishop Anastasios 'Developing Share Values: How Religious Communities Can Contribute' in Lindholm T, Durham WC, Tahzib-Lier BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: Leiden 2004.

Appiah KA 'Identity, authenticity, survival: Multicultural societies and social reproduction' in Gutman A (ed) *Multiculturalism* Princeton University Press: Princeton 1994.

Baubérot J 'The Place of Religion in Public Life: The Lay Approach' in Lindholm T, Durham WC, Tahzib-Lier BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: Leiden 2004.

Bengoetxea J, MacCormick N and Moral Soriano L, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in De Burca G and Weiler JH (eds.) *The European Court of Justice* Oxford University Press: Oxford 2001.

Benhabib S 'Toward a Deliberative Model of Democratic Legitimacy' in Benhabib S (ed) *Democracy and Difference: Contesting the Boundaries of the Political* Princeton University Press: Princeton NJ 1996.



Bergman HJ 'Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory' in van der Vyver JD and Witte J Jr (eds) *Religious Human Rights in a Global Perspective Legal Perspectives* Kluwer Law International: Leiden 1996.

Berlin I 'Concepts of Liberty' in Berlin I (ed) *Four Essays on Liberty* Oxford University Press: Oxford 1969.

Berlin I 'The Pursuit of the Ideal' in Berlin I *The Proper Study of Mankind* Chatto & Windus: London 1997.

Bloed A 'The CSCE Process from Helsinki to Vienna: An Introduction' in Bloed A (ed.) *From Helsinki To Vienna: Basic Documents Of The Helsinki Process* Martinus Nijhoff: Dordrecht 1990.

Bojosi KN 'The African commission working group of experts on the rights of indigenous communities/populations: some reflections on its work so far' in Dersso SA (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* Pretoria University Press: Pretoria 2010.

Børesen KE 'Religion Confronting Women's Human Rights: The Case of Roman Catholicism' in Lindholm T, Durham WC and Tahzib-Lier BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: Leiden 2004.

L Boothby 'Protecting of Freedom of Religion in Restricted or Institutional Settings' in Lindholm T, Durham WC Jr and Tahzib-Lie B (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Casanova J 'Religion, European secular identities, and European integration' in Byrnes TA and Katzenstein PJ (ed) *Religion in an Expanding Europe* Cambridge University Press: Cambridge 2006.

Chanock M 'Human Rights and Cultural Branding: Who Speaks and How' in An-Na'im AA *Cultural Transformation and Human Rights in Africa* Zed Books: London 2002.

Cheadle H 'Limitation of Rights' in H Cheadle H (et al) *South African Constitutional Law: The Bill of Rights* Butterworths: Durban 2002.

Chinkin C 'International Law and Human Rights' in Evans T (ed) *Human Rights Fifty years on: a Reappraisal* Manchester University Press: Manchester 1998.

Copelon R and Petschesky R 'Toward an Interdependent Approach to Reproductive and Sexual Rights as Human Rights: Reflections on the ICPD and Beyond' in Schuler MA (ed) *From Basic Needs to Basic Rights: Women's Claims to Human Rights* Institute for Women Law and Development: Washington DC 1995.

Cox H 'The Influence of Religion in America' in White RC and Zimmerman AG (eds) *An Unsettled Arena Religion and the Bill of Rights* Eerdmans: Grand Rapids MI 1989.

Cohen B 'Executive Summary – Discrimination based on religion and belief in the United Kingdom' in I Chopin, J Cormack and J Niessen (eds) *The implementation of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) as it relates to religion and belief in 15 EU Member States* (2004).

Cumper P 'Freedom of thought, conscience and belief' in D Harris and S Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law*. Clarendon Press: Oxford. 1995.

Cumper P 'Religious Liberty in the United Kingdom' in *Religious Human Rights in a Global Perspective Legal Perspectives* van der Vyver JD and Witte J Jr (ed) Marthinus Nijhoff Publishers: The Hague 1996.

Currie I 'Minority Rights: Education, Culture, and Language' in Chaskalson *et al* (eds) *Constitutional Law of South Africa* Juta: Cape Town 1995.

Currie I and de Waal J 'Limitation of Rights' in Currie I & de Waal J (ed) *The Bill of Rights Handbook* Juta & Co Publishers: Landsdowne 2005.

Davis D, Chaskalson M and de Waal J 'Democracy and constitutionalism: the Role of Constitutional Interpretation' in van Wyk JD et al (eds) *Rights and Constitutionalism, the new South African Legal Order* Juta: Kenwyn 1994.

Davie G 'Europe: The Exception that Proves the Rule?' in Berger PL (ed) *The Desecularization of the World Resurgent Religion and World Politics* William B. Eerdmann Publishing Co: Grand Rapids Michigan 1999.

Davie G 'Vicarious Religion: A Methodological Challenge' in Ammerman N (ed) *Everyday Religion: Observing Modern Religious Lives* Oxford University Press: New York 2007.

Dersso SA 'The socio-historical and political process leading to the emergence and development of norms on minorities' in Dersso SA (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* Pretoria University Press: Pretoria 2010.

Dietz M 'Context is All: Feminism and Theories of Citizenhip' in Mouffe C (ed) *Dimensions of Radical Democracy Pluralism, Citizenship, Community* Verso: London 1992.

Driver TF 'The case for pluralism' in Hick J and Knitter PF *The Myth of Christian Uniqueness: toward a Pluralistic Theology of Religions* Maryknoll: New York 1987.

Du Plessis LM 'The South African Constitution as a Monument and Memorial and the Commemoration of the Dead' in Christensen R and B Pieroth (eds) *Rechtstheorie in rechtspraktischer Absicht* Duncker & Humblot: Berlin 2008.

Du Plessis LM 'International Law and the Evolution of (domestic) Human-Rights Law in Post 1994 South Africa' in Nijman J and Nollkaemper A (eds) *New Perspectives on the Divide Between National and International Law* Oxford University Press: Oxford 2007.

Durham WC 'Perspectives on Religious Liberty: A Comparative Framework' in van der Vyver JD and Witte J Jr (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Marthinus Nijhoff Publishers: The Hague 1996.

Dworkin R 'Liberalism' in Dworkin R *A Matter of Principle* Harvard University Press: Cambridge 1985.

Eide A 'The Framework Convention in Historical and Global Perspective' in Weller M (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* Oxford University Press: Oxford 2005.

Evans MD 'Historical Analysis of Religion or Belief as a Technique for Resolving Religious Conflict' in Lindholm T, Durham WC Jr and Tahzib-Lie B (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Evans MD 'The League of Nations: Drafting the Covenant' in Evans MD *Religious Liberty and International Law in Europe* Cambridge University Press: Cambridge 2009.

Evans MD 'The UN System' in Evans MD (ed) *Religious Liberty and International Law In Europe* Cambridge University Press: Cambridge 2009.

Farlam P 'Freedom of Religion, Conscience, Thought and Belief' in Woolman S et al (eds) *Constitutional law of South Africa* Original Service 2006.

Farlam P 'Freedom of Religion, Belief and Opinion' in Woolman S et al (eds) *Constitutional Law of South Africa* Original Service 2005.

Glendon MA 'Rights from Wrongs' in Steiner HJ and Alston P *International Human Rights in Context Law, Politics, Morals* Oxford University Press: Oxford 2008.

Gunn J 'Adjudicating Rights of Conscience Under the European Convention on Human Rights' in van der Vyver JD and Witte J Jr (ed) *Religious Human Rights in a Global Perspective* Martinus Nijhoff Publishers: The Hague 1996.

Gyekye A *Person and Community: Ghanaian Philosophical Studies* reprinted as 'Person and Community in African Thought' in Coetzee PH and Roux APJ (eds) *Philosophy from Africa: A Text with Readings* International Thomson Publishing: Johannesburg 1998.

Habermas J 'Faith and Knowledge' in Habermas J (ed) *The Future of Human Nature* Polity: Cambridge 2003.

Hallencreutz CF and Westerlund DS 'Introduction 'Anti-Secularist Policies of Religion' in Westerlund DS (ed) *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics* Hurst: London 1996.

Henrard K 'The Right to Equality and non-discrimination and the Protection of Minorities in Africa' in Dersso SA (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* Pretoria University Press: Pretoria 2010.

Keane J 'Secularism?' in Marquand D and Nettler RL (ed) *Political Quarterly Religion and Democracy* Blackwell Publishers: Oxford 2000.

King U 'Hinduism and Women: Uses and Abuses of Religious Freedom' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: The Hague 2004.

Kuitert HM 'Een moral van het jaar nul? Ethiek-beoefening onderweg naar 2000' in: *Zijn de dagen van God geteld? Feestbundel voor Ton van der Worp* 1995.

Krishnaswami A 'Study of Discrimination in the Matter of Religious Rights and Practices' in van der Vyver JD and Witte J (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Martinus Nijhoff Publishers: The Hague 1996.

Lerner N 'The Nature and Minimum Standards of Freedom of Religion or Belief' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Lerner N 'Religious Human Rights under the United Nations' in van der Vyver JD and Witte J Jr (ed) *Religious Human Rights in a Global Perspective* Martinus Nijhoff Publishers: The Hague 1996.

Leydet D 'Citizenship' in Zalta EN (ed) *The Stanford Encyclopedia of Philosophy* Spring edition 2005.

Lindholm T 'Philosophical and Religious Justification of Freedom of Religion or Belief' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff: The Hague 2004.

Little D 'Studying "Religious Human Rights" Methodological Foundations' in van der Vyver JD and Witte Jr J (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Martinus Nijhoff Publishers: The Hague 1996.

Locke J 'A Letter Concerning Toleration' in Shapiro I (ed) *Two Treatises of Government and a Letter Concerning Toleration* Yale University Press: New Haven 2003.



Machnyikova Z 'Article 8' in Weller M (ed) *Oxford Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* Oxford University Press: Oxford 2005.

Martínez Torrón J and Navarro-Valls R 'The Protection of Religious Freedom in the System of the Council of Europe' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Meyerson D 'Religion and the South African constitution' in Radan P, Meyerson D and Croucher R (eds) *Law and religion* Routledge: London and New York 2005.

Mouffe C 'Preface: Democratic Politics Today' in Mouffe C *Dimensions of Radical Democracy Pluralism, Citizenship, Community* Verso: London 1992.

Mojzes P 'Religious Human Rights in Post-Communist Balkan Countries' in van der Vyver JD and Witte Jr J (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Marthinus Nijhoff Publishers: The Hague 1996.

Minnerath R 'The Right to Autonomy in Religious Affairs' in Lindholm T, Durham W C and Tahzib-Lie B G (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Nexon D 'Religion European identity and political contention in historical perspective' in Byrnes TA and Katzenstein PJ (ed) *Religion in an Expanding Europe* Cambridge University Press: Cambridge 2006.

Nowak M 'The Right to Education' in A Eide *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* Martinus Nijhoff: Dordrecht/Boston/London 2001.

Nowak N and Vospernik T 'Permissible Restrictions on Freedom of Religion or Belief' in Lindholm T, WC Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Özlem D 'The Head-Cover Controversy in Contemporary Turkey' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Passerin d'Entrèves M 'Hannah Arendt and the Idea of Citizenship' in Mouffe C (ed) *Dimensions of Radical Democracy Pluralism, Citizenship, Community* Verso: London 1992.

Philpott D and Shah TS 'Faith, freedom, and federation: the role of religious ideas and institutions in European political convergence' in Byrnes TA and PJ Katzenstein (ed) *Religion in an Expanding Europe* Cambridge University Press: Cambridge 2006.

Pobee JS 'Africa's Search for Religious Human Rights Through Returning to the Wells of Living Water' in van der Vyver JD and Witte Jr J (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Martinus Nijhoff Publishers: The Hague 1996.

Rawls J 'The idea of Public Reason: Postscript.' in Bohman J and Rehg W (eds) *Deliberative Democracy: Essays on Politics and Reason* MIT Press: Cambridge Massachusetts 1997.

Raz J 'Multiculturalism: a Liberal Perspective' in Raz J *Ethics in the public domain* Clarendon Press: Oxford 1994.

Sebidi LJ 'Towards a Definition of Ubuntu as African Humanism'. In Khabela MG and Mzoneli Z (Eds.) *Perspectives on 'Ubuntu': A Tribute to Fedsen* Lovedale Press: Alice 1998.

Scheinin M 'Article 18' in Eide A and Gudmunder A (ed) *The Universal Declaration of Human Rights: A Common Standard of Achievement* Martinus Nijhoff Publishers: The Hague 1999.



Sheen J 'Women's Rights to Freedom of Religion or Belief' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Shelton D and Kiss A 'A Draft Model Law on Freedom of Religion, with Commentary' in van der Vyver JD and Witte Jr J (ed) *Religious Human Rights in a Global Perspective Legal Perspectives* Marthinus Nijhoff Publishers: The Hague 1996.

Tahzib-Lie BG 'Dissenting Women, Religion or Belief, and the State: Contemporary Challenges that Require Attention' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Van Boven T 'The United Nations Commission on Human Rights and Freedom of Religion or Belief' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Van Boven T 'UN Commission on Human Rights and Freedom of Religion or Belief' in Lindholm T, Durham WC and Tahzib-Lie BG (eds) *Facilitating Freedom of Religion or Belief: A Deskbook* Martinus Nijhoff Publishers: The Hague 2004.

Van Niekerk GJ 'Legal Pluralism' in Bekker JC, Rautenbach C and Goolam NMI (eds) *Introduction to Legal Pluralism in South Africa* 2<sup>nd</sup> ed LexisNexis Butterworths: Durban 2006.

Weller P 'Equity, Inclusivity and Participation in a Plural Society: Challenging the Establishment of the Church of England' in Edge PW and Harvey G (ed) *Law and Religion in Contemporary Society: Communities, Individualism and the State* Ashgate: Aldershot 2002.

Weller M 'Article 15' in Weller M (ed) *Commentaries on International Law The Rights of Minorities in Europe A Commentary of the European Framework Convention for the Protection of National Minorities* Oxford University Press: Oxford 2005.

Witte J and Green CM 'The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles' in van der Vyver JD and Witte J Jr *Religious Human Rights in a Global Perspective Legal Perspectives* Marthinus Nijhoff Publishers: The Hague 1996.

Wolterstorff N 'Abraham Kuyper (1837-1920)' in Witte J Jr. and Alexander FS (eds) *The Teachings of Modern Christianity on Law, Politics, and Human Nature* Columbia University Press: New York 2006.

Woolman S 'Community rights: Language, culture and religion' in Woolman S et al (eds) *Constitutional law of South Africa* 2<sup>nd</sup> edition Original Service 2003.

Woolman S 'Dignity' in Woolman S et al (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> edition Original Service 2006

Woolman S and Botha H 'Limitations' in Woolman S, Roux T and M Bishop M (eds) *Constitutional Law of South Africa* Juta: Cape Town 2009.

Yavuz MH 'Islam and Europeanisation in Turkish - Muslim Socio-Political Movements' in Byrnes TA and PJ Katzenstein (ed) *Religion in an Expanding Europe* Cambridge University Press: Cambridge 2006.

## **Articles**

Ackermann D 'Women Religion and Culture: A Feminist Perspective on 'Freedom of Religion' (1994) 22 (3) *Missionalia* 212.

Ackermann LWH 'Menswaardigheid na Tien jaar van Regstaatlikheid in Suid-Afrika' (2004)1  
*Potchefstroom Electronic Law Journal* 1.

Ackermann LWH 'Some Reflections on the Constitutional Court's Freedom of Religion  
Jurisprudence' (2002) 43 *Dutch Reformed Theological Journal* 183.

Adesoji AO and Akin A 'Indigeneship and Citizenship in Nigeria: Myth and Reality'. (2009)  
2 (9) *The Journal of Pan African Studies* 151.

Alston W 'Religious Diversity and the Perceptual Knowledge of God' (1988) 5 *Faith and  
Philosophy* 433.

Amoah J and T Bennett T 'The Freedoms of Religion and Culture Under The South African  
Constitution: Do Traditional African Religions Enjoy Equal Treatment?' (2008) 24 *Journal of  
Law and Religion* 1.

Andrews PE 'Big Love'? The Recognition of Customary Marriages in South Africa' (2007) 64  
*Washington & Lee Law Review* 1485.

Apanovitch DP 'Religion and Rehabilitation: The Requisition of God By The State.' (1998)  
47 *Duke Law Journal* 785.

Arslan Z 'Taking Rights Less Seriously: Postmodernism and Human Rights' (1999) 5 *Res  
Publica* 195.

Artz DE 'The Application of International Human Rights Law in Islamic States' (1990) 12  
*Human Rights Quarterly* 203.

Audi R 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 (4)  
*San Diego Law Review* 677.

Bacquet S 'Manifestation of Belief and Religious Symbols at Schools: Setting Boundaries in English Courts' (2009) 4 *Religion and Human Rights* 121.

Bader V 'Religions and States. A New Typology and a Plea for Non-constitutional Pluralism' (2003) 6 *Ethical Theory and Moral Practice* 55.

Bader V 'The Cultural Conditions of Transnational Citizenship: On the Interpenetration of Political and Ethnic Cultures Source' (1997) 25 (6) *Political Theory* 771.

Baines CD 'L 'Affaire des Foulards--Discrimination or the Price of a Secular Public Education System?' (1996) 29 *The Vanderbilt Journal of Transnational Law* 303.

Bakircioglu O 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 (7) *German Law Journal* 711.

Barker CR 'Church and State Relationships in German "Public Benefit" Law' (2000) 3 (2) *The International Journal of Not-for-Profit Law* 1.

Barnett L 'Freedom of Religion and Religious Symbols in the Public Sphere' (2008) *Law and Government Division* 1.

Baubérot J 'Secularism and French Religious Liberty: A Sociological and Historical View' (2003) 2 *Brigham Young University Law Review* 241.

Bekink B 'Constitutionalism Secularism and The Right to Freedom of Religion - a South African Perspective'' (2008) 3 *Tydskrif vir Suid Afrikaanse Reg* 481.

Benson IT 'The case for religious inclusivism and the judicial recognition of religious associational rights: A response to Lenta' (2008) 1 *Constitutional Court Review* 295.

Benson IT 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities' (2007) 21 (1) *Emory International Law Review* 113.

Bennoune K 'Secularism and Human Rights: A Contextual Analysis of Headscarves Religious Expression and Women's Equality Under International Law' (2007) 45 *Columbia Journal of Transnational Law* 366.

Berger BL 'Law's Religion: Rendering Culture' (2007) 45 (2) *Osgoode Hall Law Journal* 1.

Berger B 'The Limits of Belief: Freedom of Religion Secularism and the Liberal State' (2002) 17 *Canadian Journal of Law and Society* 51.

Berman HJ 'Religious Foundations of Law in the West: An Historical Perspective' (1983) 1 *Journal of Law & Religion* 3.

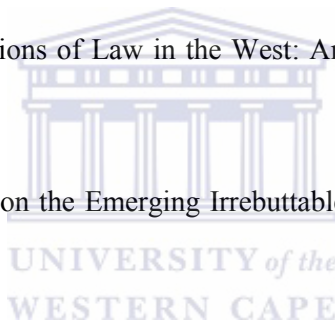
Bezanson RP 'Some Thoughts on the Emerging Irrebuttable Presumption Doctrine' (1974) 7 *Indiana Law Review* 644.

Bhandar B 'The Ties that Bind: Multiculturalism and Secularism Reconsidered' (2009) 36(3) *Journal of Law and Society* 301.

Bonthuys E 'Irrational accommodation: Conscience Religion and Same-Sex Marriages in South Africa' (2008) 125 (3) *South African Law Journal* 473.

Botha H 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *South African Journal of Human Rights* 249.

Botha H 'Equality dignity and the politics of interpretation' (2004) 19 *South African Public Law* 724.



Botha H 'Human dignity in comparative perspective' (2009) 20(2) *Stellenbosch Law Review* 171.

Brady TA, Cameron E and Cohn H 'The Politics of Religion: The Peace of Augsburg 1555' (2006) 24 (1) *German History* 86.

Brems E 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 240.

Brems E 'Diversity in the Classroom: The Headscarf Controversy in European Schools' (2006) 31 *Peace & Change* 117.

Brems E 'Human Rights Minimum and Maximum Perspectives' (2009) 9 (3) *Human Rights Law Review* 349.

Brems E 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam' (2004) 5 *Human Rights Review* 5.

Brems E 'Above Children's Heads - The Headscarf Controversy in European Schools from the Perspective of Children's Rights' (2006) 14 (2) *International Journal of Children's Rights* 119.

Brett R 'Human Rights and the OSCE' (1996) 18 (3) *Human Rights Quarterly* 668.

Brown DM 'Freedom from or Freedom for? Religion as a Case Study in Defining the Content of Charter Rights' (2000) 33 *University of British Columbia Law Review* 98.

Buckingham JE 'The Limits of Rights Limited' (2000) 11 *Stellenbosch Law Review* 133.

Calhoun C 'Secularism Citizenship and the Public Sphere' (2008) 10 (3) *Hedgehog Review* 7.

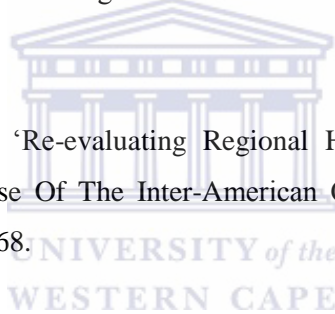
Carmella AC 'Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion' (1998) 73 (5) *Notre Dame Law Review* 1191.

Carpentier N and Cammaerts B 'Hegemony Democracy Agonism and Journalism: an interview with Chantal Mouffe' (2006) 7 (6) *Journalism studies* 964.

Carpenter G 'The Equality Act in the Constitutional Court' (2008) 23 (2) *Suid Afrikaanse Publikereg/South African Public Law* 185.

Carter LS 'Religious Freedom as if Religion Matters: A Tribute to Justice Brennan' (1999) 87 *California Law Review* 1059.

Cavallaro JL and Brewer SE 'Re-evaluating Regional Human Rights Litigation In The Twenty-First Century: The Case Of The Inter-American Court' (2008) 102 *The American Journal Of International Law* 768.



Charlow R 'The Elusive Meaning of Religious Equality' (2006) 83(5) *Washington University Law Review* 1.

Chaskalson A 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *South African Journal of Human Rights* 193.

Chaskalson A 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *South African Journal of Human Rights* 193.

Chemerinsky E 'Why Church and State Should Be Separate' (2008) 49 *William & Mary Bill of Rights Journal* 2193.

Choudhury T 'Perceptions of Discrimination and Islamophobia - Voices from members of Muslim communities in the European Union EUMC 2006'. (2006) *European Monitoring Centre on Racism and Xenophobia* 1.

Claassens A and Mnisi S 'Rural women redefining land rights in the context of living customary law' (2009) 25 (3) *South African Journal on Human Rights* 491.

Clarke M 'The concept of Sub-Culture' (1974) 25 (4) *The British Journal of Sociology* 428.

Coertzen P 'Freedom of Religion in South Africa: Then and Now 1652 – 2008' (2008) 29 (2) *Verbum Et Ecclesia Journal* 345.

Coertzen P 'Christian freedom and freedom of religion with reference to the South African constitution (1996)' (2005) 46 (3/4) *Dutch Reformed Theological Journal* 351.

Coetzee PH and APJ Roux 'Ludin's Kopftuch (headdress): A Problem of Religious Freedom in German schools' (2004) 69 (2) *Koers* 277.

Cooke M 'A Secular State for a Postsecular Society? Postmetaphysical Political Theory and the Place of Religion' (2007) 14 (2) *Constellations* 224.

Cook RJ and S Howard 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) 56 *Emory Law Journal* 1039.

Cooke M 'Five Arguments for Deliberative Democracy' (2000) 48 (5) *Political Studies* 947.

Cole DW 'Perspectives on Religious Liberty: A Comparative Framework' (1996) 1 *Religious Human Rights in a Global Perspective Legal Perspectives* 29.

Conkle DO 'Toward a general theory of the establishment clause' (1988) 82 *Northwestern University Law Review* 1113.



Cornell D 'Dignity Freedom and the Post-apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann' (2008) *Acta Juridica* 18.

Cornell D 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu Dignity and Reconciliation' (2004) 19 *South African Public Law* 661.

Cowen S 'Can "Dignity" guide South Africa's Equality Jurisprudence?' (2001) 17 *South African Journal of Human Rights* 34.

Crawford AN 'Learning Lessons from Multani: Considering Canada's Response Response to Religious Garb Issues in Public Schools' (2007) 36 *Georgia Journal of International and Comparative Law* 159.

Cumper P and Edge P 'First Amongst Equals: The English State and the Anglican Church in the 21<sup>st</sup> Century?' (2006) 83 *University of Detroit Mercy Law Review* 601.

Custos D 'Secularism in French Public Schools: Back to War? The French Statute of March 15 2004' (2006) 54 *American Journal of Comparative Law* 337.

Dalton J 'There is nothing light about Feathers: Finding Form in the Jurisprudence of Native American Religious Exemptions' (2005) 6 *Brigham Young University Law Review* 1575.

D'Amato A 'Is Equality a Totally Empty Idea?' (1983) 81 *Michigan Law Review* 600.

Danchin PG 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2008) 23 *Journal of Law & Religion* 455.

Danchin PG 'Who is the "Human" in Human Rights? The Claims of Culture and Religion' (2009) 24 *Maryland Journal of International Law* 94.

Danchin PG 'US Unilateralism and International Protection of Religious Freedom: The Multilateral Alternative' (2002 -2003) 41 *Columbia Journal of Transnational Law* 33.

Davids A 'The Revolt of the Malays: A Study of the Reactions of the Cape Muslims to the Smallpox Epidemics of the Nineteenth Century Cape Town' (1983) 5 *Studies in the History of Cape Town* 55.

Davies G 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in SB v Denbigh High School' (2005) 1 (3) *European Constitutional Law Review* 511.

Davis DH 'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (2002) 2 *Brigham Young University Law Review* 217.

De Lange R 'The European Public Order Constitutional Principles And Fundamental Rights'(2007) 1(1) *Erasmus Law Review* 3.

Devenish GE 'Freedom of religion belief and opinion' (1995) 16 1 *Obiter* 15.

Devenish GE 'Minority rights and cultural pluralism – the protection of language and cultural identity in the 1996 Constitution' (1999) *Tydskrif vir Hedendaagse Romeins Hollandse Reg.* 201.

De Vos P 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *Tydskrif Hedendaagse Romeins Hollandse Reg* 62.

De Vos P 'Freedom of Religion v Drug Traffic Control: The Rastafarian he Law Society and the Right to Smoke the "holy weed"' (2001) 5 *Law Democracy and Development* 85.

Dickson B 'The United Nations and Freedom of Religion' (1995) 44 (2) *The International and Comparative Law Quarterly* 327.

Doe N 'Towards a 'Common Law' on Religion in the European Union' (2009) 37 (1/2) *Religion State & Society* 14.

Dominique C 'Secularism in French Public Schools: Back to War? The French Statute of March 15 2004' (2004) 54 *The American Journal of Comparative Law* 337.

Donoho DL 'Autonomy Self-Governance and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 *Emory International Law Review* 391.

Doshi RM 'Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality Pluralism and Originalism' (2010) 98 *Georgetown Law Journal* 459.

Douglas L 'The Many Meanings of Separation' (2003) 70 *University of Chicago Law Review* 1701.

Douglas L 'Summary and Synthesis: The Crisis in Religious Liberty' (1992) 60 (3) *George Washington Law Review* 841.

Douzina C 'The end(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 446.

Douzina C 'Identity Recognition Rights or What Can Hegel Teach Us About Human Rights' (2002) 29 (3) *Journal of Law and Society* 379.

Dryzek JS 'Alternatives to Agonism and Analgesia' (2005) 33(2) *Political Theory* 218.

Du Plessis LM 'Die Grondwet as Gedenkteken en die Werkdadigheid van Onopvallende Grondwetlike Kragte' (2005) 70 (3) *Koers* 535.

Du Plessis LM 'Legal Academics and the Open Community of Constitutional Interpretation' (1996) 12 *South African Journal on Human Rights* 214.

Du Plessis LM 'Religious Freedom and Equality as Celebration of Difference: a Significant Development in Recent South African Constitutional case-law' (2009) 12 (4). *Pothchefstroom Electronic Review* 10

Du Plessis LM 'Affirmation and Celebration of the 'religious Other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial Constitutionalism in action' (2008) 8(2) *African Human Rights Law Journal* 376.

Du Plessis LM 'Religious Human Rights in South Africa' in *Religious Human Rights in a Global Perspective Legal Perspectives* (1996) 441

LM du Plessis 'Religion Law and State in South Africa' (1997) 4 *European Journal for Church and State Research* 221.

Du Plessis LM 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"' (2001) *Brigham Young University Law Review* 439.

Du Plessis LM 'Religion Law and the State in South Africa' (1997) 4 *European Journal for Church & State Research* 221.

Du Plessis LM 'Doing damage to freedom of religion' (2000) 11 (2) *Stellenbosch Law Review* 295.

Du Plessis LM 'Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case-Law' (2009) 12(4) *Pothchefstroom Electronic Review* 1.

Du Toit CW 'Religious Freedom and Human Rights in South Africa After 1996: Responses and Challenges' (2006) 8 (16) *Brigham Young University Law Review* 677.

Eddy PR 'Religious Pluralism and the Divine: Another Look at John Hick's Neo-Kantian Proposal' (1994) 30 (4) *Religious Studies* 467.

Esbeck CH 'Differentiating the Free Exercise and Establishment Clauses' (2000) 42 (2) *Journal of Church and State* 311.

Evans C 'The "Islamic scarf" in the European Court of Human Rights' (2008) *Melbourne Journal of International Law* 1.

Evans C 'Strengthening the Role of the Special Rapporteur on Freedom of Religion or Belief' (2006) 1 *Religion and Human Rights* 75.

Evans C 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 4.

Evans C and Thomas CA 'Church-State Relations in the European Court of Human Rights' (2006) 3 *Brigham Young University Law Review* 699.

Fagan A 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *South African Journal of Human Rights* 220.

Fischer JD and Wallace CJ 'God and Caesar in the Twenty First Century: What recent cases say about Church-State Relations in England and the United States' (2006) 18 *University of Louisville Journal of International Law* 485.

Fogel RS 'Headscarves in German Public Schools: Religious Minorities are Welcome in Germany Unless - God Forbid - They are Religious' (2006) 51 *New York Law School Law Review* 618.

Foster J 'Hospitality The Apostle John Jacques Derrida and Us' (2007) 9 *Reformed Perspectives Magazine* 1.

S Fowler 'Communities organizations and people' (1993).21 (4) *Pro Rege* 20.

Franz-Willing G 'The Origins of the Second World War' (1986) 7 (1) *The Journal of Historical Review* 95.

Fredman S 'Providing Equality to the Framework Convention for the Protection of National Minorities.' (2005) 21 *South African Journal of Human Rights* 163.

Freedman J 'Secularism as a Barrier to Integration? The French Dilemma' (2004) 42 (3) *International Migration* 5.

Freedman W 'The right to Religious Liberty the Right to Religious Equality and section 15(1) of the South African Constitution' (2000) *Stellenbosch Law Review* 99.

Freedman W 'Church-state Relations and the Right to Religious Freedom' (1997) *Tydskrif vir Suid- Afrikaanse Reg* 156.

Froneman JC 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3.

Galeotti AE 'Citizenship and Equality: The Place for Toleration' (1993) 21 (4) *Political Theory* 585.

Galston WA 'Defending Liberalism' (1982) 76 (3) *The American Political Science Review* 621.

Galston WA 'Value Pluralism and Liberal Political Theory' (1999) 93 (4) *The American Political Science Review* 769.

Gardbaum S 'Liberalism Autonomy and Moral Conflict' (1996) 48 (2) *Stanford Law Review* 385.

Garvey JH 'Free exercise and the values of religious liberty' (1986) *Connecticut Law Review* 179.

Gerstenberg O *Germany: Freedom of Conscience in Public Schools* (2003) 3 *International Journal of Constitutional Law* 94.

Giddens A 'French Headscarf Ban Against Interests of Women' (2004) *New Perspectives Quarterly* 43.

Gouws A and du Plessis LM 'The Relationship Between Political Tolerance And Religion: The Case Of South Africa' (2000) 14 *Emory International Law Review* 657.

Goodsell EE 'Constitution Custom and Creed: Balancing Human Rights Concerns With Cultural And Religious Freedom in Today's South Africa' (2007) 21 *Brigham Young University Law Review* 109.

Govindjee A 'Beards Nose Studs and Questions of Religion and Equality: *Pillay v KwaZulu-Natal MEC of Education and Others; Dlamini & others v Green Four Security*' (2007) *Obiter* 357.

Graber MA 'Our Paradoxical Religion Clauses' (2009) 69 *Maryland Law Review* 1.

Grant E 'Dignity and Equality' (2007) 7 (2) *Human Rights Law Review* 299.

Grimm D 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 (2) *University of Toronto Law Journal* 383.

Gunn JT 'Religious Freedom and Laïcité: A Comparison of the United States of America and France' (2004) *Brigham Young University Law Review* 419.

Gunn JT 'Definition of "Religion" in International Law' (2003) 16 *Harvard Human Rights Law Journal* 189.

Gunn JT 'Under God but not the Scarf: The Founding Myths of Religious Freedom in the United States and Laicite in France' (2004) 7 *Journal of Church and State* 8.

Günther W 'Postmodernism' (1997) 86 *International Review of Mission* 343.

Habermas J 'Equal Treatment of Cultures and the Limits of Postmodern Liberalism' (2005) 13 (1) *The Journal of Political Philosophy* 1.

Habermas J 'Reconciliation Through the Public use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92 (3) *The Journal of Philosophy* 109.

Habermas J 'Religious Tolerance - The Pacemaker for Cultural Rights' (2004) 79 *Philosophy* 5.

Habermas J 'Pre-political Foundations of the Democratic Constitutional State.' (2006) *The Dialectics of Secularization: On Reason and Religion* 19.

Habermas J 'Religion in the Public Sphere' (2006) 14 (1) *European Journal of Philosophy* 1.



Hackett RIJ 'Rethinking the Role of Religion in Changing Public Spheres: Some Comparative Perspectives' (2005) 9 (13) *Brigham Young Law Review* 659.

Hall TL 'Religion Equality and Difference' (1992) 65 (1) *Temple Law Review* 50.

Haynes J 'Religion Secularisation and Politics: A Postmodern Conspectus' (1997) 18 (4) *Third World Quarterly* 709.

Hazewinkel HJ 'Religious freedom in the CSCE/OSCE process' (1998) 9 *Helsinki Monitor* 1.

Henrard K 'The Accommodation of Religious Diversity in South Africa against the Background of the Centrality of the Equality Principle in the New Constitutional Dispensation' (2001) 45 (1) *Journal of African Law* 51.

Heyns C and Brand D 'The Constitutional Protection of Religious Human Rights in Southern Africa' (2000) 14 *Emory international Law Review* 699.

Heyns C and Brand D 'The Constitutional Protection Of Religious Human Rights In Southern Africa' (2000) 33 *Comparative and International Law Journal of Southern Africa* 53.

Heyns C 'The African Regional Human Rights: System: The African Charter' (2004) 108 (3) *Penn St Law Review* 679.

Hintjens HM 'Explaining the 1994 Genocide in Rwanda' (1999) 37 *The Journal of Modern African Studies* 241.

Hick J 'The Epistemological Challenge of Religious Pluralism' (1997) 14 *Faith and Philosophy* 277.

Hick J 'The Philosophy of World Religions' (1984) 37 *Scottish Journal of Theology* 229.

Hirschl R & Shachar A 'The New Wall of Separation: Permitting Diversity Restricting Competition' (2009) 30 *Cardozo Law Review* 2535.

Hoover J 'Do the Politics of Difference Need to be Freed of a Liberalism?' (2001) 8(2) *Constellations* 201.

Hoehne O 'Special Procedures for the New Human Rights Council – A Need for Strategic Positioning' (2007) 4 1 *Essex Human Rights Review* 1.

Idriss MM The House of Lords Shabina Begum and Proportionality (2006) 11(3) *Judicial Review* 239.

Ingolf P 'Integrating the Charter of Fundamental Right into the Constitution of the European Union: Practical and Theoretical Propositions' (2003/2004) 10(5) *Columbia Journal of European Law* 48.

Juss SS 'Freedom of Conscience Rights: Lessons for Great Britain' (1997) 39(4) *Journal of Church and State* 749.

Kennedy D 'Losing Faith in the Secular: Law Religion and the Culture of International Governance' (1999) 313 *Religion and International Law* 120.

Kerr A 'Back to the Problems of a Hundred or More Years Ago: Public Policy Concerning Contracts Relating to Marriages that are Potentially or Actually Polygamous' (1984) 101 *South African Law Journal* 445.

Kahn RA 'The Headscarf as Threat: a Comparison of German and U.S. Legal Discourses' (2007) 40 *Vanderbilt Journal of Transnational Law* 417.

Kilian C 'The Other side of the Veil: North African Women in France Respond to the Headscarf Affair' (2003) 17 *Gender & Society* 567.

Klare KE 'Legal Theory and Democratic Reconstruction' (1991) 25 *University of British Columbia Law Review* 69.

Klare KE 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* 146.

Korovin EA 'The Second World War and International Law' (1946) 40 (4) *The American Journal of International Law* 742.

Kraxberger B 'Strangers indigenes and settlers: contested geographies of citizenship in Nigeria' (2005) 9/1 *Space and polity* 9.

Krishnaswami Study (1979) 11 *New York University Journal on International Law and Politics* 227.

Kroeze IJ 'God's Kingdom in The Law's Republic: Religious Freedom In South African Constitutional Jurisprudence' (2003) 470 *South African Journal of Human Rights* 19.

Kukathas C 'Liberalism and Multiculturalism: The Politics of Indifference'(1998) 26 (5) *Political Theory* 686.

Kumaraswamy PR 'The Strangely Parallel Careers of Israel and Pakistan' (1997) 4 (2) *Middle East Quarterly* 1.

Kuru AT 'Passive and Assertive Secularism Historical Conditions Ideological Struggles and State Policies towards Religion' (2007) 59 *World Politics* 568.

Kuru AT 'Secularism State Policies and Muslims in Europe: Analyzing French Exceptionalism' (2008) 4(1) *Comparative Politics* 1.

Kuru AT 'Globalization and Diversification of Islamic Movements: Three Turkish Cases' (2005) (Summer) *Political Science Quarterly* 120.

Kymlicka W 'Liberalism and Communitarianism' (1998) 18 *Canadian Journal of Philosophy* 181.

Kymlicka W 'Two Models of Pluralism and Tolerance (1992) 13 *Analyse & Kritik* 33.

Laborde C 'Secular Philosophy & Muslim Headscarves in Schools' (2005) 13(3) *The Journal of Political Philosophy* 305.

Ladeur K 'The Myth of The Neutral State and The Individualisation of Religion: The Relationship Between State and Religion in The Face of Fundamentalism' (2009) *Cardozo Law Review* 2445.

Langa P 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

Lapidus IM 'The Separation of State and Religion in the Development of Early Islamic Society' (1975) 6 (4) *International Journal of Middle East Studies* 363.

Lerner N 'How Wide the Margin of Appreciation? The Turkish Headscarf Case The Strasbourg Court and Secularist Tolerance (2005) 13 *Willamette Journal of International Law and Dispute Resolution* 65.

Lerner N 'Proselytism Change of Religion and International Human Rights' (1998) 12 *Emory International Law Review* 477.

Lenta P 'Muslim Headscarves in The Workplace and in Schools' (2007) 124 (2) *South African Law Journal* 296.

Lenta P 'Religious liberty and cultural accommodation' (2006) 122 *South African Law Journal* 352.

Lenta P 'Cultural and religious accommodations to school uniform regulations' (2008) 1 *Constitutional Law of South Africa* 259.

Le Roux W 'Conscience against the law: Mahatma Gandhi Nelson Mandela and Bram Fischer as practising lawyers during the struggle' (2001) XXXXII *CODICILLVS* 36.

Levinson M 'Liberalism Versus Democracy? Schooling Private Citizens in the Public Square' (1997) 27 (3) *British Journal of Political Science* 333.

Liviatan O 'Judicial Activism and Religion-Based Tensions in India and Israel' Vol. 26, No. 3 (2009) 26 (3) *Arizona Journal of International & Comparative Law* 583.

Louw DJ 'Towards a decolonized assessment of the religious other. (1990) 18 (4) *South African Journal of Philosophy* 390.

Mahlman M 'Religious Tolerance Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf case' (2003) 4 *German Law Journal* 1099.

Malherbe E.F.J. 'Die Grondwetlike Beskerming van Godsdienstvryheid' (1998) 58 *Tydskrif vir die Suid-Afrikaanse Reg* 673.

Martinez-Torron J 'The European Convention on Human Rights' (2008) 3(2) *Global Jurist Advances* 17.

Mazower M 'Minorities and the League of Nations in interwar Europe' (1997) 126(2) *Daedalus* 126.

Mbiti J 'Autonomous nature of human beings' (1970) *African religions and philosophy* 141.

McConnell MW 'Accommodation of Religion' (1985) 1 *Supreme Court Review* 1.

McCrea R 'Limitations on Religion in a Liberal Democratic Polity: Christianity and Islam and the Partial Secularity of the European Union' (2008) 27 *Yearbook of European Law* 195.

McCrudden C 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655.

McLean GR 'Freedom of Religion and State Neutrality: A Philosophical Problem' (1997) 114 *South African Law Journal* 174.

Melvin NJ 'Appendix 2C. Islam Conflict and Terrorism' (2005) *Security and Conflicts Major Armed Conflicts* 123.

Menachem M 'From "Honor" To "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?' (2008) *Legal Pluralism Privatization of Law and Multiculturalism* 609.

Menendez AJ 'Review of a Christian Europe' (2005) 30 (1) *European Law Review* 133.

Menendez AJ 'A pious Europe? Why Europe should not define itself as Christian' (2005) 30 (1) *European Law Review*.133.

Meyler B 'Religion and Morality in The Public Square: The Limits Of Group Rights: Religious Institutions And Religious Minorities in International Law' (2007) 22 *St. John's Journal of Legal Commentary* 535.

Mhango MO 'The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari' Students' (2008) 52 *Journal of African Law* 218.

Mhango MO 'Upholding the Rastafari religion in Zimbabwe: Farai Dzvoza v Minister of Education Sports and Culture and Others' (2008) 8 *African Human Rights Law Journal* 221.

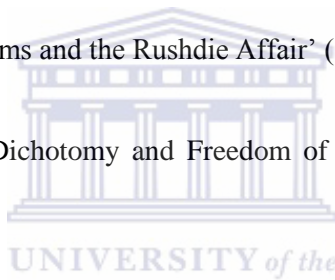
Minnow M 'Putting Up and Putting Down: Tolerance Reconsidered' (1990) 28 *Osgoode Hall Law Journal* 441.

Mitra SK 'Desecularising the state: religion and politics in India after Independence' (1991) 33(4) *Comparative Studies in Society and History* 755.

Modak-Truran MC 'Beyond Theocracy and Secularism (Part I): Toward A New Paradigm for Law and Religion' (2007) 27 *Mississippi College Law Review* 159.

Modood T 'British Asian Muslims and the Rushdie Affair' (1990) 61 *Political Quarterly* 143.

Moens G 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.



Mofokeng LL 'The right to freedom of religion: an apparently misunderstood aspect of legal diversity in South Africa' (2007) 11 *Law Democracy and Development* 121.

Mokgoro Y 'The Protection of Cultural Identity in The Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms?' (1997) 52 *Southern Methodist University Law Review* 1549.

Mokgoro Y 'The Customary Law Question in The South African Constitution' (1997) 41 *Saint Louis University Law Journal* 1279.

Modood T 'Minorities Faith and Citizenship' (1992) 12 *Discernment: A Christian Journal for Inter-Religious Encounter* 59.

Moon R 'Liberty Neutrality and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms' (2003) 41(3) *Brandeis Law Journal* 562.

Moon G and Allen R 'Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights and Their Implications' (2000) 6 *European Human Rights Law Review* 580.

Moosa N 'The Interim and Final Constitutions and Muslim Personal Law: Implications for South African Muslim Women' (1998).9 *Stellenbosch Law Review* 196.

Morsink J 'World War Two and the Universal Declaration'(1993) 15(2) *Human Rights Quarterly* 357.

Moruzzi NC 'A Problem with Headscarves: Contemporary Complexities of Political and Social Identity' (1994) 22 *Political Theory* 653.

Mouffe C Deliberative Democracy or Agnostic Pluralism (2000) *Political Science Series* 72.

Munro DC 'The Popes and the Crusades'(1916) 55 (5) *Proceedings of the American Philosophical Society* 348.

Murphy AR 'Tolerance Toleration and the Liberal Tradition' (1997) 29 (4) *Polity* 593.

Mutua MW 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context' (1996) *Religious Human Rights in a Global Perspective Legal Perspectives* 417.

Mutua MW 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 25 *Vanderbilt Journal of International Law* 339.



Moens G 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

Nathan A 'A Human Rights Imperative: Extending Religious Liberty beyond the Border' (2000) 33(2) *Cornell International Law Journal* 47.

Nathwani N 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights' (2007) 25 (2) *Netherlands Quarterly Human Rights Journal* 221.

Newman J 'The Idea of Religious Tolerance' (1978) 15 (3) *American Philosophical Quarterly* 187.

Ngwenya C 'Conscientious Objection and Legal Abortion in South Africa: Delineating the Parameters' (2003) 28 *Journal for Juridical Science* 1.

O'Donnell TA 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 (4) *Human Rights Quarterly* 474.

On S 'Brian Barry and the Headscarf Case in France' (2006) 5 *Contemporary Political Theory* 176.

Orucu E 'Methodological Aspects of Comparative Law' (2007) 8 (29) *European Journal of Law Reform* 37.

Pannenberg W 'How to think about Secularism' (1996) 64 *First Things* 27.

Parker TM 'Freedom to Manifest Religious beliefs; An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2007) 17 *Duke Journal of Comparative & International law* 91.

Patrick J 'Church State and Charter Canada's hidden Establishment Clause' (2006) 14 *Tulsa Journal of Comparative & International Law* 27.

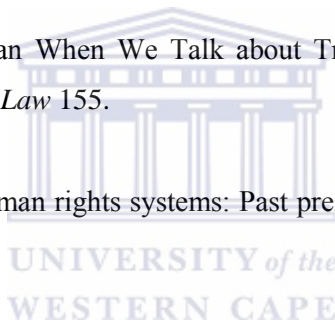
Perry MJ 'A Right to Religious Freedom? The Universality of Human Rights The Relativity of Culture' (2005) 10 *Roger Williams University Law Review* 385.

Pienaar GJ 'The Effect of Equality and Human Dignity on the Right to Religious Freedom' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 579.

Pieterse M 'Religious Confusion: Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC)' (2001) 64 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 672.

Pieterse M 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20 *South African Public Law* 155.

Pillay N 'Women's rights in human rights systems: Past present and future' (2009) 13(2) *Law Democracy & Development* 36.



Plesner IT 'Legal Limitations to Freedom of Religion or Belief in School Education' (2006) 19 *Emory International Law Review* 557.

Poulter S 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43.

Powers GF 'Religion conflict and prospects for reconciliation in Bosnia Croatia and Yugoslavia' (1996) 50 (1) *Journal of International Affairs* 221.

Pretorius SP 'The significance of the use of ganja as a religious ritual in the Rastafari movement' (2006) 27 (3) *Verbum Et Ecclesia Journal* 1012.

Quinot G 'Snapshot or participatory democracy? Political engagement as fundamental human right' (2009) 25 (2) *South African Journal on Human Rights* 392.

Rautenbach C 'Some comments on the current (and future) status of Muslim personal law in South Africa' 2004 (2) *Potchefstroom Electronic Law Journal* 1.

Rautenbach C 'Indian Succession Laws with Special Reference to the Position of Females: a model for South Africa' (2008) 41 (1) *Comparative and International Law Journal of Southern Africa* 105.

Rautenbach IM 'Die Konstitusionele Hof se Riglyne vir die Toepassing van die Reg op Gelykheid II' (2001) 2 *Tydskrif vir Suid Afrikaanse Reg* 329.

Rautenbach IM, Jansen van Rensburg F, Pienaar G 'Culture (And Religion) In Constitutional Adjudication' (2003) 6 (1) *Potchefstroom Electronic Law Journal* 1.

Rautenbach C 'Godsdienstige en kulturele simbole in openbare skole: Sigbaarwording en groei van regspluralisme in Suid-Afrikaanse skole' (2008) 25 (1) *Tydskrif vir Hedendaagse Romeins Holl andse Reg* 25.

Rawls J 'Justice as fairness: Political not metaphysical' (1985) 14(3) *Philosophy and Public Affairs* 223.

Rawls J 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1.

Rebouché R 'The Substance of Substantive Equality' (2009) 24 *American University International Law Review* 711.

L Reyhler 'Religion and Conflict' (1997) 2(1) *International Journal of Peace Studies* 1.

Rieffer BA 'Religion Politics and Human Rights Understanding the Role of Christianity in the Promotion of Human Rights' (2006) 6 *Human Rights and Human Welfare* 31.

Richardson N 'Community in Christian Ethics and African Culture' (1997) *Scriptura* 373.

Riley A 'Headscarves Skullcaps and Crosses: Is the Proposed French Ban Safe From European Challenge?' (2004) *Center for European Policy Studies* Policy Brief No. 491.

Rosenfed M 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal' (1986) 74 *California Law Review* 1687.

Ruitenberg CW 'Educating Political Adversaries' (2009) 28 *Studies in Philosophy and Education* 269.

Ryskamp GR 'The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty' (1980) 3 *Brigham Young University Law Review* 616.

Sachs A 'Equality Jurisprudence: The Origin of the Doctrine in the South African Constitutional Court' (1999) 5 *Review of Constitutional Studies* 76.

Sacks V 'Multiculturalism Constitutionalism and The South African Constitution' (1997) *South African Public Law* 627.

Saktanber A and G Corbacioglu G 'Veiling and Headscarf-Skepticism in Turkey' (2008) 15 (4) *Social Politics: International Studies in Gender State & Society* 514.

Sanford L 'Religious Language and the Public Square Reviewed work: Love and Power: The Role of Religion and Morality in American Politics by Michael J. Perry' (1992) 4 *Harvard Law Review* 2061.

Sarkissian A 'Religious Reestablishment in Post-Communist Polities' (2009) 51 (3) *Journal of Church and State* 472.

Scheeck L 'Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance' (2005) 15 *Questions de recherche / Research in question* 9.

Shah NA 'Women's Human Rights in the Koran: an Interpretive Approach' (2006) 28 (4) *Human Rights Quarterly* 868.

Shaw RL 'The Establishment Clause and the Concept of Inclusion' (2004) 83 (1) *Oregon Law Review* 1.

Sheff LS 'Rabbi Captain Goldman's Yarmulke Freedom of Religion and Conscience and Civil (Military) Disobedience' (1987) *Israel Yearbook on Human Rights* 17.

Sinopoli RC 'Liberalism and Contested Conceptions of the Good: The Limits of Neutrality' (1993) 55 (3) *The Journal of Politics* 644.

Smith CL 'Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees' (1992) 5 (1) *Law and Contemporary Problems* 211.

Smith N 'Freedom of religion under the Final Constitution' (1997) *South African Law Journal* 217.

Smithey SI 'Religious Freedom and Equality Concerns under the Canadian Charter of Rights and Freedoms' (2001) *Canadian Journal of Political Science* 85.

Ssenyonjo M 'The Islamic Veil and Freedom of Religion the Rights to Education and Work: a Survey of Recent International and National cases' (2008) 58 *Chinese Journal of International Law* 653.

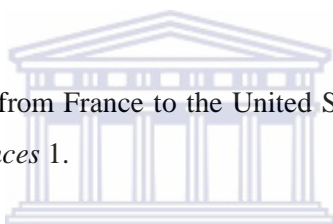
Stephenson CA 'Religious Exercises and Instruction in Ontario Public Schools' (1991) 49 *University of Toronto Faculty Law Review* 82.

Stevenson J 'Peace in Northern Ireland: Why Now?' (1998) 112 *Foreign Policy* 41.

Sullivan DJ 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International law* 487.

Tahzib-Lie BG 'The European Definition of Freedom of Religion or Belief' (1998) 17 *Helsinki Monitor* 17.

Taieb J 'Freedom of Religion: from France to the United States a National Conflict of Law' (2004) 4(3) *Global Jurist Advances* 1.



Tamir Y 'A Strange Alliance: Isaiah Berlin and the Liberalism of the Fringes' (1998) 1(2) *Ethical Theory and Moral Practice Nationalism Multiculturalism and Liberal Democracy* 279.

Taylor BC 'Kansas Denies Religion-Based Defense to Rastafarians on Marijuana Charges.' (1998) 38 *Washburn Law Journal* 307.

Taylor PM 'The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression' (2006) 3 *Brigham Young University Law Review* 811.

Temperman J 'The Neutral State: Optional or Necessary? A Triangular Analysis of State-Religion Relationships Democratisation and Human Rights Compliance' (2006) 1 *Religion and Human Rights* 269 279.

Tomasi J 'Kymlicka Liberalism and Respect for Cultural Minorities' (1995) 105 (3) *Ethics* 580.

Tschannen O 'The Secularization Paradigm: A Systematization'(1991) 30 (4) *Journal for the Scientific Study of Religion* 395.

Tseming Y 'Race Religion and Cultural Identity: Reconciling the Jurisprudence of Race and Religion' (1997) 37 *Indiana Law Journal* 119.

Tushnet MV 'Following the Rules Laid down: A Critique of Interpretivism and Neutral Principles' (1983) 96 (4) *Harvard Law Review* 781.

Uddin TA 'Evolution towards Neutrality: Evolution disclaimers Establishment Jurisprudence Confusions and a Proposal of Untainted Fruits of a Poisonous Tree' (2007) 8 *Rutgers Journal of Law & Religion* 1.

Vakulenko A 'Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends' (2007) 7 (4) *Human Rights Law Review* 721.

Van Marle K 'Equality: An Ethical Interpretation' (2000) 63 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 595.

Van Boven T 'Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs' (1991) 13 (4) *Human Rights Quarterly* 437.

Van der Poll L 'The impact of traditional sex practices on the construction of female sexuality: An African human rights perspective' (2009) 13(2) *Law Democracy & Development* 1.

Van der Schyff G 'The Legal Definition of Religion and Its Application' (2002) 119 *South African Law Journal* 288.

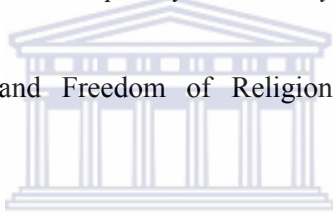
Van der Vyver JD 'The Contours of Religious Liberty in South Africa' (2007) 21 *Emory International Law Review* 77.

Van der Vyfer JD 'Constitutional perspectives of Church –State relations in South Africa' (1999) 2 *Brigham Young University Law Review* 635.

Van Vollenhoven WJ and Blignaut S 'Muslim Learners Religion Expression through Attire in Cultural Diverse Public School in South Africa: A cul-de-sac?' (2007) 35 *Journal of Family Ecology and Consumer Sciences* 1.

Van der Walt BJ. 'When Africa and Western Cultures meet: From confrontation to appreciation' (2006) *Institute for Contemporary Christianity* 158.

Vašek M 'Ritual Slaughter and Freedom of Religion' (2009) 3 *Constitutional Law developments in Austria* 228.



Viljoen F and Louw L 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights:1994-2004' (2007) 101 (1) *The American Journal of International Law* 1.

Von Campenhausen A 'The German Headscarf' (2004) *Brigham Young University Law Review* 655.

Waldron J 'Religious Contributions in Public Deliberations' (1993) 30 *San Diego Law Review* 817.

Warren ME 'Can Participatory Democracy Produce Better Selves? Psychological Dimensions of Habermas's Discursive Model of Democracy' (1993) 14(2) *Political Psychology*. 209.

Weil P 'Lifting the veil' (2004) 22(3) *French Politics Culture and Society* 142.



Weinrib L 'Canada's Charter: Rights Protection in a Cultural Mosaic' (1996) 4 *Cardoza Journal of International and Comparative Law* 395.

Westen P 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.

Wing AK and Smith MN 'Critical Race Feminism Lifts the Veil?: Muslim Women France and the Headscarf Ban' (2006) 39 *University of California Davis Law Review* 743.

Wise D 'Wearing the Veil' (2006) 156 *New Law Journal* 1786.

Wright J 'The OSCE and the Protection of Minority Rights' (1996) 18(1) *Human Rights Quarterly* 190.

Young IM 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 258.



**International and regional instruments**

African Charter on Human and Peoples' Rights. Adopted by the Organization of African Unity at the 18th Conference of Heads of State and Government on 27 June 1981 Nairobi Kenya.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador (OAS 1988).

American Declaration of the Rights and Duties of Man (American Declaration) (OAS 1948).

American Convention of Human Rights (Pact of San José) 1969.

Charter of Fundamental Rights of the European Union (2000).

Charter of the Organization of American States (1948)

Charter of the Organisation of African Unity (1963).

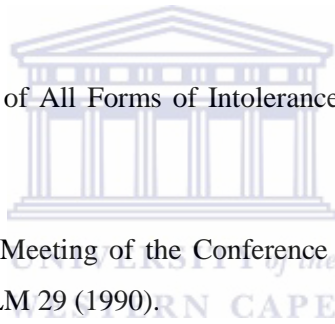
Charter of the United Nations (1945).

Convention on the Elimination of All Forms of Discrimination against Women (1979).

Convention on the Rights of the Child (1989).

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

Declaration of the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).



Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) Section II (9.4) ILM 29 (1990).

The International Convention of the Elimination of All Forms of Racial Discrimination. (1965).

The Convention on the Prevention and Punishment of Genocide (1948 )

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

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

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in 1998 and entered into force on 1 January 2004.

The Statute of the Council of Europe (1949).

The Universal Declaration of Human Rights (1948).

United Nations Declaration on the Elimination of All Forms of Racial Discrimination. (1963).

Conference on Security and Cooperation in Europe: Final Act (Helsinki Accord) (1975).

European Convention for the Protection of Human Rights and Fundamental Freedoms. (1950).

European Coal and Steel Community (ECSC) Treaty or Paris Treaty (1950).

Maastricht Treaty (1992).

Lisbon Treaty (2009).

Treaty of Amsterdam (1999).

Treaty of Nice (2003).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005)

The African Charter on the Rights and Welfare of the Child (1999).

European Social Charter (1961).

The Preamble to the Framework Convention for the Protection of National Minorities. (1994).

### **South African cases**



*Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA).

*Antonie v Governing Body Settlers High School and Others* 2002 (4) SA 738 TPD.

*Bhe & Others v Magistrate Khayelitsha & Others* 2005 (1) SA 580 (CC).

*Bührmann v Nkosi and Another* 2001 (1) SA 1145 T.

*Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE); 1999 (9) BCLR 951 (SE).

*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 2000 (10) BCLR 1051 (CC).



*Crossley and Others v National Commissioner of South African Police Service and Others* [2004] 3 All SA 436 (T).

*David Dikoko v Thupi Zacharia Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR (CC).

*Dlamini and Others v Green Four Security* (2006) 27 ILJ 2098 (LC).

*Dlamini & others v Green Four Security* CCPR/C/91/D/1474/2006 14 November 2007.

*Esop v Union Government (Minister of the Interior)* 1913 CPD 133.

*Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 2 SA 268 (C).

*Garreth Anver Prince / South Africa* 255/2002 EC.CL/167 (VI).

*Gumede v President of the Republic of South. Africa & Others* 2009 (3) BCLR 243 (CC).

*Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 50; 1997 (11) BCLR 1489 (CC).

*In re Certification of the Amended Text of the Constitution of the RSA* 1997 (1) BCLR 1 (CC);

*In re Certification of the Amended Text of the Constitution of the RSA* 1996 (10) BCLR 1253 (CC).

*Islamic Unity Convention v Independent Broadcasting Authority*: 2002 4 SA 294 (CC).

*Lawrence v The State and Another, Negal The State and Another, Solberg v The State and Another* 1997 (10) BCLR 1348 (CC) 1997 (4) SA 1176 (CC).

*Lawrence v The State and Another; Negal v The State and Another; Solberg v The State and Another* 1997 (4) SA 1176 (CC); 1997(10) BCLR 1348 (CC).

*MEC for Education: KwaZulu-Natal v Navaneethum Pillay* 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC).

*Minister of Home Affairs & Another v Fourie & Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 1 SA 524 (CC) 2006 (3) BCLR 355 (CC).

*Mthembu: Mthembu v Letsela* 1997 (2) SA 936 (TPD).

*Mthembu v Letsela & Another* 1998 (2) SA 675 (T).

*Mthembu v Letsela & Another* 2000 (3) SA 867 (SCA).

*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

*Nkosi & Another v Bührmann* 2002 (1) SA 372 (SCA).

*Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC).

*Pillay v MEC for Education, KwaZulu-Natal, and Others* 2006 (10) BCLR 1237 (N).

*Police and Prison Rights Union and Others v Department of Correctional Services and Another* (C544/2007) [2010] ZALC 68; 2010 (9) BCLR 921 (LC).

*Port Elizabeth Municipality v Various Occupiers*: 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

*President of the RSA v Hugo* 1997 (4) SA 1(CC).

*Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976 (C).

*Prince v President, Cape Law Society, and Others* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA).

*Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

*Prince v President of the Law Society of the Cape of Good Hope*. 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC).

*Prince v South Africa African Comm Hum & Peoples' Rights Comm* No 255/2002; (2004) AHRLR 105 (ACHPR 2004).

*Prince v South Africa* communication no 1474/2006 views adopted on 31 October 2007  
CCPR/C/91/D/1474/2006 14 November 2007.

*Ryland v Edros* 1997 (1) BCLR 77 (C).

*S v Bhulwana* 1996 (1) SA 388 (CC).

*S v Gwadiso* 1995 (12) BCLR 1579 (CC).

*S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

*S v Williams* 1995 3 SA 632 (CC)

*The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

*Wittmann v Deutscher Schulverein Pretoria* 1998 (4) SA 423 449.

*Woodways CC v Vallie* 2010 (6) SA 136 (WCC) (31 August 2009).

### **Foreign cases**

*Ahmad v United Kingdom* App No 8160/78 4 Eur Comm'n H R 126 (1981).

*Ahmet Arslan and Others v Turkey* - 41135/98 Judgment 23 February 2010.

*Aishah Azmi v Headfield School and Kirklees Metropolitan Borough Council* (271)  
Employment Tribunal case number 1801450/2006 6 October 2006.

*Assembly of the Church of the Universe v Canada - MAB, WAT and J AYT v Canada* Comm No 570/1993.

*Atkas v France* (No. 43563/08).

*Begum R (on the application of) v Denbigh High School* [2004] EWHC 1389 (Admin) (15 June 2004) ELR 374.

*Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295.

*Big M Drug Mart* (1985) 13 CRR 64 97.

*Big M Drug Mart Ltd.; R.B. v Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315.

*Bulut v Turkey* Dec. Adm. 18783/91. (EComHR 74 Decisions and Reports 93 3 May 1993) inadmissibility decision.

*Bulut v Turkey Kurtulmuş* Application no. 18783/91.

*Central Okanagan School District No 23 v Renaud* (1992) 2 SCR 970.

*Chamberlain v Surrey School Board* (2000) 80 BCLR (3d) 181 (C.A.); reversing (1998) 60 BCLR (3d) 311 (S.C.).

*Church of the Lukumi Babalu Aye Inc. v City of Hialeah* 723 F. Supp. 1467 1469 (S.D. Fla. 1989) *aff'd mem.* 936 F.2d 586 (11 th Cir. 1991) *cert. granted*, No. 91-948, 1992 U.S. LEXIS 1707 (U.S. Mar. 23, 1992).

*Church of Lukumi Babalu Aye Inc v City of Haileah* 508 US 520 - Supreme Court 1993



*City of Boerne v Flores* 521 US 506 (1997).

*Clement Boodoo v Trinidad and Tobago* Comm No 721/1996 (UN Human Rights Committee 2 April 2002).

*County of Allegheny v ACLU* 492 U.S. 573 593 (1989).

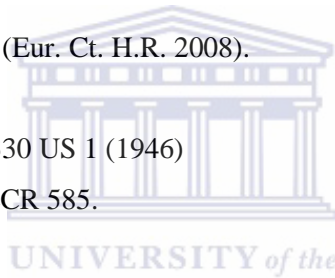
*Dahlab v Switzerland* application No. 42393/98 ECtHR decision of 15 February 2001 (cf. ECHR 2001-V Eur Court HR 449).

*Dawkins v Dept. of Environment* [1993] IRLR 284.

*Dogru v France* (No 27058/05) (Eur. Ct. H.R. 2008).

*Everson v Board of Education* 330 US 1 (1946)

*Flaminio Costa v Enel* (1964) ECR 585.



*Farai Dzvova v Minister of Education, Sports and Culture and Others* Judgment SC 26/07 (2007) ZNSC 26.

*Goldman v Weinberger* 475 U S 503 (1986).

*Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* 126 S. Ct. 1211 (2006).

*Handyside v UK* ECtHR 24 –A 7 December 1976.

*Hasan and Chaush v Bulgaria* (26<sup>th</sup> October 2000: Appln No. 30985/96).

*Hoffmann v Austria* 17 EHRR 293 (1994) (ECtHR 255 –C 23 June 1993).

*Hutterian Brethren of Wilson Colony v Alberta* 2007 ABCA 160.

*Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* case (1970).

*K Singh Bhinder v Canada* Comm No 208/1986 (UN Human Rights Committee 31 October 1989).

*Kabal Singh v R.H.M. Bakeries (Southern) Ltd.* EAT 818/77.

*Karaduman v Turkey* App. No. 16278/90 (EComHR 74 DR 93 3 May 1993) inadmissibility decision.

*Kervanci v France* (No 31645/04). (Eur. Ct. H.R. 2008).

*Klass v Federal Republic of Germany* (1979) 2 EHRR 214.

*Kokkinakis v Greece* 17 EHRR 397 (1994) (ECtHR 260 A 25 May 1993).

*Koptuch-Urteil* [Headscarf Decision] (September 2003) Bundesverfassungsgericht [BVerGE] 108,208 (F R G).

*Kurtulmus v Turkey* (No 65500/01).

*Lee v Weisman* 505 U.S. 577, 631 (1992).

*Lemon v Kurtzman* 403 U.S. 602, 612-13(1971).

*Leyla Sahin v Turkey* Application No 44774/98 Grand Chambers Judgment of 10 November 2005 19 BHCR 590 [2006] ELR 73.

*Ludin v Land Baden-Württemberg* Case No 2BvR 1436/02 Judgment of 24 September 2003.

*Lynch v Donnelly* 465 U.S. 668, 675, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

*Lyng v Northwest Indian Cemetery Protective Association* 485 U S 439 (1988).

*M.A.B, W.A.T. and J.-A.Y.T v Canada* (Communication no 570/1993) inadmissibility decision of 8 April 1994 UN Doc CCPR/C/51/D/570/1993.

*Mandla v Lee* [1983] IRLR 209.

*Mann Singh v France* (No 24479/07).

*Manoussakis and Others v Greece* Judgment of 26 September 1996 (1996) 23 EHRR 387.

*Marbury v Madison* 5 US (1 Cranch) 137 (1803).

*McCreary County v American Civil Liberties Union* 125 S.Ct. 2722 (2005).

*Media Rights Agenda & Others v Nigeria* Communication 105/93, 128/94, 130/94 and 152/96.

*Metropolitan Church of Bessarabia and Others of Moldova* Application No 45701/99, ECHR 2001 XII.

*Multani (tuteur de) v Commission scolaire Marguerite-Bourgeois* [2002] J.Q. no. 619 (Que. S.C.).

*Multani (tuteur de) v Commission scolaire Marguerite-Bourgeois* [2002] J.Q. no. 1131 (Que. S.C.).

*Multani v Commission scolaire Marguerite-Bourgeois* (2004) 241 D.L.R. (4th) 336 (Que. C.A.).

*Multani v Commission scolaire Marguerite- Bourgeoys* [2006] 1 S.C.R. 256.

*Müller and Others v Switzerland* App. No. 10737/84, 133 Eur. H.R. Rep. (ser. A) 212 (1988).

*Mitchell v Helms* 530 U.S. 793,809 (2000).

*Nijjar v Canada 3000 Airlines Ltd.* [1999] C.H.R.D. No. 3.

*Oregon Department of Human Resources v Smith* 494 U S 872 (1990).

*Otto-Preminger Institute v Austria* App. No. 13470/87, 295-A Eur. H.R. Rep. (ser. A) 34 (1994).

*Panesar v Nestle Co. Ltd.* [1980] I.C.R. 144.

*Prais v EC Council* (Case 130/75) 1976 ECR 1589, 2 CMLR 708.

*R (on the application of Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin).

*R (on the application of Begum) v Denbigh High School* [2005] EWCA Civ 199 (02 March 2005) 1 WLR 3372.

*R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

*R (on the application of X) v Head Teacher and Governors of Y School* [2008] 1 All ER 249.

*R v Oakes* [1986] 1 S.C.R. 103.

*R v Paul Simon Taylor* [2001] EWCA Crim. 2263 (Criminal Division).

*Rahime Kayhan v Turkey* Communication No -8/2005 CEDAW/C/34/D/8/2005 (2006).

*Raihon Hudoyberganova v Uzbekistan* Communication No. 931/2000 U.N. Doc. CCPR/C/82/D/931/2000 (2004).

*Re Chickeche* (1995) 2 LRC 93.

*Refah Partisi (The Welfare Party) and Others v Turkey* Judgment of 13 February 2003.

*Shabina Begum v Denbigh High School* E L R 374 (Q B 2004) 2004 WL 1174215.

*Sherbert v Verner* 374 US 398, 404 (1963).

*Singh Binder v Canada Comm* No 208/ 1986 ( UN Human Rights Committee 9 November 1989) U N Doc A/45/40 (Vol II) Annex IX SE (1990).

*Singh v Rowntree Mackintosh Ltd.* [1979] I.R.L.R. 199.

*Singh v British Rail Engineering Ltd.* [1986] ICR 22.

*Singh v Lyons Maid Ltd.* [1975] IRLR 328.

*SPUC v Grogan* [1991] ECR I-4685.

*State v McBride* 955 P 2d 133 (Kan Ct App (1998).

*Stedman v United Kingdom* App. No.29107/95 89 – A (1997) D&R 104, 107-8.

*Suleiman v Juffali* 1 FLE 479, 490 (2002).

*Syndicat Northcrest v Amselem* (2005) 29 S.C.L.R.

*Tuli v St. Albert Protestant Separate Sch. Dist. No. 6* [1985] 8 C.H.R.R. D/3906 (Can.)

*United States of America - Trans World Airlines Inc v Hardison* 432 US 63 (1977) 84.

*Van Orden v Perry* 545 U.S. 677.

*Van Orden v Perry* 125 S.Ct. 2854 (2005).

*Walz v Tax Commissioner of the City of New York* 397 U.S. 664, 674 (1970).

*Wingrove v United Kingdom* App. No. 17419/90 (Eur. Ct. H.R. 1996).

*Wisconsin v Yoder* 406 U S 205 (1972).

*X v Austria* App No 1753 /63 (EComHR 15 February 1965) inadmissibility decision, Yb 8, 174

*X v United Kingdom* App No 8231/78(EComHR 28 Decisions and Reports 5 28, 6 March 1982) inadmissibility decision.

*X v United Kingdom*, App. No. 8160/78 (1981) 22 DR 27.

*X and the Church of Scientology v Sweden* No. 7805/77, 16 DR 68 (Dec. 1979) 73.

*Zylberburg v Sudbury Board of Education* [1988] 52 D.L.R. (4th) 577.

### **South African legislation**

The Constitution of South Africa Act 108 of 1996.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

The Cape Town Cemeteries Bill.

Marriage Act act 25 of 1961.

Prohibition of Female Circumcision Act 1985.

Marriage Act Act 25 of 1961.

Extension of Security of Tenure Act, Act 62 of 1997.

Road Traffic Act 1988, s.16.

Schools Act, Act 84 of 1996.

Criminal Justice Act 1988, s.139.



Drugs and Drug Trafficking Act 140 of 1992.

Medicines and Related Substances Control Act 101 of 1965.

### **Foreign legislation**

The Constitution of Nepal (1990).

Political Constitution of the Republic of Panama (1972).

The Constitution of Sudan (1998).

The Constitution of the USA (1788).

The French Constitution (1958).

The Constitution of the Islamic Republic Of Iran (1979).

The Constitution of the Kingdom of Saudi Arabia (1992).

Human Rights Act (1998).

Race Relations Act 1976.

Religious Freedom Restoration Act of 1993.

Basic Law for the Federal Republic of Germany (1949).

Oaths Act 1978.

(The French Law of 2004).Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics

### **Doctoral and masters theses**

Bohler-Muller N *Developing a New Jurisprudence of Gender Equality in South Africa* unpublished LLD thesis University of Pretoria (2005).

Buckingham *Realising Religious Freedom: The application of the Canadian Understanding of Religious Freedom to South Africa* (1998) LLD Thesis Universiteit of Stellenbosch.



Ginwala F *Class Consciousness and Control: Indian South Africans 1860-1946* (1947) PhD Thesis Oxford University.

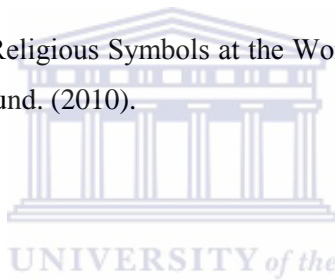
Heyns CH *A jurisprudential analysis of civil disobedience in South Africa* LLD Thesis University of the Witwatersrand (1991).

Koopman NN *Dade of Deugde? Implikasies vir die Suid-Afrikaanse kerke van n moderne postmoderne debat or moraliteit.* PhD Thesis University of the Western Cape (2000).

van der Schyff G *The Right to Freedom of Religion in South Africa* (2001) LLM Thesis Randse Afrikaanse Universiteit 133.

Sundkvist N 'The Wearing of Religious Symbols at the Workplace in Sweden' Master Thesis Faculty of Law University of Lund. (2010).

#### **United Nations Documents**



Krishnaswami A *Study of Discrimination in the Matter of Religious Rights and Practices* (1960) UN Document E/Cn 4/ Sub 2 /200/ Rev 1

Malik C 'Report of the 8th Session of the Human Rights Commission' (14 April-13 June 1952) U.N. Bulletin 13 (Sept. 1952): 248.

UN Economic and Social Council, Commission on Human Rights *Report by the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights* 16 February 2000 UN Doc. E/CN.4/2000/112 56<sup>th</sup> Sess

Civil and Political Rights Including the Question of Religious Intolerance: Report of the Special Rapporteur on freedom of religion or belief Asma Jahangir E/CN.4/2006/5

Report of the Special Rapporteur on freedom of religion or belief Asma Jahangir dated 16 February 2010 regarding the application of Sharia law in Afghanistan A/HRC/13/40/

Eide A 'Final text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities' E/CN.4/Sub.2/AC.5/2991/2.

Report of the Commission de Reflexion *sur l'application du principe de la laïcité dans la Republique.*

United Nations Report of the Special Rapporteur on freedom of religion or belief Asma Jahangir Mission To The United Kingdom Of Great Britain And Northern Ireland A/HRC/7/10/Add.3 7 February 2008 14-23.

Special Rapporteur on Freedom of Religion Ends Visit to France' UN Press Release 30 September 2005.

Report of the Special Rapporteur on freedom of religion or belief Asma Jahangir E/CN.4/2006/5.

Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief Sub-Commission on the Prevention and Protection of Minorities, Commission on Human Rights, Economic and Social Council 39<sup>th</sup> Sess at paragraph 183 U N Doc E/CN.4/Sub 2/1987/26/(1986).

United Nations Special Rapporteur on Freedom of Religion or Belief A Amor *Racial Discrimination and Religious Discrimination: Identification and Measures* [29] UN Doc A/CONF. 189/PC. 1/7 (2000).

Report of the Special Rapporteur on freedom of religion or belief Asma Jahangir dated 16 February 2010 regarding the application of Sharia law in Afghanistan A/HRC/13/40/Add.1.

CRC Committee Concluding Observations: France CRC/C/15/Add.240 (30 June 2004).

Special Rapporteur Amor *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* UN Doc E/CN.4/1996/95/Add.2 para 97 (1996).

UN Human Rights Committee ICCPR 'General Comment 23' in Art. 27: 'The Rights of Minorities' 50<sup>th</sup> Session 1214<sup>th</sup> meeting 1994 A/49/40 I (1994) 107.

Report of Krishnaswami A Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 12 U.N. ESCOR Sub-Comm'n on Prevention of Discrimination and Protection of Minorities (Agenda Item 5) U.N. Doc. E/CN.4/Sub.2/200/Rev.1.

Advisory Committee Opinion on Finland ACFC/INF/OP/I (2000) 002 2000.

UN ICCPR Human Rights Committee, ICCPR 'General Comment 23' in Art. 27: 'The Rights of Minorities' 50<sup>th</sup> Session.

Report of the Special Rapporteur on freedom of religion or belief Jahangir A A/HRC/13/40 - General Assembly 21 December 2009.

United Nations Economic and Social Council U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights.

CRC Committee Concluding Observations: France CRC/C/15/Add.240 (30 June 2004)

Country missions: France September 2005 E/CN.4/2006/5/Add.4.

Country missions: France September 2005 E/CN.4/2006/5/Add.4.

Advisory Committee Opinion on Finland ACFC/INF/OP/I (2000) 002 2000.

General Comment No. 18: Non-discrimination: 11/10/1989.

### **Others**

Alston P & Weiler JH 'An Ever Closer Union in Need of a Human Rights Policy: The European Union and Human Rights (1999) *Jean Monnet Working Paper* 99/1 25.

Durban Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

South African Charter of Religious Rights and Freedoms 21/10/2010.

Journal Official de la Republique Francaise [J.O.] 17 March 2004 at 5190.

*Guidelines for Review of Legislation Pertaining to Religion or Belief* prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the Council of Europe's Commission for Democracy Through Law (Venice Commission) 2004. Adopted by the Council of Europe on 18 October 1961 Turin.

Krishnaswami *Study of Discrimination in the Matter of Religious Rights and Practices* (1960).

Mootz FJ III 'Faith and Politics in the Post-Secular Age: The Promise of President Obama' (2009) Research Paper.

Wolfenden Report (1957). *Report of the Commission on Homosexual Offences and Prostitution*. London: Home Office HMSO.

The Situation of Muslims in France' in *Monitoring the EU Accession Process: Minority Protection* (New York The Open Society Institute 2002) Part 3.

University of British Columbia, Human Security Centre, Overview *The Human Security Report 2005: War and Peace in the 21st Century* (2005) 15.

Basedau M & de Juan A 'The "Ambivalence of the Sacred" in Africa: The Impact of Religion on Peace and Conflict in Sub-Saharan Africa' (2008) *GIGA Research Programme: Violence, Power and Security* No 70.

L Scheeck 'Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance' (2005) 15 *Questions de recherche / Research in question* 1, 9.

Davies L 'Nicolas Sarkozy's cabinet approves bill to ban full Islamic veil' [guardian.co.uk](http://guardian.co.uk).

McCrudden C & Prechal S 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach European Network Of Legal Experts In The Field Of Gender Equality'.

Bloß L 'European Law of Religion – organizational and institutional analysis of national systems and their implications for the future European Integration Process' (2003) 13/03 *Jean Monnet Working Paper*.

Merrett M 'Religious Liberty as a Paradigm For the Development of Human Rights' Research Paper (1997) 5.

France: Headscarf Ban Violates Religious Freedom' Human Rights Watch, Statement of 27 February 2004.

'French Ban on Faith Symbols Would Contravene International Human Rights Law' MRG 28 January 2004.

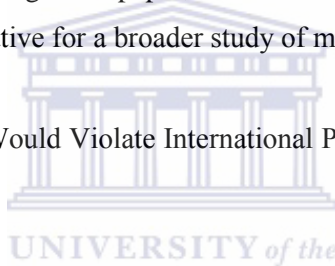
Glendinning L (2007) 'Schoolgirl loses court battle to wear niqab' *The Guardian* Thursday February 22, 2007.

Baer S (2005) Country Report Germany drafted for the European Network of Legal Experts in the nondiscrimination field (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation).

Directory and Guide on Religious Practices in HM Prison Service (London 1992).

Benson IT 'Taking a Fresh Look at Religion and Public Policy in Canada : The Need for a Paradigm Shift' (2008) This background paper, commissioned by the Federal Government of Canada's Policy Research Initiative for a broader study of multi-culturalism.

'A Ban in Religious Symbols Would Violate International Protection of Freedom of Religion' (17 December 2003).



Koch C 'Classroom Crucifixes, Teacher Headscarves, Faith Healers and More-The German Experience of Religious Freedom Under a Bill of Rights'.

Madood T 'Remaking Multiculturalism after 7/7' (2005) *Open Democracy* (29 September 2005).

Basedau M & De Juan A 'The "Ambivalence of the Sacred" in Africa: The Impact of Religion on Peace and Conflict in Sub-Saharan Africa' (2008) *GIGA Research Programme: Violence, Power and Security* No 70.

Higazi A 'Interpreting religious conflict in Nigeria' (2009) *CRISE Internal Paper* Oxford: Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford.

Human Rights Watch 'They do not own this place': government discrimination against "non-indigenes" in Nigeria' (2006) (New York: Human Rights Watch).

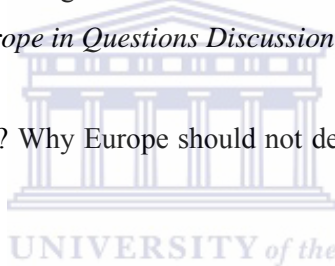
Cold War *The Reader's Companion to Military History* (1996).

University of British Columbia, Human Security Centre, *The Human Security Report 2005: War and Peace in the 21st Century 2005* (Oxford University Press: Oxford).

Tuschl RH *Ethnic and Religious Conflicts in The Southern Hemisphere* EPU Research Papers Issue 03/06.

McCrea R 'The Recognition of Religion within the Constitutional and Political Order of the European Union' (2009) 10 *Europe in Questions Discussion Paper Series*.

Menéndez AJ 'A pious Europe? Why Europe should not define itself as Christian' (2004) 10 *Arena Working Paper*.



Modood T 'The liberal dilemma: integration or vilification?'

de Klerk FW to *The 9th World Summit of Nobel Peace Laureates* Paris, 11 December 2008.

Tremblay LB 'The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?' 18 *EUI Working Paper LAW* (2009).

Submission of The Becket Fund for Religious Liberty 8 February 2008 to the United Nations Human Rights Council in relation to the Universal Periodic Review France.

Thomson G *Countries of the World & Their Leaders* Yearbook 08 Volume 2 2007.

Martin M 'Cry Freedom and Accept the Muslim Headscarf' *The Times* I February 2004.

*Guidelines for Review of Legislation Pertaining to Religion or Belief* prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in consultation with the Council of Europe's Commission for Democracy Through Law (Venice Commission) 2004.

Tobler C *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (2005)

Parkipuny M 'The indigenous peoples' rights question in Africa' statement to the 6th session of the United Nations Working Group on Indigenous Populations in Geneva Switzerland on 3 August 1989.

Habermas J 'Die Dialektik der Säkularisierung' *Blätter für deutsche und international Politik*.

Odendaal A '*Ethnic Conflict and its Management: A position paper*' Centre for Conflict Resolution (1998).



The Bible (King James Version) Hendrickson Publishers: Massachusetts 2006.

Shivdas M and Coleman S *Without Prejudice: CEDAW and the Determination of Women's Rights* 2010.

### **Websites**

[http://www.un.org/esa/population/publications/2006Migration\\_Chart/](http://www.un.org/esa/population/publications/2006Migration_Chart/)

[http://www.migration-online.de/data/migration\\_policy\\_group\\_5.pdf](http://www.migration-online.de/data/migration_policy_group_5.pdf)

<http://www.becketfund.org/index.php/article/364.html> last accessed on 23/10/10.

[www.giga-hamburg.de/workingpapers](http://www.giga-hamburg.de/workingpapers)>

[http://www.credreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold\\_war](http://www.credreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold_war)

<http://www.humansecurityreport.info>.

[www.epu.ac.at/epu/research/rp\\_0306.pdf](http://www.epu.ac.at/epu/research/rp_0306.pdf)



<http://ssrn.com/abstract=1550914>  
[www.opendemocracy.net/content/articles/PDF/3249.pdf](http://www.opendemocracy.net/content/articles/PDF/3249.pdf)  
[http://www.givengain.com/cause\\_data/images/2137/Building\\_peace\\_and\\_the\\_world\\_without\\_violence.pdf](http://www.givengain.com/cause_data/images/2137/Building_peace_and_the_world_without_violence.pdf)  
<http://www.endgametrust.co.uk/secularism.pdf>  
<http://ssrn.com/abstract=1557594>  
[http://www.holbergprisen.no/downloads/diverse/hp/hp\\_2005/2005\\_hp\\_jurgenhabermas\\_religi\\_oninthepublicsphere.pdf](http://www.holbergprisen.no/downloads/diverse/hp/hp_2005/2005_hp_jurgenhabermas_religi_oninthepublicsphere.pdf)  
[www.un.org](http://www.un.org)  
<http://www.cia.gov/cia/publications/factbook/geos/fr.html>  
<http://www.tatsachen-ueber-deutschland.de>  
[http://www.fra.europa.eu/fraWebsite/attachments/Perceptions\\_EN.pdf](http://www.fra.europa.eu/fraWebsite/attachments/Perceptions_EN.pdf)  
[http://www.un.org/esa/population/publications/2006Migration\\_Chart/](http://www.un.org/esa/population/publications/2006Migration_Chart/)  
<http://www2.parl.gc.ca/content/lop/researchpublications/prb0441-e.pdf>  
[www.legifrance.gouv.fr/texteconsolide/MCEBW.htm](http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm)  
[www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX\\_SIMPLE\\_AV90&nod=1LX9051211P1](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX_SIMPLE_AV90&nod=1LX9051211P1)  
<http://www.assemblee-nationale.fr/debrereport>  
<http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4461905.stm>  
[www.eumap.org/reports/2002/eu/international/sections/france/2002\\_m\\_france.pdf](http://www.eumap.org/reports/2002/eu/international/sections/france/2002_m_france.pdf)  
[http://medias.lemonde.fr/mmpub/edt/doc/20051109/708103\\_joe\\_20051109\\_0261\\_0006.pdf](http://medias.lemonde.fr/mmpub/edt/doc/20051109/708103_joe_20051109_0261_0006.pdf)  
<http://www.becketfund.org/index.php/article/364.html>  
[www.unitedsikhs.org/.../Translation\\_ECtHRJudgment\\_Jasvir\\_Singh\\_16\\_July\\_2009.doc](http://www.unitedsikhs.org/.../Translation_ECtHRJudgment_Jasvir_Singh_16_July_2009.doc)  
<http://www.guardian.co.uk/world/2010/jul/13/french-ban-face-veils/print>  
<http://www.islamonline.net/english/introducingislam/topic03.shtml>  
[http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=cewces\\_papers](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=cewces_papers)  
[http://www.hrw.org/English/doc/2004/02/26/france7666\\_txt.htm](http://www.hrw.org/English/doc/2004/02/26/france7666_txt.htm)  
[http://www.minorityrights.org/news\\_detail.asp?ID=20](http://www.minorityrights.org/news_detail.asp?ID=20)  
<http://www.silverringthing.org.uk>  
[www.hrwf.org](http://www.hrwf.org)  
<http://www2.ohchr.org/english/issues/religion/visits.htm>

<http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en>  
[http://www.migration-online.de/data/migration\\_policy\\_group\\_5.pdf](http://www.migration-online.de/data/migration_policy_group_5.pdf)  
<http://www.teachernet.gov.uk/management/atoz/u/uniform>  
<http://www.teachernet.gov.uk/management/atoz/u/uniform>  
<http://www.bailii.org/ew/cases/EWCA/Civ/2005/199.html>  
<http://www.bailii.org/ew/cases/EWHC/Admin/2004/1389.html>  
[www.employmentappeals.gov.uk/Public/Upload/07\\_0009ResfhAMMAA.doc](http://www.employmentappeals.gov.uk/Public/Upload/07_0009ResfhAMMAA.doc)  
[www.opendemocracy.net/conflict-terrorism/multiculturalism\\_2879.jsp](http://www.opendemocracy.net/conflict-terrorism/multiculturalism_2879.jsp)  
[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm)  
[www.bundestag.de/htdocs\\_e/info/germanbasiclaw.pdf](http://www.bundestag.de/htdocs_e/info/germanbasiclaw.pdf)  
[http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/policy/aneval/mon\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/mon_en.htm)  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1521307](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521307)  
<http://www.uni-trier.de/index.php?id=24373>  
<http://www.uni-trier.de/ievr/kopftuch/GesetzBadenWuerttemberg01042004.htm>  
<http://www.uni-trier.de/ievr/eng/kopftuch.htm>  
<http://www.bverwg.de/media/archive/2282.pdf>  
<http://www.spiegel.de/unispiegel/schule/0,1518,425678,00.html>  
[http://www.solarnavigator.net/history/declaration\\_of\\_independence.htm](http://www.solarnavigator.net/history/declaration_of_independence.htm)  
[http://faculty.ucc.edu/egh-damerow/american\\_legal\\_tradition.htm](http://faculty.ucc.edu/egh-damerow/american_legal_tradition.htm)  
<http://ssrn.com/abstract=961031>  
<http://cwis.org/fwdp/Africa/parkipuny.txt>  
<http://blaetter.de/artikel.php?p=2802>  
<http://plato.stanford.edu/archives/spr2009/entries/citizenship/>  
<http://www.unmikonline.org/regulations/unmikgazette/02english/Eirs/Convention.pdf>  
<http://www.latin-dictionary.org/L/1/tolerantia> Last accessed on 29/11/10.  
<http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>  
[http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857725&portal=hbkm  
&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649](http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857725&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649)  
<http://www.uni-trier.de/~ievr/kopftuch/ReligiousSymbols.pdf>  
[http://www.osce.org/odihr/item\\_11\\_13600.html](http://www.osce.org/odihr/item_11_13600.html)  
[www.irla.org/documents/reports/symbols.html](http://www.irla.org/documents/reports/symbols.html)

<http://www.saman.com>  
[http://www.osce.org/documents/odihr/2008/10/34058\\_en.pdf](http://www.osce.org/documents/odihr/2008/10/34058_en.pdf)  
[http://www.osce.org/documents/odihr/2009/07/38726\\_en.pdf](http://www.osce.org/documents/odihr/2009/07/38726_en.pdf)  
<http://www.uni-trier.de/~ievr/kopftuch/ReligiousSymbols.pdf>  
[http://ccrweb.ccr.uct.ac.za/archive/staff\\_papers/odendaal\\_ethnic.htm](http://ccrweb.ccr.uct.ac.za/archive/staff_papers/odendaal_ethnic.htm)  
[www.islamonline.net/servlet/Satellite?cid=1123996016350&pagename=Islam](http://www.islamonline.net/servlet/Satellite?cid=1123996016350&pagename=Islam)  
<http://www.endgametrust.co.uk/secularism.pdf>  
[http://www.oas.org/xxxivga/english/reference\\_docs/Estatuto\\_CorteIDH.pdf](http://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf) Last accessed on  
[08/12/2010.](http://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf)  
[http://eucenter.berkeley.edu/workingpapers/Parsons\\_Brief%20History%20of%20EU.2009.doc](http://eucenter.berkeley.edu/workingpapers/Parsons_Brief%20History%20of%20EU.2009.doc)  
<http://www.cidh.oas.org/what.htm>  
<http://www.osce.org/activities/13539.html>  
[http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/osce.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/osce.pdf)  
[http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/osce.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/osce.pdf)  
[http://www.theodora.com/wfbcurrent/european\\_union/european\\_union\\_history.html](http://www.theodora.com/wfbcurrent/european_union/european_union_history.html)  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>  
<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10458.htm>  
[http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/FR/BFRL\\_FRA\\_UPR\\_S2\\_2008\\_BecketFundforReligiousLiberty\\_uprsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/FR/BFRL_FRA_UPR_S2_2008_BecketFundforReligiousLiberty_uprsubmission.pdf)  
[http://www.yuni.com/library/latin\\_1.html](http://www.yuni.com/library/latin_1.html)  
<http://2ndlook.wordpress.com/tag/war/>  
<http://www.lepg.org/wars.htm>  
<http://www.servat.unibe.ch/icl/sa00000.html>  
<http://www.sudan.net/government/constitution/compile.html>  
<http://www.fordham.edu/halsall/mod/1878berlin.html>  
[www.giga-hamburg.de/workingpapers](http://www.giga-hamburg.de/workingpapers)  
<http://www.ceri-sciences-po.org/publica/qdr.htm>  
[www.jeanmonnetprogram.org/papers/00/990101.rtf/](http://www.jeanmonnetprogram.org/papers/00/990101.rtf/)  
<http://www.mideastweb.org/briefhistory.htm>  
[http://www.credoreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold\\_war](http://www.credoreference.com.ezproxy.uwc.ac.za/entry/rcmh/cold_war)  
[www.epu.ac.at/epr/research/rp\\_0306.pdf](http://www.epu.ac.at/epr/research/rp_0306.pdf)

<http://www.humansecurityreport.info>>

[www.opendemocracy.net/content/articles/PDF/3249.pdf](http://www.opendemocracy.net/content/articles/PDF/3249.pdf)

[www.hrw.org](http://www.hrw.org)

[http://www.givengain.com/cause\\_data/images/2137/Building\\_peace\\_and\\_the\\_world\\_without\\_violence.pdf](http://www.givengain.com/cause_data/images/2137/Building_peace_and_the_world_without_violence.pdf)

<http://register.consilium.europa.eu/pdf/en/03/cv00/cv00501en03.pdf>

<<http://www.endgametrust.co.uk/secularism.pdf>>

<http://www.secularnations.org/index.php?page=secularCountries>

<http://www.loc.gov/lcib/9806/danpost.html>

<http://ssrn.com/abstract=1557594>

<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf>

<http://www.state.gov/g/drl/rls/irf/2010/index.htm>

<http://www.state.gov/g/drl/rls/irf/2008/108500.htm>

