THE INTERACTION OF CHILDREN’S RIGHTS, EDUCATION RIGHTS AND FREEDOM OF RELIGION IN SOUTH AFRICAN SCHOOLS

BY

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DECLARATION

I, Kasturi Chetty, student number 199208956, hereby declare that this thesis for Doctor Legum (LLD) is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

Kasturi Chetty
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1. Religion
2. Culture
3. Equality
4. Education
5. Children’s rights
6. History
7. South Africa
8. Discrimination
9. Reasonable Accommodation
10. Diversity
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- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, General Assembly resolution 39/46 of 10 December 1984
- **Convention on Psychotropic Substances** (1971), entry into force 16 August 1976, in accordance with article 26(1)
- **International Covenant on Civil and Political Rights**, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49
- **International Covenant on Economic, Social and Cultural Rights**, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

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United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly Resolution 36/55 of 25 November 1981
This study examines the topic of the interaction of children’s rights, education rights and freedom of religion in South African schools from a legal perspective. It comprises of a discussion on the historical development of religion in South African schools; South Africa’s international obligations with regards to children’s rights, education rights and freedom of religion and the South African substantive law pertaining to children rights, education and freedom of religion as impacting on legal issues pertaining to religion in schools.

The study utilises a desktop approach, which comprises of a wide range of legal and other literary sources, international instruments, statutes and case law on children’s rights, education rights and freedom of religion. Importantly, it highlights the integral connection between these aforementioned rights when dealing with issues pertaining to religion in schools.

This thesis illustrates that much of the historical development of religion in schools took place without consideration of children’s rights, or more particularly, the best interests of the learners. Instead, (a particular brand of) religious beliefs were promoted in education above other religions and the well-being of school-children. Furthermore, despite the introduction of specific children’s rights into the Constitution, this thesis emphasises that the rights of children have still not been recognised sufficiently in education laws and policies. It is submitted that children’s rights have a paramount and practical role to play in matters pertaining to religion in South African schools. Consequently, it is recommended that children’s rights, more particularly the best interests of the child principle, should be expressly introduced into education legislation and policies. This will create legal obligations for school administrators and SGBs on the inclusion of children’s rights in religious exemption procedures. Furthermore, it is recommended that national guidelines on religious/cultural exemptions (which incorporate children’s rights) be developed which will set legal parameters for the handling of religious/cultural exemption procedures in schools.
This thesis also argues against the interpretation that the right to establish private schools includes the right to require religious conformity from non-adherent learners by way of a complete waiver of their religious freedom. Despite the importance of respecting the right of religious communities to protect and preserve their faith in private schools, it is submitted that this right cannot be exercised without regard for the religious freedom, dignity and best interests of non-adherent children. As a result, it is submitted that the waiver of the freedom of religion of non-adherent children is not consistent with the values which South African society reveres and therefore cannot be enforced. This thesis suggests that there is a way for the rights of private schools and the rights of non-adherent children to co-exist in harmony through the application of the reasonable accommodation principle in private schools. Reasonable accommodation of different faiths teaches religious tolerance to leaners in private schools and ensures that they are prepared to grapple with the religious diversity that they will inevitably face outside of the school environment. It is submitted that the enforcement of reasonable accommodation in private schools is to the benefit of all learners in private schools and to South African society in general.

Moreover, this study questions and analyses the state’s provision of compulsory religion education in public schools through the *National Policy on Religion and Education*. A theoretical distinction is made between religion education and religious instruction in the National Policy itself. Religious instruction refers to the teaching of specific religious beliefs. Religion education refers to the teaching about different religions and worldviews from an academic perspective. It is submitted that the National Policy is correct in removing religious instruction from public schools as this would not be in accordance with freedom of religion or equality rights of learners who are not of the majority faith. It is submitted further that, although the provision of compulsory religion education in public schools impacts upon the freedom of religion of learners and their parents, (if taught correctly) it is a reasonable and justifiable limitation on freedom of religion in that it pursues the legitimate state goal of nation-building through the teaching of religious tolerance and “celebrating diversity” in schools. In light of South Africa’s history of religious discrimination, it must be recognised that the current position (although not problem-free) is a significant step forward in the protection of minority religious rights in South African schools.

Despite this, it is submitted that there are numerous problems with the implementation of the National Policy that impact upon the dignity, equality and other rights of the learners
concerned. These problems cannot be ignored since they impact upon the daily lives of school children. However, many of these problems can be minimised through more effective teacher training in this subject area. Accordingly, this thesis recommends that the current position be maintained as an acceptable compromise between the two extremes of providing religious instruction in one faith and removing religion education from public schools altogether. However, it emphasises that the state has to make a concerted effort to improve teacher training in this subject area in order to ensure that the objectives of the National Policy are carried out as envisaged.

Furthermore, this thesis finds that certain provisions of the National Policy contain not only educational goals, but spiritual goals. Also in some instances, it is difficult to determine whether the religion education curriculum borders on being religious or not. In accordance with freedom of religion, it is submitted that the line between religion education and religious instruction must be clearly drawn in law and in practice. Consequently, the state must reconsider the National Policy and the corresponding religion education curriculum to ensure that they are aligned with the objectives of nation-building in all respects, meaning that any provisions or learning outcomes which have purely spiritual goals must be amended or removed.
“Differences are not intended to separate, to alienate. We are different precisely in order to realize our need of one another.”¹

1  INTRODUCTION

It is said that no issue has divided human society as much as religion.² Furthermore, no topic is more controversial than the relationship between religious belief and human rights.³ All over the world, religious sects continue to perpetuate hostility, discrimination and even war in the name of religion. The controversy over religion may arise from one group’s disapproval of another group’s beliefs; or one group’s opinion that their belief system represents the exclusive truth. Aside from these major disputes between religions, there is also continued internal feuding within religions, over denominational differences. Further conflict arises when one religion is endorsed by the state and allowed to dominate public space, at the expense of others.

It is clear that the issue of whether and how to accommodate religious beliefs in a multi-faith society is a matter of global concern. Increased globalisation has resulted in most countries being religiously diverse.⁴ As Lubbe states:

¹  Archbishop Desmond Tutu.
“This migration of people has come to mean that our traditions of faith no longer live in isolation from each other. We are interdependent everywhere on earth, we are all neighbours somewhere, minorities somewhere, majorities somewhere. The result of this interpenetration of communities is that we can no longer neatly divide the world in terms of religious affiliation. The map of the world in which we now live cannot be colour-coded according to Christian, Muslim and Hindu identity, but each part of the world features a rich mosaic of colours and textures of the whole religious reality of planet earth.”

In truth, however, wherever there is diversity, there is also a host of complex problems relating to religious and cultural differences, assumptions and expectations which play out in the public realm, including the school environment. A variety of religious beliefs and issues of cultural heritage may come into conflict with school rules or with the religious beliefs of others within the environment.

From the outset it must be noted that even though religion and culture are dealt with as separate rights, one cannot make a blanket distinction between the two. Black’s Law Dictionary defines religion as:

“a [human’s] relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In the broadest sense [religion] includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments.”

However, religious practices are not only based on faith, but also on the customs of a community. Similarly, cultural beliefs do not develop in a vacuum and may be based on the community’s religious beliefs. Therefore, it is possible for the belief or practice to be entirely religious or cultural and it is also possible for a practice to be a mixture of the two. As a result, in many issues of religion dealt with in this thesis, issues of culture are irrevocably intertwined.

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7 MEC for Education: KwaZulu-Natal v Navaneethum Pillay 2008 (2) BCLR 99 (CC) (“Pillay”) at para 47.
Many multi-faith states, including South Africa, have had to deal with controversial cases regarding the right of learners to exercise religious freedom and to be “different” in schools. The relationship between education and religion poses a particularly complex dilemma in societies where human rights are at the core of the educational and political systems; because in these societies, religious rights may clash with the rights to equality and human dignity (amongst other rights) which are at the core of human rights culture.8

Consequently, there is constant tension between religion and the law and religion and other competing rights in numerous institutions, particularly schools. It is submitted that schools are a centre for conveying a wide range of values and aspirations of a society to its younger members and therefore a study of this nature in the specific context of schools is imperative. Schools have an essential role to play in assisting the youth in coming to grips with complex social issues.9 They serve as forums for the exchange of ideas between learners of different cultural and religious backgrounds. Schools, therefore, must foster a culture of tolerance and impartiality, so that everyone within the school environment feels equally free to participate and make a contribution.10 The way that learners are taught to interact in the school environment will be carried through to their interaction in the broader society.11

Since the topic at hand relates to the school environment, it stands to reason that it concerns children in particular. In all matters involving children, the best interests of the child is considered to be of paramount importance in South Africa.12 As a result, this thesis will illustrate that issues pertaining to religion in schools cannot be discussed without considering children’s rights as contained in section 28 of the Constitution. In fact, this thesis analyses the role that children’s rights have played and should play such matters.

Also linked to the issues pertaining to religion in schools are education rights. Importantly, education is the tool to provide equal opportunity in a country where education was separate and severely unequal in the past.13 In addition, education is the basis for the development of

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8 Section 7(1) of the Constitution of the Republic of South Africa (“Constitution”).
11 Pillay at para 121.
12 Section 28 (2) of the Constitution.
respect for human rights and values, and schools are the forum in which this development takes place. An examination of the manner in which religious diversity is dealt with from an educational perspective, will assist in understanding the issue from a broader perspective and will hopefully impact on society as a whole. This necessitates exploring education rights as contained in section 29 of the Constitution, as well as other relevant education legislation and policies.

For obvious reasons, the topic warrants a discussion on the right to freedom of religion itself-as contained in section 15 of the Constitution. This would include defining the content of the right as well as its limitations. Consequently, this thesis examines children’s rights, education rights and freedom of religion and the impact of these rights on matters pertaining to religion in schools, from a South African legal perspective. It highlights the connection between these aforementioned rights when dealing with religion in schools and illustrates that issues pertaining to religion in schools must be observed through the prism of children’s rights and education rights. It is submitted that a discussion of freedom of religion alone would lead to a bare outcome.

Overall, this thesis deals with the following issues: the historical development of religion in South African schools; South Africa’s international obligations with regards to children’s rights, education rights and freedom of religion; the South African substantive law that governs decision-making on children rights, education and freedom of religion (as is relevant to issues pertaining to religion in schools) and the manner in which that law has been applied in South African cases. Furthermore, the thesis identifies and analyses certain problematic legal issues related to the topic at hand and makes recommendations for a future approach.

2 STATEMENT OF THE PROBLEM

The exercise of religious rights in the school setting raises numerous controversial and multifaceted legal concerns that impact on many constitutional rights of learners within that setting.

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14 Dickinson & van Vollenhoven “Religion in Public Schools: Comparative Images of Canada and South Africa” September 2002 20(3) Perspectives in Education 110.
Inevitably, there are many divergent views on the role religion should play (if any) in a multi-faith society and more particularly in schools, with each viewpoint giving rise to its own set of concerns. On the one hand, it is acknowledged that religion is an important part of human life. For many religious followers, a relationship with God/a higher power is fundamental to all aspects of their lives. Religion is a matter that is so important, personal and intertwined with people’s identities that the United Nations has recognised freedom of religion as a basic human right.\textsuperscript{15} It is clear that religious bodies play a significant role in public life.\textsuperscript{16} In fact, the making of law, which is recognised in modern times as a practical and rational human process of the secular order, has its origins rooted in religious beliefs of some kind. Furthermore the relationship between the state and the church has dominated politics in many parts of the world for centuries.\textsuperscript{17}

On the other hand, however, the relationship between the state and the church has proved to be an “unholy alliance” resulting in the religious persecution of many people by the state.\textsuperscript{18} There have been many instances in which public institutions have discriminated against people on the grounds of religious belief, particularly in schools.\textsuperscript{19} It is in reaction to these forms of persecution that the idea of human rights and the calls for secularism\textsuperscript{20} first began.\textsuperscript{21}

In some instances the hostility and competitiveness amongst religions is caused by the state engaging in religious favouritism. When one religion is endorsed by a state and privileged by the law; it leaves the other faiths to be discriminated against or marginalised.\textsuperscript{22} In some cases a particular religion is not endorsed by the state, but religion on the whole is revered by the state and its importance in public life is promoted over non-religion- which is meant to be

\textsuperscript{15} Article 18 of the Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948.

\textsuperscript{16} Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (“Fourie”) at para 90.


\textsuperscript{19} National Policy on Religion and Education, as approved by the Council of Education Ministers on 4th August 2003 para 2 (Ministers Forward).

\textsuperscript{20} Secularism is defined as “[t]he doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or in a future state.” See Onions (ed) The Shorter Oxford English Dictionary (1993) 1926.

\textsuperscript{21} De Waal & Currie (n18) 288-289.

\textsuperscript{22} Illustrated in Chapter 2.
equally respected and protected.\textsuperscript{23} However, it must be accepted that in societies where the majority are very religious, it may be considered fair for the majority to be acknowledged by the law. It stands to reason that social context is an important consideration in determining the fairness of the law.

Nevertheless, this acknowledgment of the majority faith must not unfairly discriminate against other faiths. The state must ensure that all religions (and other belief systems) are equally protected and respected by the law.\textsuperscript{24} This leads to the question of what constitutes unfair discrimination on the basis of religion. Does it require merely an absence of coercion or even-handedness by the state? Does is require that all religions (and other belief systems) be treated in exactly the same way in all respects, or does fairness dictate differential treatment at times? These are pertinent questions which need to be addressed.

Another controversial issue is whether or not religion should form part of the public school curriculum and if so, the format in which it should be provided. There are religious proponents who believe that religious instruction in schools is vital to instilling learners with particular values.\textsuperscript{25} Contrastingly, others believe that religion is a private concern that should be kept completely out of public domains such as schools in order to avoid the marginalisation and segregation that occurs as a result of religious differences.\textsuperscript{26} According to this perspective, schools should encompass religious neutrality,\textsuperscript{27} thereby ensuring equality amongst all religions. After all, many people draw on values, ethical principles and an understanding of the world from sources that are not religious and these could be used to produce good citizens.\textsuperscript{28} This would not interfere with a learner engaging in private religious studies should they wish to; but, so the argument goes, it need not be a public issue.

\textsuperscript{23} De Waal & Currie (n18) 290.
\textsuperscript{24} Section 9 of the Constitution.
\textsuperscript{26} Adhar & Leigh \textit{Religious Freedom in a Religious State} (2005) 241; Professor John Hull argues that a school is for education; it should not be turned into a “worshipping community”. See quote by Professor John Hull in Cumper “School Worship: Praying for Guidance” 1998 1 \textit{European Human Rights Law Review} 45 55.
\textsuperscript{27} Adhar & Leigh (n 26) 236.
\textsuperscript{28} \textit{National Policy on Religion and Education} para 14 (Values).
Alternatively, some believe that public schools have an educational responsibility to teach children about different religions from a purely academic standpoint - in a way that is different to religious instruction. Religious instruction entails subjecting learners to doctrinal religious teachings of one religion. Religion education, on the other hand, entails teaching about religions from an educational, non-devotional standpoint. In this regard, John Stuart Mill argued that there could be no objection to education about religions, meaning that people should learn about the fundamental beliefs; doctrines; significant characters; events and customs of others. It can be argued that education of this nature would promote tolerance and help shape a society where people have a better understanding of each other’s religions and cultures. Studying religion for historical, cultural or sociological reasons could be valuable in equipping learners to operate in a multi-faith and multi-cultural society. However, it must be questioned whether or not a subject as contentious and as personal as religion can be taught from an “objective” point of view (in any format) in a way that does not somehow compromise the freedom of religion of any learner in the environment; and if so, whether this is constitutionally justified in South Africa.

Aside from teaching about religion, the right to conduct religious observances in schools protects the display of religious symbols, individual and collective scripture readings, prayers, moments of silence, worship, and messages by members of the clergy. There is concern about the manner in which and the religious perspective from which these observances may be conducted in public schools. If the law permits public schools to determine their own religious ethos which best suits the interests of each school; then it may be within the rights of the school to conduct religious observances solely from the perspective of the majority religion within the school. Albeit that it may be considered to be acknowledgement of the majority; the school still has to determine an appropriate method of dealing with learners who do not belong to the chosen faith in times when religious observances are being conducted.

Some schools see religious exemption processes as the answer to this challenge. In other

29 Adhar & Leigh (n26) 245.
30 National Policy on Religion and Education, definition section and paras17 and 23.
32 Adhar & Leigh (n26) 245.
33 In terms of section 36 of the Constitution.
35 Section 20(1)(a) of the South African Schools Act 84 of 1996.
words, if a parent does not wish for his or her child to participate in religious observance/instruction, he or she could apply for a religious exemption. Many schools operate on this basis, believing that this amounts to the sufficient accommodation of religious minorities. However, schools often fail to consider the rights and best interests of the child during these religious exemption procedures. It is illustrated later on in this thesis that religious exemptions that are insensitively handled have implications for children’s rights.

Furthermore, a contemporary contentious issue relating to religion is the right to wear religious/cultural attire and adorn religious/cultural symbols in the school environment. It is accepted the freedom of religion encompasses not only the right to hold beliefs but also to manifest these beliefs. It is therefore the state’s responsibility to create positive circumstances for the exercise of religious rights. However, where religious beliefs are manifested in a public space, they naturally impact upon the rights of other people within that space. As a result, the right to adopt religious beliefs is absolute; however, the right to manifest those beliefs in public may be limited. It is the state’s (school’s) responsibility to limit the manifestation religious rights in order to protect the rights of others and other legitimate state interests.

School are charged with the difficult task of deciding which forms of religious expression to accommodate and how far that accommodation should extend. On the one hand, prohibiting all forms of religious/cultural dress and symbols is contrary to religious and cultural rights as well as freedom of expression. On the other hand, permitting these forms of expression may create practical problems for the school and may impact upon the rights of others within the school environment. As a result, schools have to reasonably accommodate religious and cultural diversity while at the same time maintaining order and discipline within the school. The pertinent question is: how far must an educational institution go in accommodating learners’ religious expressions?

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36 Article 18 of the Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948; Article 18 of the International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966; Section 15 of the Constitution.
38 See Prince v President of the Law Society of the Cape 2002 (3) BCLR 231 (CC) (“Prince”).
39 Van der Schyff (n34) 145.
A further area of concern is where the state permits the establishment of private schools that cater to specific cultural, linguistic or religious needs. On the one hand this right enhances religious, cultural and associational rights by allowing communities to perpetuate their way of life through education. On the other hand, it allows for the creation of exclusive groups of school-children who are divided along cultural, linguistic and religious lines. In order to protect the religious ethos of the school, private schools are permitted to exclude non-adherent children or to require religious conformity through the waiver of the religious rights of the non-adherent child by his or her parent. However, a complete waiver of the religious rights of a child has severe implications for the children’s rights, dignity and religious rights of the child concerned. Also, this gives rise to a possible conflict between parental authority over a child’s education and religious upbringing and a child’s individual religious rights. Consequently, the constitutionality of a waiver of the religious freedom of a child attending a private school must be questioned.

3 THE SOUTH AFRICAN CONTEXT

Although the majority of South Africans claim allegiance to Christianity, South Africa can be described as a “multi-cultural mosaic” comprising of Christianity, Hinduism, Islam, Buddhism and African traditional religions amongst others, each with its own strong religious heritage.

Significantly, Christianity was the favoured religion in the education system since the inception of formalised education in South Africa. As a result, religious instruction and religious observances from a Christian perspective became an integral part of the school system; while other religions were marginalised and not afforded a voice. This unequal

40 Section 29(3) of the Constitution; De Waal & Currie (n18) 484-485.
44 National Policy on Religion and Education para 9.
45 Dickinson & van Vollenhoven (n14) 10.
treatment of religions in education severely impacted upon a vast number of South African school-children.

There is no doubt that many Christians expected the new South Africa to emerge as a Christian state or, at least, for Christianity to be given prominence. In fact, the entire religious sector probably over-estimated the role that religion would play in the new constitutional democracy. What emerged instead is the new South Africa as a democratic constitutional state based on human rights and values, which entrenches equality and religious freedom for all.

The “new” South Africa does not endorse a state religion. However, the Constitution does not create a complete “wall of separation between church and state” either. In fact, the Preamble of the Constitution makes a controversial reference to God, which reads as follows: “May...
God protect our people. God bless South Africa.” This statement sets the tone for the remainder of the Constitution and clearly shows the drafters’ intentions to respect and even promote the place of religion in South African public life. The Preamble coupled with the South African national anthem, “Nkosi Sikelel’ iAfrica”, (translated as “God Bless Africa”) emphasises the state’s recognition of the importance of religion in South African society. This reverence for religion in the Constitution has translated into education legislation and policies which show due respect for religion in general.53

The 1996 Constitution is a document containing a Bill of Rights (Chapter 2), which aims to uphold the values of human dignity, equality and freedom for all.54 This cultivation of respect for human rights is essential in the light of the inequality and discrimination that existed under the old regime, particularly with regards to the education of children. The adoption of the new Constitution concretised the move from apartheid to democracy. As stated in S v Makwanyane:55

“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

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53 For example, the National Policy on Religion in Education and section 20(1) of the South African Schools Act 84 of 1996. This will be illustrated in Chapter 5; du Plessis observes: “Although South Africa is now internationally respected and applauded for the fact that it has changed into a democratic state, it holds true that its existing legal system developed within a Christian-historical framework. Regardless of the country’s political change, the majority of South Africans remain Christian. Inevitably governance and laws, even in the democratic dispensation, will show resemblances with principles and values distilled from the Christian religion and the Christian-based development of South African law. This may not necessarily directly hamper the move towards sustainable democratic change itself, but it may impact on the observances of religious minority groups (such as Islam or Hindu) as far as tolerance with and the fulfilment of their religious-related human rights are concerned.” See du Plessis “The Fulfilment of Human Rights Related to Religion”, Paper prepared for the ICS Workshop on Secular and Religious Sources of Human Rights Law in Berlin 15 (17 – 20 May 2006) 8 (footnotes omitted).

54 Section 1(a) of the Constitution; Section 7(1) of the Constitution, affirms the founding values upon which the Constitution based. It states that the Bill of Rights: “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” Furthermore, section 39(1) of the Constitution compels courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights.

Accordingly, the 1996 Constitution is supreme law and any law or conduct that is inconsistent with it, is invalid. This is particularly significant because prior to 1993, South African constitutional law was based on an extreme version of parliamentary sovereignty, which did not allow for the testing of laws and conduct against a higher norm. This meant that the laws of Parliament could not be challenged - even through the courts. Whereas, constitutional supremacy means that human rights are now protected from state-sanctioned abuse. Importantly, the Constitution is supreme law over and above religious law, meaning that religious practices are subject to limitations that are “reasonable and justifiable” in an “open and democratic society.”

Importantly, the Constitution applies not only to legislation, but also to regulations, rules and conduct carried out by the state or private institutions, more particularly, private schools. This is emphasised in section 8, which provides that:

“8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

Evidently, section 8(2) binds private persons 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. Section 8(2)
requires the judiciary to carry out a contextual determination of whether the relevant provision, is “capable, fit and suitable”\textsuperscript{62} for application to private persons.

Furthermore, the inclusion of the values of human dignity, equality and freedom in the first section of the Constitution\textsuperscript{63} is particularly important. These values act as guiding principles for the legislature, executive and judiciary and inform the understanding of all constitutional rights. Although, they are premised upon universal moral and ethical norms and values, they also find expression in African custom.\textsuperscript{64} According to Goldstone J and Ackerman J, the inclusion of values in the Constitution emphasises that the Constitution is more than merely “a formal document regulating public power. It also embodies …an objective normative value system.”\textsuperscript{65}

This is encapsulated in section 39(1) of the Constitution which compels courts to promote the values that underlie an “open and democratic society based on human dignity, equality and freedom” when interpreting the Bill of Rights. This means that constitutional interpretation in the new constitutional era is driven by the values articulated in the text.\textsuperscript{66} Furthermore, the influence of constitutional values on the interpretation and development of the law is mandated by section 39(2) of the Constitution.\textsuperscript{67}

The importance of human dignity and its central place in the Constitution cannot be overemphasised. In South Africa, human dignity is not only articulated in the Constitution as a founding constitutional value but also as a self-standing right.\textsuperscript{68} The Constitutional Court

\textsuperscript{62} Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) at paras 35-45.
\textsuperscript{63} See section 1 of the Constitution; The founding values are recurrently referred to in various other provisions of the Constitution, notably sections 7(1), 36(1), and 39(1), 143(2) and 195(1).
\textsuperscript{65} Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development 2001 (4) SA 938 (CC) para 54; Discussed in O’Regan “From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann” in Dignity, Freedom and the Post-Apartheid Legal Order: the Critical Jurisprudence if Laurie Ackerman (2008) 6-7.
\textsuperscript{66} Venter (n 58) 6.
\textsuperscript{67} Section 39(2) states that: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”
\textsuperscript{68} Section 10.
recognised the central position of the value of human dignity in *Dawood and Another v Minister of Home Affairs and Others*, in which it was held that:

“The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights...”

De Waal and Currie observe that dignity is perceived to be what gives people their intrinsic worth. For this reason, it has been asserted that dignity is “above all price and admits to no equivalent.” Essentially the value of dignity is central to the philosophy of constitutionalism upon which a constitutional government is based.

Integrally linked to human dignity is the value of equality. The value of equality “permeates and defines the very ethos upon which the Constitution is premised”. The Constitutional Court emphasised the importance of the value of equality in a democratic society, in the case of *Minister of Home Affairs and Another v Fourie and Another* (“*Fourie*”). The court stated:

“The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time

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69 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).
70 Para 35.
71 De Waal & Currie (n18) 231.
72 *Jones Kant’s Principle of Personality* (1971) 127.
73 Devenish (n64) 12.
74 This link between dignity and equality was recognised by the Constitutional Court in the case of *Fourie* at para 15, in which the court stated: “The sting of the past and continuing discrimination against both gays and lesbians’ lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.’ This ‘denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity’ namely that ‘all persons have the same inherent worth and dignity’, whatever their other differences may be.” Furthermore in *Pillay* at para 62, the court said that “religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.”
75 Devenish (n64) 35.
enables government to function in a way that shows equal concern and respect for all.”

This concept of equality is fundamental to the maintenance and propagation of all rights in the Bill of Rights and is therefore particularly important in a society that was acutely divided along racial, religious and linguistic lines. It finds specific expression in section 9 of the Constitution, which states that: “everyone is equal before the law and has the right to equal protection and benefit of the law.”

The value of freedom entails having the choice to participate in political, social and economic life. The concept of freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the state, or the will of another, to a course of action or inaction which he/she would not otherwise have chosen, he/she is not acting of his own volition and he cannot be said to be truly free. In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* (“*Ferreira*”) the court gave an extensive and generous interpretation to the value of freedom. According to Ackermann J:

“[A]n open society’ most certainly enhances the argument that individual freedom must be generously defined. It is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfill their own humanness and to question all received wisdom without limitations placed on them by the State. The ‘open society’ suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the ‘good life’.”

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76 *Fourie* at para 95; Pojman and Westmoreland remarked that: “[I]t is one of the basic tenets of almost all contemporary moral and political theories that humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social, and political structures of society.” See Pojman and Westmoreland (eds) *Equality: Selected Readings* (1997) 1.

77 Devenish (n64) 35.

78 See discussion in Chapter 2.

79 This value of equality is expressed in other parts of the Constitution but most specifically in section 9.

80 Section 9(1).


82 See discussion on *R v Big M Drug Mart Ltd* (1985) 13 CRR 64 in Chapter 6.

83 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (“*Ferreira*”).

84 *Ferreira* at para 50.
According to the court, this interpretation is congruent with the transformative objectives of the Constitution.\(^85\)

Significantly, in the case of *Christian Education South Africa v Minister of Education* ("*Christian Education*"),\(^86\) the Constitutional Court observed:

> "The state has an obligation to ensure that the learner’s constitutional rights are protected. It has an interest in ensuring that education in all schools is conducted in accordance with the spirit, content and values of the Constitution."\(^87\)

For that reason, the values of human dignity, equality and freedom must be borne in mind throughout this thesis.

Aside from its Constitution, South Africa has signed and/or ratified numerous international instruments dealing with children’s rights, education, freedom of religion and their interconnected rights. It has thereby made a commitment to uphold international standards with regards to these rights. In addition, South Africa has enacted legislation and adopted policies\(^88\) which give content to the constitutional provisions on the aforementioned rights and provide a framework within which schools can develop an approach on dealing with religion in schools.

Furthermore, South African courts, have encountered numerous cases involving children’s rights, education and freedom of religion. These cases illustrate the conflict and tension between religion and secular laws. Although many of these cases do not specifically deal with religion in schools, the principles developed in these cases can be applied to the arguments relating to religion in schools. It is therefore important to discuss and analyse the relevant

\(^85\) Also in this case, the Constitutional Court observed that the values in the Constitution are not mutually exclusive but in fact enhance and reinforce each other. The court stated as follows: “Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.” *Ferreira* at para 51.

\(^86\) 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) (“*Christian Education*”).

\(^87\) *Christian Education* at para 12.


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South African law in relation to each of the relevant rights and the approach of the South African courts in these cases and to make recommendations for the future.

4 RESEARCH METHODOLOGY

The approach that is used in this study is essentially a desktop approach which comprises of a discussion of the historical development, international law, South African law and prominent case law pertaining to children’s rights, education rights and freedom of religion in South African schools. Essentially, a wide range of literary sources, international instruments, statutes and cases on religion have been utilised.

5 PURPOSE OF THE THESIS

The purpose of the thesis is therefore:

- To highlight the connection between children’s rights, education rights and freedom of religion in relation to issues pertaining to religion in schools
- To outline the historical development of the law pertaining to religion in South African schools
- To discuss the international instruments relevant to children’s rights, education rights and freedom of religion which are applicable to South Africa
- To discuss the substantive law passed by South Africa on children’s rights; education rights and freedom of religion which is relevant to issues pertaining to religion in schools
- To discuss the prominent case law on children’s rights, education and freedom of religion that has impacted – directly or indirectly - on issues pertaining to religion in schools
- To make recommendations about a desired future approach

6 STRUCTURE OF THE THESIS

Chapter 2 deals with the historical development of religion in South African schools. The discussion is divided into three key time periods: namely 1652 - 1803: Dutch Reformed
religious education; 1803- 1938: Uncertainty in educational policy and 1939 - 1996: *Apartheid* and Christian National Education. It is imperative to explore the historical background on religion in South African schools in order to understand the rationale behind the current legislation/policies and case decisions on the issue.

Chapter 3 deals with South Africa’s obligations to protect children’s rights, education rights and freedom of religion through customary international law and the various human rights instruments, at world level and regional level, to which South Africa has become a party. These instruments include: the Universal Declaration of Human Rights\(^{89}\); the International Convention on the Elimination of All Forms of Racial Discrimination\(^{90}\); the International Covenant on Civil and Political Rights\(^{91}\); the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief\(^{92}\); the United National Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.\(^{93}\) Although the primary focus of the thesis is on South Africa, the purpose of Chapter 3 is to set an international context for the discussions on South African law contained in the remaining Chapters.

The aim of Chapter 4 is to illuminate the importance of considering children’s rights when dealing with issues pertaining to religion in schools. This Chapter discusses children’s rights as contained section 28 of the Constitution, particularly the best interests of the child principle, as well as the child’s right to dignity and equality. It also discusses the applicable provisions of the Children’s Act 38 of 2005, as well as prominent case law dealing with the application of the best interests of the child principle. This Chapter sets the theoretical background for the guidelines on the role of children’s rights in religious exemption procedures- dealt with in Chapter 7.

Chapter 5 aims to show to importance of considering education rights when dealing with issues pertaining to religion in schools. It contains a discussion on education rights as encompassed in section 29 the Constitution. It also focusses on the education legislation relevant to religion in schools, namely: the South African Schools Act 84 of 1996. In addition,

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89 General Assembly resolution 217 A (III) of 10 December 1948.
91 General Assembly resolution 2200A (XXI) of 16 December 1966.
it contains a discussion on the National Policy on Religion and Education\textsuperscript{94} and the Bill of Responsibilities for the Youth of South Africa. Most importantly, this Chapter introduces a discussion on the freedom of religion of children in private schools, which is subjected to more in depth analysis in Chapter 7.

Chapter 6 outlines and assesses the current South African law pertaining to freedom of religion in schools, the basis of which is section 15 of the Constitution. The discussion is divided into the following themes: 1) the protection of religion in the Constitution 2) the nature of freedom of religion; 3) the waiver of freedom of religion 4) unfair discrimination on the basis of religion; 5) the relationship between religion and culture; 6) determining centrality and sincerity in cases involving religion and culture 7) the relationship between religion and freedom of expression; 8) a school’s duty to limit freedom of religion and 9) reasonable accommodation of religious practices in schools. It also contains a discussion on the South African Charter of Religious Rights and Freedoms, which aims to enhance the religious rights in section 15.

Chapter 7 identifies three major problem areas pertaining to religion in schools that warrant analysis, namely: 1) the role of children’s rights in issues pertaining to religion in schools; 2) the freedom of religion of children in private schools and 3) the teaching of religion in public schools. The Chapter contains a summary of the current law on each of these issues, a discussion of problems associated with the current approach on each of the issues, as well as recommendations for improvement.

The final Chapter contains a summary of the findings and recommendations of the thesis.

7 CONCLUSION

It is clear that the relationship between children’s rights, education and religion poses a particularly complex dilemma for schools. It gives rise to numerous, controversial issues that impact upon many inter-related constitutional rights. Since schools serve as the forum for the exchange of ideas and development of relationships amongst South African youth, the manner in which this issue is handled in a school setting, will inevitably be carried through into

\textsuperscript{94} This discussion impacts on the broader discussion and analysis of the National Policy on Religion and Education in Chapter 7.
broader society.

South Africa is a country with a rich and diverse religious (and cultural) heritage. This thesis contends that the state needs to protect the freedom of religion, the right to equality, education rights, dignity and best interests of children and at all times ensure that young people are protected from unfair religious discrimination or religious coercion at schools.\textsuperscript{95} As a democratic society with a population comprised of many different cultures, languages and religions; the school environment needs to be a place which respects diversity and the “right to be different”.\textsuperscript{96} Essentially what is required, is the establishment of “a system infused with tolerance”\textsuperscript{97} where all people- more particularly all learners, are treated with dignity” regardless of their religion. That is what the Constitution aims to do.

In summary, the aim of this study is to assist in increasing understanding about the central issues and in addition, to make a contribution to development of South African law with regard to issues pertaining to religion in South African schools in the future.

\textsuperscript{95} National Policy on Religion and Education (Ministers Forward).
\textsuperscript{97} Van der Schyff “Cannabis, Religious Observance and the South African Bill of Rights” 2003 TSAR 122 128.
CHAPTER 2
THE HISTORICAL DEVELOPMENT
OF RELIGION IN
SOUTH AFRICAN SCHOOLS

“We endeavour to throw light upon the dark future by means of our knowledge of the intellectual tendencies of the past. We even see those things realised in the future, which the present has not yet fulfilled. The value we place upon the past and present determines our consideration of the future.” - Rein

1 INTRODUCTION

The relationship between state, church, education and religion is a highly contentious issue facing South African schools. With South Africa being the religious and culturally plural society that it is, South African schools are continuously confronted with conflicting religious and cultural interests. In order to better understand the complexities of the relationship between religion and education, it is necessary to examine the historical context in which this relationship has developed.

The purpose of this Chapter is to trace the historical development of religion in South African schools from a legal perspective, between 1652 and 1996. This period marks the beginning of informal education, encompassing religious instruction in one faith; until the adoption of the final Constitution, which entrenched freedom of religion and the right to equality for all.

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98 Rein (referred to as one of Germany’s greatest educators) quoted in Malherbe Education in South Africa (1652-1922) (1925) 3.
99 Section 15.
100 Section 9.
This historical development clearly illustrates how South African education has been characterised by religious inequality and diversity intolerance, most of which has impacted on children. Consequently, this Chapter provides insight into the rationale behind the push for equality, non-discrimination, respect for diversity and children’s rights contained in many of the current legislation and policies on religion in South African schools. These themes are explored further in Chapters 3, 4, 5 and 6.

It must be borne in mind that children’s rights were constitutionally entrenched in South African law, for the first time, with the adoption of the interim Constitution in 1993\textsuperscript{101} and then later in the final Constitution in 1996.\textsuperscript{102} This means that, most of the historical development of the role religion in schools, took place without necessarily considering the best interests of the children concerned. Instead, religious beliefs were a greater concern. If and when the needs of children were considered, it was certainly not in respect of all children, equally.

Furthermore, it is important to acknowledge from the outset the existence of the African traditional religion/s of the indigenous people of South Africa, prior to the arrival of European settlers in 1652. Although it is difficult to trace precise sources reflecting the beliefs and practices of that period,\textsuperscript{103} it must be noted that traditional Africa held spiritual beliefs which entailed that “[n]ature, man and the spirit world constitute one fluid coherent unit.”\textsuperscript{104} Although certain aspects of belief may have differed between Khoisan and Bantu tribes, the basic principles of African traditional religion\textsuperscript{105} may be summarised as follows: the belief in

\textsuperscript{101} Section 30; the Child Care Act 74 of 1983 was already in place.

\textsuperscript{102} Section 28.

\textsuperscript{103} Hexham and Poewe remark as follows: “It is remarkably difficult to reconstruct ‘traditional African religion’ prior to 1910. Almost all our information about traditional African beliefs comes from missionary sources alone.” See Hexham and Poewe “Christianity in Central Southern Africa Prior to 1910” 1 5 (a revised version of this paper appears in Elphick & Davenport Christianity in South Africa (1997); Hofmeyer & Pillay note: “The lack of documentary evidence and written records has meant that historians have neglected the religious and cultural practices of African societies.” See Hofmeyer & Pillay (eds) A History of Christianity in South Africa Vol I (1994) 11.


\textsuperscript{105} Gehman contends that although individual expressions may differ, certain common basic beliefs pervade throughout Africa, therefore African traditional religion may be referred to in the singular. See Gehman African Traditional Religion (1990) 30; Ramose states that: “Africa is a heterogeneous cultural entity although similarities of culture are sometimes observable in the lives of African people.” See Ramose African Philosophy Through Ubuntu (2002) 63; Hexham & Poewe write: “The religions of the various
a Supreme Being; the belief in a spiritual realm that infiltrates and controls the natural world and all of life and the belief in the sanctity of living as a unified society.\(^{106}\) African religious rituals do not involve direct worship of the Supreme Being but rather communication (offerings of food and other items, prayers and observation of proper rites) through intermediate spiritual beings or ancestors,\(^ {107}\) who offer guidance to the living. In African traditional religion, a person’s connection to his or her community is the most important part of life.\(^ {108}\) Harmony with one’s community means adherence to ancestral laws and customs\(^ {109}\) which are passed down from the elders in the community to the younger generation, through the telling of stories. The teaching of religion/custom is primarily based on the oral tradition,\(^ {110}\) in terms of which the elders are fully trusted as the final authority.\(^ {111}\)

It was the arrival of European settlers that prompted the religious conversion of indigenous African people to one or other denomination of Christianity, with minimal regard for African traditional religion as a legitimate belief system. These indigenous religious beliefs were repeatedly denied and debased by European settlers as mere superstition and “false” religions.\(^ {112}\) European settlers, who held their own moral and religious institutions to be

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\textit{African communities of Transorangia during the 19th century differed from each other.” “The available evidence suggests that Zulu traditional religion centred on ancestors and did not involve a belief in a high god, while the Tswana-Sotho recognized an overarching, impersonal force, similar to a high god. Yet, despite differences in beliefs and ritual practices they shared many beliefs as, for example, in witchcraft, prophecy, and a concern for healing powers.” See Hexham and Poewe (n103) 5; Setiloane points out that the Sotho-Tswana do not appear to have had a creation myth but that the Ndebele, like the Zulu, do. See Setiloane, “Modimo: God Among the Sotho-Tswana” September 1973 (4) \textit{Journal of Theology for Southern Africa} 11.}
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\textit{Ramoze (n105) 55-57; Amoah and Bennet argue that African traditional religion should not be reduced to ancestor worship as the religion is far more complex than that. They state that: “Since colonial times, a major problem with foreign perceptions of African religions has been a tendency to over-generalize and, in the process, to reduce all the indigenous systems to little more than animism and ancestor worship. However, any generalization about a matter as complex as religion, especially in a continent as diverse as Africa, is clearly an audacious undertaking.” See Amoah and Bennet “The Freedoms of Religion and Culture under the South African Constitution: Do traditional African Religions enjoy equal treatment?” (2008) 1-2.}
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\textit{Horn “African traditional Religion, Western Religious Shifts and Contemporary Education” 2003 39(3&4) \textit{Tydskrif vir Christelike Wetenskap} 51 56.}
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\textit{Turaki (n104) 98.}
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See http://www.sahistory.org.za/african-traditional-religion (Date accessed: 3 March 2012); Note that this paragraph constitutes a brief overview of African Traditional Religion. Moosa in Mamdani (n17) 122; Lekhela states: “The nature of education that the missionaries offered was predominantly religious, calculated to win the Bantu for God, and rid them of their heathen beliefs and
superior to those of Africans, proceeded to suppress various aspects of African culture. The Christianising of indigenous Africans therefore became the settlers’ primary objective. The underlying assumption of the conversion process was that Christianity is the “true religion”. The process of “civilising” indigenous Africans through the introduction of Christianity brought about the assimilation of European culture into many aspects of African life and, correspondingly, led to the abandonment of the traditional customary African lifestyle in many respects.

“The foreign, mostly Western, religious groups that compete for the souls of Africa stand accused of transplanting their religious rivalries onto African soil and, in so doing, of promoting adversarial religious perceptions and conflict within previously like-minded and peaceful communities. Those engaged in advocating the cause of extraneous customs. So keen were the missionaries to use education as an instrument of exorcism that they took no note of the deep-seated religious feelings of the Bantu: if anything they condemned their beliefs openly.” See Lekhela (n9) 14.

Moosa in Mamdani (n17) 143; Mutua states: “Messianic religions have been forcibly imposed or their introduction was accomplished as part of the cultural package borne by colonialism. Missionaries did not simply offer Jesus Christ as the saviour of benighted souls, his salvation was frequently a precondition for services in education and health, which were quite often the exclusive domain of the Church and the colonial state. It makes little sense to argue that Africans could avoid acculturation by opting out of the colonial order; in most cases, the embrace of indigenous societies by the European imperial powers was so violent and total that conformity was the only immediate option.” See Mutua “Human Rights, Religion and Proselytism” in Mutua Human Rights: A Political and Cultural Critique (2002) 94; Lubbe in Du Toit & Kruger (n5) 3.

Msila states: “Therefore, whilst the missionaries provided western education to the African for the public good, they had many private interests that they wanted to fulfil….the missionaries used education to attain their political goals.” “[Missionary Education] was geared to make the Africans docile and tame through the use of the Christian philosophy.” See Msila “From Apartheid Education to the Revised National Curriculum Statement: Pedagogy for Identity Formation and Nation Building in South Africa” 2007 16(2) Nordic Journal of African Studies 146 148.

According to Ramose: “Christianity justified its domination and elimination of indigenous African religions by appeal to Jesus Christ’s instruction: go ye and teach all nations. So it is that colonisation and Christianity assumed epistemological dominance crystallizing in their unilaterally conferred, though no less questionable, right to determine and define the meaning of experience, knowledge and truth on behalf of the indigenous African.” See Ramose (n105) 11; He states further: “...Christianity holds itself to be the true religion for all humanity.” See Ramose (n105) 25; He goes on to say: “On this basis the at times enforceable imposition of the Christian religion upon the people of Africa was no more than an extension of the European ‘spiritual empire’ alongside the political expansion of European imperialism” See Ramose (n105) 28; Nicolson observes: “But the underlying assumption is still that Christianity in the true religion....” See Nicolson “Religious education in state schools in a future South Africa” 1994 7(1) SAJE 43 45; du Toit states: “Many believed that it was the preordained will of God that whites, who represented the ‘only true’ religion and civilization, had to colonize Southern Africa three hundred years ago to evangelize its people.” See du Toit (n110) 680; It is contended that: “Christianity as always been considered the only authentic religion.” See Summers & Waddington (eds) Religious Education for Transformation (1996) 2.

Kallaway writes: “Civilising the natives to conform to Western ideas of social life and morality was also of significance.” See Kallaway “Education, health and social welfare in the late colonial context: the International Missionary Council and educational transition in the interwar years with specific reference to colonial Africa” 2009 38(2) History of Education 217 220.

Ramose (n105) 56; According to Kallaway: “Christian education at this time was in part an ideological aspect of imperialism through which indigenous peoples were inducted to Western languages, culture...” See Kallaway (n116) 217 220.
religions are almost invariably totally insensitive to the values imbedded in traditional African religion. Abandonment of indigenous African institutions and the customary African lifestyle—ranging from the clothes they wear and the food they eat to the education they receive and the language they speak—is mostly insisted upon as a conditio sine qua non of religious conversion."\(^{118}\)

Essentially, it is the more formalised teaching of the Christian religion in South African schools that is linked to the arrival of the Dutch United East India Company (DUEIC) at the Cape in 1652. The arrival of the Dutch and, the subsequent annexation of the Cape by the British in 1795, resulted in a formal education system in South Africa that reflected both the influence of the Calvinistic Dutch and the liberal, Anglican English.\(^{119}\) Christianity was therefore the favoured religion in education since the inception of formalised education in South Africa.

Christianity was, from a historical perspective, the recognised religion in South Africa. Christianity constituted the dominant norm with respect to religion and it influenced both colonial policy and the law within the apartheid regime, with little or no regard being held for other religions.\(^{120}\) This observation is illustrated in the subsequent discussion. The law that regulated the educational system during apartheid authorised the ideology of Christian National Education, which required an education system based on Christian values.\(^{121}\) This dominance of and favouritism towards Christianity was at the expense of other religions.\(^{122}\)

It must be pointed out that the development of religion in schools takes place against the backdrop of a host of other complex, interrelated issues: the move from colonialism to independence;\(^ {123}\) the language clash between the Dutch and English and later between Afrikaans and English; and racial segregation and varying political ideologies. Although it is acknowledged that the issues of religion; language; race and politics are inextricably linked,

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118 van der Vyver “Constitutional Perspective of Church-State Relations in South Africa” 1999 Brigham University Law Review 635 645.
119 Dickinson & van Vollenhoven (n14) 10.
120 Moosa in Mamdani (n17) 123.
122 Moosa in Mamdani (n17) 122.
this Chapter specifically endeavours to focus on the law relating to religion in education and on the events which impacted significantly on religion in education.

The discussion on the historical development is divided into three key time periods: namely 1652 - 1803: Dutch Reformed religious education; 1803 - 1938: Uncertainty in educational policy and 1939 - 1996: Apartheid and Christian National Education.

2 1652-1803: DUTCH REFORMED RELIGIOUS EDUCATION

In 1652, Jan Van Riebeek took up appointment as the first Commander at a resting station established at the Cape of Good Hope. At the time, the Dutch inhabitants followed the traditions of their forbearers and attempted to transplant the old life of the Netherlands as little changed as possible. At the Synod of Dort in the Netherlands held between 1618 and 1619, the Dutch Reformed Church had been proclaimed as the “community of the elect” or, the religion of the people. An edict issued by this Synod in relation to religious instruction proclaimed it mandatory for religious instruction to be conducted in schools and permitted only orthodox Christians to teach in schools. As a result, it became one of the DUEIC’s chief objectives to establish the Dutch Reformed Church of South Africa (DRC) at the Cape of Good Hope, and subsequently, to cultivate a Christian community which could disseminate the teachings of the DRC. As Reformation tradition had dominated in the Netherlands, so too did it dominate in South African education since the arrival of the Dutch.

125 These inhabitants are often referred to as “settlers”, however at the time, they had no intention to establish a Dutch colony in South Africa and settle here. Therefore the term “inhabitants” is preferred. See Malherbe (n98) 40.
127 Coertzen states: “In the Netherlands the Reformed Churches confessed the Dutch/Belgic Confession of Faith. This Confession also became part of the Dutch Reformed Church that came to South Africa in 1652, as was also the case in the Dutch Reformed Churches in the other colonies of the Dutch Republic.” See Coertzen “Freedom of Religion in South Africa: Then and now 1652-2008” 1 5; Article 36 of the Dutch Confession states that: “the government’s task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, to remove and destroy all idolatry and false worship of the Antichrist, to promote the kingdom of Jesus Christ and to see that the Word of God is preached everywhere so that God might be honoured and served by everyone, as He commands in His Word.” (Belgic Confession, Harare 2000).
128 Rose and Tunmar (n124) 113.
129 Initially the DEUC’s intention was not to expand the refreshment station beyond the area surrounding Table Mountain, however, this was the eventual result. Gerstner “A Christian Monopoly: The Reformed Church
It follows, therefore, that education at the Cape was based on the teachings of the DRC from 1652. At the time, lessons were given in the homes of settlers and later by aspirants called “meesters” and were solely based on the “divine”.\textsuperscript{131} Formal education outside of the home did not exist.\textsuperscript{132} The intention behind education was solely to provide religious instruction. The event which marked the beginning of religious education for Black Africans was the arrival of Angolan slaves who were captured at sea by a Dutch warship. Van Riebeek took issue with the fact that they did not speak Dutch and were “heathen” people\textsuperscript{133} and therefore arranged for them to receive religious instruction.\textsuperscript{134} Interestingly, Van Riebeek’s journal at the time indicates how important “Christianising” slaves was to the Dutch, so that they would resort to enticing them into attending religious instruction.\textsuperscript{135} It states:

“To encourage the slaves to attend and to hear or learn the Christian prayers, it is ordered that after school everyone is to receive a small glass of brandy and two inches of tobacco.”\textsuperscript{136}

Significantly, attendance of religious instruction by slaves, their acceptance of the DRC brand of Christianity and their confirmation into the Church was one of the means for a slave to acquire the status of an autonomous human being.\textsuperscript{137}

In due course, the first public school opened in the Cape in 1658 and it was primarily established for slaves to learn Dutch and receive religious instruction.\textsuperscript{138} This was essentially the beginning of formalised education in South Africa. Religious education in South Africa

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\footnotetext{130}{McKerron (n126) 15.}
\footnotetext{131}{Holmes Religious Education in the State School: A South African Study (1962) 28.}
\footnotetext{132}{McKerron (n126) 156.}
\footnotetext{133}{Rose and Tunmar (n124) 85; The use of the word “heathen” indicates the complete disregard for African traditional religion.}
\footnotetext{135}{Elphick states: “The DRC brand of Christianity was the emblem of white identity and the marker that separated them from the dark-skinned slaves.” See Elphick in Stanley (ed) Missions, Nationalism and the End of an Empire (2003) 56.}
\footnotetext{136}{Balkema Van Riebeeck’s Diary, Vol II (1652) 258-259.}
\footnotetext{137}{Elphick in Stanley (n135) 56.}
\footnotetext{138}{Behr & Macmillan Education in South Africa (1971) 357; Du Plessis A history of Christian missions in South Africa (1965) 29-30; Instruction in the schools was given by a siekenrooster (sick comforter), with religious instruction as the main emphasis of lessons. See McKerron (n126) 156; At this stage there was no formal segregation of schools on the basis of race. The first segregation policy was introduced in 1671 by the Dutch Reformed Church Council. See Seroto (n110) 63.}
\end{footnotes}
therefore, in practice, meant instruction in the Christian faith and no other.\textsuperscript{139} It is worth noting that some now regard this form of religious education as a “Calvinist attempt to convert students to Christianity rather than genuine education in religion.”\textsuperscript{140} At the time these schools fell under the control of local kerkraden (church councils)\textsuperscript{141} whose main concern was ensuring that teachers adhered strictly to the doctrines of the Dutch Reformed faith. They had the authority to visit and examine schools in order to ensure against the dissemination of false religious doctrine.\textsuperscript{142}

Subsequent to the Van Riebeek era, Pasques de Chavonnes, the Dutch Governor at the Cape,\textsuperscript{143} issued an Ordinance in 1714\textsuperscript{144} which created the Commission of the Scholarchs as a formal controlling body for education. The aim of the Ordinance was to regularise existing practices.\textsuperscript{145} This was the first attempt at creating proper educational legislation. This Ordinance accepted that the content of education should be almost entirely religious\textsuperscript{146} and it reaffirmed the DRC control of schools\textsuperscript{147} by stating:

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“Whereas for the prosperity of the good of the colony and welfare of the land it is not of slight importance that the young from their childhood should be well instructed in the fear and knowledge of God and be taught all good arts and morals from their youth, and thereto it is above all necessary that they should be provided with competent and God-fearing teachers, and that those should be prohibited who show desire to teach otherwise than is practiced in the Reformed Churches…”\textsuperscript{148}
\end{quote}

\textsuperscript{139} Seroto notes that many writers do not make a distinction in their work between religious instruction in homes and churches and formal education during this period, since education initially consisted of mainly religious instruction. See Seroto (n110) 6; Malherbe notes that church life and school life were inherently interwoven since schools prepared pupils for “participation service of public worship”. See Malherbe (n98) 21.

\textsuperscript{140} Summers & Waddington (n115) 6.

\textsuperscript{141} These councils were based on prototypes established in the Netherlands.

\textsuperscript{142} McKerron (n126) 16.

\textsuperscript{143} From 1714 to 1724.

\textsuperscript{144} This was the first attempt at proper educational legislation. See Malherbe (n98) 35.

\textsuperscript{145} See Rose and Tunmar (n124) 85.

\textsuperscript{146} McKerron (n126) 16.

\textsuperscript{147} See Rose and Tunmar (n124) 87.

\textsuperscript{148} Thirty years after the De Chavonnes Ordinance, the Cape was visited by the Governor General of India, van Imhoff, who journeyed into inland South Africa and was astonished not only by what passed as education but what he saw as degeneration in religious observance at the time. He observed: “…what an indifference and ignorance a great part of the country people lived in this respect, caring little or nothing for religious worship, so that it appeared to him to be rather an assemblage of blind heathens than a colony of Europeans and Christians…” See Resolution as to Country Teachers, February, 1743 in Report, Education Commission 1863, (Appendix) 6. Quoted in Rose and Tunmar (n124) 88.
This DRC controlled system of religious education, based on Calvinistic principles, continued until the inception of the de Mist administration in 1803.149

3 1803- 1938: UNCERTAINTY IN EDUCATIONAL POLICY

The 19th century may be described as a period of educational uncertainty. The English took occupation of the Cape for a brief period from 1795 - 1803 but did not have any significant impact on educational policy during this period.150 The year 1803, however, saw the Batavian151 Government take possession of the Cape152 and this marked the beginning of what can only be described as a see-saw in policy on religion in education.

After the French revolution, the revolutionary ideals of “equality, freedom and brotherhood for all men”153 began to influence the thinking of many politicians, including de Mist, the Commissioner-General of the Cape at the time.154 de Mist’s Policy of 1804 entailed that the state assume responsibility for education, relieving churches from this obligation.155 He advocated for the establishment of a secular educational system in South Africa for the first time.156 His policy entailed “that education should be vocational, universal and without regard for colour or creed....”157 While the policy noted that religious instruction was an important part of the school day, it provided that it would no longer dominate the school curriculum. The significance of this policy was that it no longer accepted the dominant position of the DRC.

It is uncontroversial to state that de Mist’s ideals were, in the South African context, exceedingly advanced and liberal for the time. The conservative Cape Dutch community accordingly battled to accept the new policy. Unsurprisingly, the de Mist Policy was labelled as “godless” by the majority of the Cape Christian population.158 The impact of the de Mist

149 Holmes (n131) 28.
150 Coertzen (n127) 5; Seroto (n110) 64.
151 Batavia refers to the Netherlands from 1795 to 1806 as a French vassal state.
152 Theal Short History of South Africa and its People (1909) 91.
153 National motto of France originating during the French revolution.
154 Holmes (n131) 29; Coetzee African Studies Programme- Occasional Papers 4 (1968) 16 23-30; Rose and Tunmar (n124) 109 and 115.
155 Cape Educational Commission Report 1863 No.9 (Appendix V) 10 ff (abridged); “…he became the more convinced of the pressing necessity of an entirely new creation of a regular school system to be erected by the authority of the Government….” See Rose and Tunmar (n124) 43.
156 Coertzen (n127) 5.
158 Holmes (n131) 29.
Ordinance was halted by the English re-occupation of the Cape in 1806, much to the relief of the Cape Dutch inhabitants who regarded it with “profound suspicion for its secular tendencies.”\textsuperscript{159} de Mist’s notion of a secular, non-discriminatory, nation-building system of education would arise once more with the fall of apartheid in the early 1990’s.

After 1806, English rule at the Cape resulted in an attitude of laissez faire, where governors of the Cape attempted to create a semi-secular system of education,\textsuperscript{160} with clerical supervision to appease the conservative Dutch community.\textsuperscript{161} The association between school and church therefore was restored under British rule. Also, during this period, the Bible and School Commission was established and it began to assume the functions of a modern Education Department.\textsuperscript{162} At this stage, the task of education was seen as producing “the most salutary effects of moral and religious improvement.”\textsuperscript{163}

A radical change occurred under the leadership of Lord Charles Somerset as Governor of the Cape in the 1820’s.\textsuperscript{164} Somerset halted the growing autonomy of the Bible and School Commission and subjected it to his personal objectives\textsuperscript{165} of anglicising the Dutch and suppressing mother-tongue (Dutch) education.\textsuperscript{166} His system required that the principles of Christianity be taught to the children of Dutch colonists and “heathens if required”,\textsuperscript{167} but that it be taught in English. Ultimately, however, the DRC stronghold in the Cape was too powerful to concede to Somerset’s system of education. The result was the establishment of a great number of Dutch private schools\textsuperscript{168} which aimed to preserve the Dutch language,\textsuperscript{169} which was regarded as “speech of religion”\textsuperscript{170} by the Dutch community; meaning that it was inextricably linked to their religious beliefs and identity.

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\item[159] See Rose and Tunmar (n124) 94.
\item[160] The system was semi-secular in so far as it looked upon the establishment of schools as a matter of state control and not a matter to be controlled entirely by a religious body, but still placed clergymen on the Board of Education that supervised the system and required religious instruction in schools in accordance with denominations of parents. Malherbe (n98) 51.
\item[161] Holmes (n131) 30.
\item[162] See Rose and Tunmar (n124) 94-95.
\item[164] Holmes (n131) 30.
\item[165] Referred to in Rose-Innes Superintendent Report for 1854 15 August.
\item[166] Rose and Tunmar (n124) 97; Take note that the issues relating to language and religion are irrevocably linked throughout history and therefore language issues will inevitably form part of the discussion.
\item[167] Behr (n134) 89.
\item[168] Malherbe (n98) 84.
\item[169] Holmes (n131) 31.
\item[170] 30.
\end{footnotes}
Thereafter, in 1838, the so-called *Herschel Report* on education was published. According to Herschel the aims of education were to ensure the teaching of English and “to form good citizens and men, by instructing them in the relations of the social civil life and to fit them for a higher state of existence, by teaching them those which connect them with their Maker and Redeemer.” This Report was influential in that its principles on the importance of religion in education were incorporated *verbatim* into the *Government Memorandum on Education*, passed on 23 May 1839. This Memorandum set out a daily hour for the perusal of Holy Scriptures as part of the curriculum; provided pupils with facilities for religious instruction by their pastors and also provided for a leave of absence to be granted to any conscientious objectors. It is noteworthy in that it introduced the religious exemption procedure into the education system.

Also significant during this period was the appointment of an impartial, full-time official known as the Superintendent–General of Education at the Cape in 1839, an event which gradually led to formation of an Education Department through which he and his officials could exercise their duties. James Rose-Innes was the first to hold the position and he remained in office until 1859. He recognised the need for respect between the different Christian denominations within the school setting and made the following comment in that regard:

“To Christian men of all denominations, the Bible is the common source of religious truth and faith. Let that be the sole foundation

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171 Contained in two letters to the Government written by Sir John Frederick William Herschel (a renowned English astronomer who gave public lectures at the Cape and who was requested to investigate educational matters in the Cape), dated 17 February 1838 and 6 March 1838. These letters were later copied and circulated as a Report. See Malherbe (n98) 75-77; As a secondary issue, the impact of this Report was that it formed the foundation of the so-called “Herschel system”, which introduced two separate classes of schools: the English medium classical schools which charged a small fee and second-class schools, which were free schools in which Dutch could be used as a medium of instruction where required. Both categories of schools would maintain offering religious instruction as part of the curriculum. For the first time, there existed a formalised division of schools based on language. See Walker *A History of South Africa* (1935) 247; McKerron (n126) 16. Holmes (n131) 31; Referred to in Muller *500 Years: A History of South Africa* (1981) 208.

172 Letter dated 6 March 1838, quoted in Malherbe (n98) 77 and 84; The Constitution of the South African Republic, formulated in 1858 reads: “The people desire the building up, prosperity and welfare of the Church and State and on that account direct that provision should be made to satisfy the want felt for Dutch Reformed ministers and school masters.” See Rose and Tunmar (n124) 113.


174 Holmes (n131) 32.

175 James Rose-Innes was the first to hold the position and he remained in office until 1859.

176 McKerron (n126) 16.
of Christian teaching in our school; as to denominational doctrines and forms, let each church take care of that.\textsuperscript{177}

Evidently there was a move towards inter-denominational tolerance at this time.

Behr regards the appointment of Rose-Innes as the event that signalled the transfer of responsibility of education from church to state.\textsuperscript{178} In this regard, McKerron notes further that the right of state control over schools was more clearly recognised at this point, since the government could exercise more effective control through the Superintendent.\textsuperscript{179}

Subsequently, a contrasting shift took place when the Education Act 13 of 1865, with its accompanying “Schedule of Regulations”,\textsuperscript{180} made provision for non-compulsory religious education. This meant that if religious instruction was offered at school, it would be outside of ordinary school hours and not part of the compulsory curriculum.\textsuperscript{181} Article 7 of the Regulations to the Act stated:

“The managers of the school may provide for the religious instruction of the scholars at an hour set apart by them for that purpose in addition to the ordinary school hours; but no scholars shall be compelled to attend at that hour for religious instruction without the consent of their parents or guardians.”

Article 7 raised objections from many within religious communities. The schools which adhered to the provision were labelled as “godless”\textsuperscript{182} and the ensuing 21 years consisted of attempts preserve compulsory religious education, mostly through the establishment of church and private schools. Eventually, in 1886, the aforementioned objections resulted in the Cape Parliament accepting a motion by Jan Hofmeyer\textsuperscript{183} to reintroduce Bible reading and religious instruction into schools.\textsuperscript{184}

\textsuperscript{177} Greyling (n173) 40; Quoted in Holmes (n131) 31-32.
\textsuperscript{178} Behr (n134) 12.
\textsuperscript{179} McKerron (n126) 16.
\textsuperscript{180} Referred to in Malherbe (n98) 95.
\textsuperscript{181} Holmes (n131) 32; McKerron (n126) 27.
\textsuperscript{182} Holmes (n131) 33.
\textsuperscript{183} South African born, Dutch-speaking Politician and intellectual.
\textsuperscript{184} Holmes (n131) 33.
Between 1835 and 1846, English attempts to anglicise the Cape Dutch had resulted in the Great Trek\(^{185}\) and the later establishment of the Boer\(^{186}\) Republics, known as the South African Republic (later known as the Transvaal) and the Orange Free State.\(^{187}\) As a result, significant laws and policies on religion in education were being introduced in the South African Republic from the early 1870’s onwards.\(^{188}\) For instance, an 1874 Draft Ordinance was issued by Rev T.F Burgers, the then President of the South African Republic, which contained provisions for full state education. The Draft Ordinance proclaimed, for example, that no religious instruction should be given during school hours;\(^{189}\) that teachers need not be members of the church\(^{190}\) and that teachers must refrain from doing anything offensive to the religious beliefs of others.\(^{191}\) The Draft Ordinance was extremely unpopular amongst the conservative population and therefore had to be modified.\(^{192}\) In order to appease religious objectors, the resultant Act 4 of 1874 (known as Burgers’ Act) contained a clause including

\(^{185}\) A large segment of frontier whites (referred to as Boers- meaning farmers), having been alienated from British rule, undertook a mass migration between 1836 and 1845, known as the Great Trek. The trek initially resulted in the founding of the Republic of Natalia, where the British followed the Boers and took over the territory in 1842. The Boers then moved westwards across the Drakensberg Mountains where they established the Republic of the Orange Free State and northwards, where they established the South African Republic. See Theal (n152) 124-125; See a full study in Muller Die Oorprong van die Groot Trek (1974); Referred to in Debroey South Africa: to the Sources of Apartheid (1989) 173; Stimie The Education of Whites in the Republic of South Africa (1975) 2.

\(^{186}\) This term makes reference to the Afrikaans community. Afrikaans is a simplified version of the High Dutch spoken by their forebears but with added words of German, Portuguese and Bantu origin. (See Ransford “The Great Trek” at http://www.ourcivilisation.com/smartboard/shop/transford/chap1.htm (Date accessed : 1 March 2012)); van Niekerk notes that: “The Afrikaners, who are the descendants of the Dutch settlers, and of Protestant settlers of other nationalities, mainly French and German, who also came to the Cape, became the chief bearers of reformed Christian ideas....” See van Niekerk “The impact of reformed books on the educational philosophy of the early Dutch colonists (1652-1795): a preliminary overview” 2001 21(3) SAJE 146 146.

\(^{187}\) Msila (n114) 148; Theal (n152) 148-157; Information on the development of education in the Orange Free State is scant compared to that of the Cape and the Transvaal. In this regard, McKerron notes that for many years after its establishment, the fate of the Republic of the Orange Free State was uncertain (with the fear of British invasion and people living under pioneering conditions) and therefore little attention was given to education. The first attempt at providing stable education was only made in 1872. Restoration of this system after the Anglo-Boer war was exceedingly difficult. See McKerron (n126) 35-38; Malherbe notes that with the exception of the Cape Province on which a few accounts on the history of education have been written, the rest of the country is “virgin soil” on the topic. See Malherbe (n98) 1; Therefore developments in the Orange Free State area are not focussed on for purposes of the topic at hand.

\(^{188}\) The colony of Natal was recognised as British territory in 1843. The arrival of British immigrants ensued from 1848 and therefore the territory endured many years of conflict between them and the Bantu in Natal and Zululand. For many years it was reliant on the Cape Colony until a legislative council was established in 1857. A full parliamentary government was only established in 1893. Therefore development in education in this area was slow and less significant than the Cape and Transvaal for purposes of the topic at hand. See Theal (n132) 124-125.

\(^{189}\) Article 26.

\(^{190}\) Article 4.

\(^{191}\) Article 51.

\(^{192}\) For full discussion, see Jeppe “Transvaal Book Almanac” (1877) 38, referred to in Malherbe (n98) 246.
Bible reading and Bible history as part of the compulsory curriculum.\textsuperscript{193} Despite this, the Act was still found to be too modern and too secular to be successful in this area.\textsuperscript{194}

Subsequently, Rev. du Toit was appointed as Superintendent of Education in the South African Republic. Rev. du Toit’s Education Act 1 of 1882,\textsuperscript{195} (in contrast to Burger’s Act) resulted in the introduction of state-aided schools in which parental involvement in the curriculum (including religious instruction), was encouraged. These schools opened and closed with prayer and the Bible was read, but not from a particular denominational standpoint. The policy applied at these schools is viewed as the early beginning of Christian National Education.\textsuperscript{196} In general, Rev. du Toit’s policies made religious instruction a dominant aspect of teaching.\textsuperscript{197} Mansvelt, who succeeded Rev. du Toit, framed the new Education Act 8 of 1892. This Act was based on the similar principles relating to religious instruction as Rev. du Toit’s Act; however it altered the denominationally neutral policy prevalent at the time by formalising favouritism towards the Protestant faith.\textsuperscript{198}

An intervening event, namely the Anglo-Boer War,\textsuperscript{199} ensued between the British and the combined forces of the Boer Republics between the years 1899 and 1902. This event further intensified religious and linguistic differences between the English and Afrikaans communities.\textsuperscript{200} The war left the Boer Republics defeated and subject to British rule.\textsuperscript{201}

\begin{itemize}
\item\textsuperscript{193} Article 26 of Act 4 of 1874.
\item\textsuperscript{194} Malherbe (n98) 246.
\item\textsuperscript{195} 259.
\item\textsuperscript{196} Holmes (n131) 35.
\item\textsuperscript{197} Behr (n134) 97.
\item\textsuperscript{198} Take note that the Reformed denominations in South Africa included the DRC (Nederduitse Gereformeerde Kerk), the Nederlandisch Hervormde Kerk, the Gereformeerde Kerke in Suid-Afrika and the Afrikaans Protestant Church (Afrikaanse Protestantse Kerk). See de Gruchy \textit{The Church Struggle in South Africa} (1979) 20-21; Gerstner states: the Reformed faith, sometimes called “Calvinism” was one of the principal branches of the Protestant Reformation…” See Gerstner in Elphick & Davenport (n129) 1; Hofmeyer & Pillay state that the Protestant tradition in South Africa has its origins with the arrival of the Dutch in 1652, the early German settlers in 1660 and the French Huguenots in 1668, See Hofmeyer & Pillay (n103) 11. See also the “History of the Presbyterian Church in Southern Africa” which states: “In 1517 Martin Luther nailed his 95 Theses to a church door in Wittenberg, Germany. This public challenge to the practices of the church of his time led to the formation of a new family of churches known as the Protestant Churches. The two main streams of Protestant churches are the Reformed Churches and the Lutheran Churches.” Found at http://users.iafrica.com/d/da/danman/history.html (Date accessed: 29 July 2012).
\item\textsuperscript{199} See Judd & Surridge \textit{The Boer War} (2002); Also known as the “South African War”. See Nassan \textit{The South African War} (1999); Theal (n152) 181 and 189; Malherbe \textit{Education in South Africa. Volume II: 1923-1975} (1977) 297; Eybers Selected Constitutional Documents illustrating South African History 1795-1910 (1918) xvii; Bloemberg \textit{Christian-Nationalism and the rise of the Afrikaans Broederbond in South Africa, 1918-48} (1990) 59; Behr (n134) 10; Rose and Tunmar (n124) 101; Stinnie (n185) 3; Hofmeyer & Pillay (n103) 11; Debroey (n185) 97.
\item\textsuperscript{200} Rose and Tunmar (n124) 101.
\item\textsuperscript{201} Msila (n114) 148; Theal (n152) 91.
\end{itemize}
way of the Treaty of Vereeniging in 1902, the Boer Republics (now the Transvaal and Orange River Colony) were incorporated into the British Empire.\textsuperscript{202}

Lord Milner, as former Governor of the Cape and High Commissioner of Southern Africa,\textsuperscript{203} was called upon to take over the administration of Transvaal and Orange River Colony, once they were annexed by the British. Lord Milner’s policy of anglicisation was introduced in the Transvaal. Inevitably, the policy met with increasing resistance from leaders in the DRC.\textsuperscript{204} The opposition to Milner’s policy lead to the Movement for “Vrye Christelike Nasionale Onderwys”, which was aimed at establishing private Dutch\textsuperscript{205} schools which were Christian-based.\textsuperscript{206} Eventually, the reaction to Milner’s policy was embodied in the Public Education Ordinance 7 of 1903,\textsuperscript{207} which endorsed the establishment for free Christian National schools. From the outset, the government refused to fund schools adopting this program. It stands to reason that these schools did not survive due to economic pressure. As a result, the Christian National Education movement remained dormant between 1903 and 1907.\textsuperscript{208}

A significant turn of events took place in the Transvaal under the leadership of Jan Smuts, (later Prime Minister of South Africa) who was strongly committed to reconciliation between Afrikaans speakers and English speakers.\textsuperscript{209} He favoured local control over many aspects of education. Importantly, Smuts sought to create blended English and Afrikaans culture so there could be one single education system.\textsuperscript{210} In 1907, Smuts introduced the Education Act

\begin{itemize}
\item \textsuperscript{202} Bloomberg (n199) xx.
\item \textsuperscript{203} McKerron (n126) 38 and 45.
\item \textsuperscript{204} An extract from letter by Lord Milner to Mr Lyttleton dated 13/06/04 states: “In September, 1903, the Director of Education was approached by the clerical members of the Christelijks Naionale Onderwijes Comissie, representing all branches of the Dutch Church. [The current system] continues to be opposed by those who are regarded as the leaders of the Boer opinion”; An extract from a letter signed by Rev. H.S. Bosman, Moderator of the Dutch Reformed Church in Transvaal states: “The present system, it is declared, must be opposed ‘even to the shedding of blood.’ Independent schools must be established, and no negotiations with the Education Department entertained”; An Extract from letter by Lord Milner to Mr Lyttleton dated 16/05/04 states: “Opposition to the government scheme was organized on racial lines by the Dutch Reformed Church ….The predikants demanded that teachers should be appointed by School Committees chosen by the people, and that Dutch and English languages should be placed on equality.” Taken from Headlam The Milner Papers (1931) 513-516, quoted in Rose and Tunmar (n124) 101-103.
\item \textsuperscript{205} Afrikaans only replaced Dutch as an official medium of instruction in schools in the 1920’s; Behr (n134) 100.
\item \textsuperscript{206} They schools were similar to private schools that had been established in the Cape Colony after the Hershel policy. See Rose and Tunmar (n124) 101.
\item \textsuperscript{207} Referred to in McKerron (n126) 38 and 45.
\item \textsuperscript{208} Holmes (n131) 38.
\item \textsuperscript{209} Blumfield states: “He saw it as a means to “effect reconciliation between Boer and Briton and to use education for the creation of a ‘new nation’”. See Blumfield “A timeline of South African events in Education in the Twentieth Century: 1900 – 1999” (2008).
\item \textsuperscript{210} Rose and Tunmar (n124) 114.
\end{itemize}
(known as Smuts’ Act), which was non-denominational when it came to religion. The Act provided, for example, that: the school day shall begin with a prayer and Bible reading; Bible history would be studied in the first half hour of the day in either Dutch or English; Bible reading and Bible history did not apply to schools established or maintained for attendance by non-Christian children; no child whose parents had objected to religious instruction in writing would be compelled to attend instruction in Bible history and no doctrine of dogma particular to any religious denomination would be taught in public school. This Act was neither un-Christian nor irreligious. It promoted Christianity but at the same time required that freedom of conscience be maintained and that minority religions be respected - much to the dissatisfaction of conservative Christians.

The year 1910 is particularly significant as this was the year in which the four colonies (now called Provinces) of the Cape, Transvaal, Natal and the Orange River Colony were amalgamated to become the Union of South Africa. Initially, the Provinces (through Provincial Councils) retained control over primary and secondary education within its boundaries and the Union Department of Education assumed responsibility for higher education. However, this division of education between provincial and central government proved to be unpopular and unsatisfactory and led to calls for an “integrated national system of education”. Therefore the advent of the Union marked the beginning of the development of a national system of education.

Significantly, in 1937, the Nicol Commission was appointed by the Transvaal Provincial Council to inquire into the educational system of the Province. In 1939, the Commission released a Report which found that there was practically a unanimous demand that schools should remain Christian and that Christianity should be the basis of the educational system,

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211 Section 34 of Education Act of 1907; See Director of Education Report (Transvaal) 1906-7.
212 Renamed the Orange Free State.
213 South Africa Act of 1909; Eybers (n199) lxxiv; Republic of South Africa Official Yearbook of the Republic of South Africa (1986) 43.
214 Later the Department of National Education.
215 From 1912, the Union Department gradually took control over issues that the provinces could not handle. See Stimie (n185) 12-13.
216 12-13.
217 This term “national” was used in the administrative sense to denote one system, controlled by the central government; not “national” in the ideological sense which would entail that educational policy would be applicable to all population groups in the country in the same way - there would still be a distinction between different race groups. The ambiguity of the term “national” is explained in Malherbe (n199)141.
218 Lekhela (n9) 15-16.
219 Malherbe (n199) 40.
failing which the country would be heading in the direction of becoming a “heathen state”.  

The Report contained comments to the effect that there were too many non-Christian pupils in certain schools and that pagan atmospheres prevailed in the homes of pupils, thereby necessitating that schools teach the Bible in a reverent and sympathetic way and do whatever possible to develop Christian virtues. This demand for the establishment of a Christian-based education system would eventually materialise and manifest itself during the apartheid era.

4 1939-1996: APARTHEID AND CHRISTIAN NATIONAL EDUCATION

A pivotal event occurred in 1939, when a church conference organised by the Federasie van Afrikaanse Kultuurvereniginge (FAK) was held in Bloemfontein, its main topic for discussion being Christian National Education. As a result of this conference, the Institute of Christian-National Education (ICNE) was formed to ensure:

“continual propagation and furtherance of the historically-developed idea of Christian and National education and for insuring that the general lines of policy laid down ... [by the Institute] ... should find acceptance in a systematic way.”

In 1948 this Committee released a Policy Statement known commonly as Beleid, which served as the foundation principles for the Christian National Education policy enforced by

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221 Par.11 and 544. The Nicol Report served as the origin of the religious instruction clauses of the Ordinance of 1953, which formed the new legal basis for Christian Education in state schools in the Transvaal.

222 The National Party (NP) was associated with a number of Afrikaner Nationalist bodies which together constituted a Nationalist movement. One of those bodies included the FAK. The NP was the Afrikaner political organ after 1948 and the FAK was on the cultural front, safeguarding confessionalism and all aspects of Afrikaner life. Many NP leaders were once office bearers in the FAK. See Bloomberg (n199) xxvi-xxvii.

223 See Malherbe (n199) 50; Rose and Tunmar (n124) 117; Ostrowick “Christian National Education” (1993) 1 (research paper).

224 Rose and Tunmar (n124) 107; Van Heyningen “Christian National Education” 50.

225 ICNE “Christian National Education Policy” (1949) 2; See Blumfield (n209).

226 In 1972 the Human Science Research Council was asked to report to the Minister on its deliberations on differentiated education and publish its findings. If placed side by side with Beleid, it is clear that white education in the 1970’s South Africa was almost identical to the formulations contained in Beleid in 1948. See Rose and Tunmar (n124) 142; A publication in 1951 of the Commission of enquiry into education in the Orange Free state, which begun two years before the Beleid was published, stated: “The positive acceptance of the Christian principle as educational policy of the Province and the thorough permeation of our schools with the Christian atmosphere are strongly urged in evidence on the ground that Christian character can be formed only a Christian milieu.” See Rose and Tunmar (n124) 107-109; In 1945, the Pretorius Commission
the apartheid government from 1948 into the early 1990’s. This policy statement reflected the existing Afrikaner thinking on the relationship of schools to church and state. The intention of the policy as far as the Afrikaner schools were concerned, was clarified by J.C. Van Rooyen, Chairman of the FAK as follows:

“Our Afrikaner schools must not only be mother-tongue schools; they must also be in every sense of the word Christian and National schools, they must be places where our children are steeped and nourished in Christian National spiritual culture of our nation. We want no language mixing, no cultural mixing, religious mixing nor racial mixing.”

Furthermore, Article 15 of Beleid contains what may be described as being the basis of apartheid education. It states:

“We believe that the calling and task of White South Africa with regard to the native is to Christianize him and help him on culturally, and that this calling and task has already found its nearer focusing in the principles of trusteeship, no equality and segregation. We believe besides that any system of teaching and education of natives must be based on the same principle. In accordance with these principles we believe that the teaching and education of the native must be grounded in the life and worldview of the Whites most especially those of the Boer nation as senior White trustee of the native…”

The year 1948 marked a crucial turning point in South African history. It was in this year that the National Party (NP) won the election and introduced apartheid, a system of racism and segregation which led to the systematic deterioration of the position of non-white people in

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227 These foundation principles for CNE Policy included: The use of mother-tongue instruction and a policy of no mixing of languages and cultures in schools; The preparation of Black people for an inferior station in life beneath White people; The preservation of the cultural status of Black people who were regarded as still being in “cultural infancy” and requiring to be in the trusteeship of White people; The teaching of religion in schools and the teaching of all subjects in accordance with Calvinist tenets. See summary in Seroto (n110) 106; See also summary in Bloomberg (n199) xxiii-xxv.

228 Ostrowick (n223) 1.


230 See Rose and Tunmar (n124) 108 and 119.

231 Quoted in Msila (n114) 148-149.

232 For example, the National Party enacted the Immorality Act 21 of 1950, which forbade inter-racial marriage and inter-racial intercourse between blacks and whites; the Group Areas Act 41 of 1950, which created different residential areas for different races and the Populations Registration Act 30 of 1950, which classified all South Africans into particular racial groups; See further details in Muller (n171) 481-490.
South Africa. The state based the legitimacy of the *apartheid* laws on religious grounds with the moral support of the DRC. *Apartheid* education in South Africa promoted separateness along racial, class, gender and ethnic lines, issues which are inevitably intertwined with religion. It was children, in particular, who had to endure unequal education and discriminatory practices at school. Robinson comments that: “The degradation imposed upon, and profound humiliation suffered by, children’s parents under the apartheid system, had a severe impact on [children].”

Overall, the education policy and curriculum development in *apartheid* South Africa was used as an ideological state apparatus to promote the interests of the ruling *apartheid* government, which included the ideology of Christian Nationalism. The NP government also reintroduced Christian National Education as the guiding philosophy of education. Although the intention behind Christian National Education was the preservation of Calvinism, it became identified with the survival of the Afrikaner people and, therefore,

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234 van den Heever “Diversity: Religion and the Study and Religion” 2004 11(3&4) *Religion and Theology* 199 200-202; Bloomberg (n199) xxiii-xxv and 133; Seroto (n110) 101; Kitshoff states that: “It is important to note that some of these ‘white’ master symbols which contributed to the destabilization and disruption of South African society found their way via (biblical) religious education transported into the Christian National Education system, into the schools.” See Kitshoff (n163) 332.

235 Kuperes argues that: “the NGK’s heavy political involvement with the state began in the early 1900s when it advanced a Neo-Calvinist, ideological justification of apartheid.” See Kuperus “Resisting or embracing reform? South Africa’s democratic transition and NGK-State relations” 1996 38(4) *Journal of Church and State* 841 843; Bosch states that: “For many decades, the National Party and the Dutch Reformed Churches were seen as jointly responsible for keeping the laager intact, buttressing the weak spots and keeping up the moral of the people. After the National Party came into power in 1948, the entire legislative machinery was harnessed with this one purpose in mind, namely to safeguard the Afrikaner identity once and for all…..” See Bosch “The Afrikaner and South Africa” 1986 43(2) *Theology Today* 203 208; Lave “A Nation at Prayer, A Nation in Hate: Apartheid in South Africa” (1994) *Stanford Journal of International Law* 483 499-501 (noting that in 1948, the Church accepted a report called *Racial and National Apartheid in the Bible*, which was the first attempt to justify *apartheid* based on the Bible).

236 Msila (n114) 146; Naicker “From Apartheid Education to inclusive education: The challenges of transformation”, International Education Summit for a Democratic Society (26-28 June 2008) 1; Daniel & Greytak state: “Though segregationist legislation was certainly not confined to education, it did produce some of apartheid’s most visible disparities. Educational policy under apartheid essentially divided South Africans into four racially-segregated education systems…” See Daniel & Greytak “An analysis of the ‘right’ to education in South Africa and the United States” 2012 27 *SAPR/PL* 344 347.


238 Msila states: “The CNE principles on education for the Africans were declared as a way of maintaining the black South Africans in permanent state of political and economic subordination. The education system had been an obvious instrument of control to protect power and privilege.” See Msila (n114) 149.

239 van den Heever points out that although the policy contained the terms “Christian” and “National”, it only served the interests of a small group of the population, certainly not all Christians nor the whole nation. See van den Heever (n234) 205-206.
became “a factor in the development of apartheid.”

At the time, Christianity was thought to be “the only solution for all the great and grave problems we face in this country of ours.”

In fact, legislation during the apartheid era demonstrated a manifest Christian preference in many instances other than in education.

Importantly, in 1949, the Eiselen Commission was established to specifically investigate the education of Black pupils. The outcome was the Report of the Eiselen Commission of 1951, which recommended that a distinction be drawn between Black and White education.

The Report endorsed a policy in terms of which Bantu education would in content be dictated to by the needs of children brought up in the Bantu culture, “en endowed with a knowledge of

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240 Hexham “Religious conviction or political tool? The problem of Christian National Education” March 1979 26 Journal for theology of Southern Africa 20; Kitshoff states that very often the style of education was described as “Christian nature”. See Kitshoff (n163) 316; Nation-building was reserved only for White people. H.F Verwoerd stated: “When I talk about the nation I talk about the white people of South Africa.” See Giliomee “Nation-building in South Africa: White perspectives” in Swilling (ed) Views of the South African State (1990) 32; Kitshoff observes that syllabi from as late as 1989 aimed: “To bring each child nearer a living practical faith in Christ, and nearer the love and service of God through the knowledge acquired”, at “the moulding of the Christian character”, “the pursuit of a Christian way of life”; and to prepare the pupil “to accept Christ as his personal Saviour and for a life of service to God and his fellowman.” See Kitshoff (n163) 317; See also Kruger Sweeping whirlwinds. a study of religious change Reformed and civil religion in the city of Pretoria (Tshwane) 1855-2000 (2003) 104.

241 Coetzer & Masumbe “Interdenominational Schooling and Social Transformation” August 2003 Missionalit 305 315; It is also contended that: “As Christianity is the only religion taught, the common aims obviously relate directly to the teaching of Christianity...Education authorities feel that it is important for students to know something about the Bible. It is hoped that reading large portions of the Bible, learning versus off by heart or simply listening to ‘Bible stories’ will somehow lead to the production of ‘better’ people and, consequently, a ‘better’ society. A conversion to the Christian religion would be paramount.” See Summers & Waddington (n115) 8; Roux states: “Spirituality was also never seen as part of moral education and learners were not exposed to the opportunity to become spiritual in a broader sense, except from a Christian religious point of view.” See Roux “Children’s spirituality in social context: a South African example” April 2006 11(1) International Journal of Children’s Spirituality 151 152.

242 For example, censorship under the Publications Act 42 of 1974 was invoked to protect “a Christian view of life”; Sunday observance laws required respect of the Christian Sabbath day and other Christian Holy days; only Christian oaths were utilised in criminal tribunals (section 162(1) of the Criminal Procedure Act 51 of 1977). See van der Vyver “Religion” in Joubert & Scott (eds) The Law of South Africa vol 23 (1986) 197-200. Also discussed in du Plessis (n52) 443-444; “Legislation of a not so overtly religious nature, such as the infamous Prohibition of Mixed Marriages Act 55 of 1949 and the controversial section 16 of the Immorality Act, were enacted at the behest of, amongst others, the Afrikaans churches in an attempt to prevent ‘miscegenation.’” Quoted in du Toit (n100) 678; See also du Plessis “Religious Human Rights in South Africa” in van der Vyver & Witte (eds) Religious Human Rights in Global Perspective: Legal perspective (1996) 443-444.


244 Report of the Eiselen Commission (1951) 13, 131; The Report of the Eiselen Commission found no evidence that “the intelligence of black children was of so special and peculiar a nature as to demand on these grounds a special type of education.” It also stated: “The Bantu child comes to school with a basic physical and psychological endowment that differs ... so slightly from that of the European child that no provision has to be made in educational theory or basic aims.”

245 The Report of the Eiselen Commission para 1; Coetzer & Masumbe state: “The apartheid state abhorred interethnic mixing and by implication, interdenominationalism and cross-border cultural exchange because it would educate the Bantu to the point where they would challenge racial discrimination.” See Coetzer & Masumbe (n241) 313.
the Bantu language and imbued with values, interests and behaviour patterns characteristic with a Bantu. In other words, it endorsed a policy whereby Black children would be subjected to an inferior education system than White children. The needs of children were determined along racial lines. Moreover, the Report stated that “[t]he desire for schooling as a means of fathoming the Christian religion was and remains a powerful motive.”

The impact of the Eiselen Report was that its main recommendations were embodied in the Bantu (Black) Education Act 47 of 1953, which established a national system of Bantu education. This Act placed the education of Black people under the control of a single state department. The establishment of the Christian National Education policy is reflected in the Bantu Education Act. Subsequently, the Education of Training Act 90 of 1979 provided for the education of Black people and it too required that education have a Christian character.

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247 It was stated on the House of Assembly debates that: “The new educational system should have its roots ‘in the spirit and being of a Bantu society’ and serve the respective ethnic communities.” See House of Assembly Debates, (1953) cols.3585-3585; Davenport and Saunders comment that the education policy for Blacks was “based on the assumption of an inferior potential in African minds” and as “explicitly designed to prepare blacks for an inferior place in society.” See Davenport & Saunders South Africa: A Modern History (2000) 674; When HF Verwoerd spoke on the new education system in 1954, he stated: “There is no space for him [the “Native”] in the European Community above certain forms of labor. For this reason it is of no avail for him to receive training which has its aim in the absorption of the European Community, where he cannot be absorbed. Until now he has been subjected to a school system which drew him away from his community and misled him by showing him the greener pastures of European Society where he is not allowed to graze.” See Verwoerd “Bantu Education: Policy for the Immediate Future” (1954) and quoted in Kallaway Apartheid and Education: The Education of Black South Africans (1984) 92-93.
248 Dr Verwoerd, described the purpose of Bantu education as follows: “Racial relations cannot improve if the wrong type of education is given to natives. They cannot improve if the result of native education is the creation of frustrated people who, as a result of the education they received, have expectation in life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthens their desire for the white-collar occupations to such an extent that there are more such people than openings available.” See House of Assembly Debates of 17 September 1953 col 3576.
249 Kallaway (n247) 171; February notes that the state used the Bantu Education Act of 1953 to close down many non-public or religious schools, in order to ensure the government’s monopoly on black education - which it intentionally geared towards careers in trade or labour. See February “From Redress to Empowerment” in Featherman et al (eds) The Next 25 Years: Affirmative Action in Higher Education in the United States and South Africa (2010) 81.
250 Lekhela (n9) 20.
251 Kallaway (n247) 171; Behr (n134) 35-36; van den Heever observes that: “As official reason for the move it was said that mission and church schools undermined the authority of parents in their children’s education, but the real reason was the racist philosophy encapsulated by this Bill of Europeans being the guardians of blacks. The concept of guardianship allowed the State to use the state machinery at its disposal to transform Christian National Education into a totalitarian education system.” See van den Heever (n234) 205; Also see Mitchell cited in van den Heever “Religion, Erziehung und Rechte zur Religionsausübung. Perspektiven aus dem entstehenden ‘Neuen’ Suidafrika,” 1996 Spiritus. Zeitschrift für Religionswissenschaft 15 18.
252 Rose and Tunmar (n124) 108 and 119; Take note that South Africa became a Republic on 31 May 1961 by way of the Republic of South Africa Constitution Act 32 of 1961; van den Heever (n234) 205. Behr (n134) 87; Seroto (n110) 138.
In later years, separate legislation was passed for the education of Coloured people, namely the Coloured People’s Education Act 47 of 1963, and for Indians, namely the Indian Education Act 61 of 1965. Christianity played a prominent role in the education of Coloured pupils during the apartheid era. The only apparent difference was the use of the word “Scripture” when referring to Coloured people’s education as opposed to “Bible”. On the other hand, Christianity was not specifically mentioned in relation to the education of Indian people.

Congruently, the National Education Policy Act 39 of 1967 established an integrated national system of education for White people. It provided for education with a Christian character but with due respect for the religious convictions of parents and pupils. Moreover, education had to have a broad national character, and the mother-tongue, if English or Afrikaans, would be used as the medium of instruction. The Act, with its insistence on mother-tongue instruction and segregated education, ties in significantly with the principles relating to Christian National Education formulated in Belied.

Subsequently, increasing tensions over language issues in education ensued and eventually erupted in the mid-to late 1970’s. Accordingly, In June 1980, the government requested the

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255 Behr (n134) 96-97.
256 Dovey “De-Mystifying Christian National Education: a Programme for Teacher Training Courses” 1979 *Journal of Education* 27 27; Stimie (n185) 2.
257 And later the National Education Policy Amendment Act 103 of 1986.
258 Extract from Hansard Parliamentary Debate (22 February 1967), relating to the objection to the separation of white pupils into English and Afrikaans medium schools:
   Dr. C.P Mulder: “We on this southern point of Africa are a Christian people….Must we, for the sake of a few people who object, change the entire nation’s character? That would be foolish.”
   Mr. L.E.D. Winchester: “Under this Bill apartheid is being applied amongst the white race. The other races in this country are separated on the grounds of colour; now the white race is going to be separated on the grounds of language differences. …I consider the Bill to an attack on religious freedoms and the rights of parents…..”
   Minister of Education: “My interpretation of ‘the Christian character of education’ is that education shall build on the basis of traditional Western culture and view of life which recognize the validity of the Biblical principles, norms and values. I challenge any hon. Member to tell me that that is sectional; that it includes one group of Christians and excludes another.”
260 The Soweto uprising was triggered by the Department of Education’s decision to enforce Afrikaans as a medium of instruction in some subjects in Black schools on the Witwatersrand. On 16 June 1976, a well-organised mass protest of some 6000 children from Soweto lead to a confrontation with police and the deaths of several school children. This event triggered off riots, violence and unrest, which spread through South Africa. A massive country-wide boycott ensued in Black schools in 1980. On a positive note, this uprising marked the beginning of resistance against segregated schooling and inspired world-wide protests.
Human Sciences Research Council (HSRC) to conduct a comprehensive investigation into all aspects of South African education taking into account all population groups. The Main Committee of the Council adopted eleven principles that would be used as points of departure for its recommendations for the provision of a system which would take into account commonality and diversity; individual and group expectations and the needs of country as a whole. Included in these principles was: “recognition of what is common as well as what is diverse in the religious and cultural way of life and the language of the inhabitants.” The results of the investigation were published in July 1981, under the title *Provision of Education in the RSA* (or the so-called De Lange Report) which called for a uniform compulsory education policy.

Importantly, the De Lange Report stressed that: “the distribution of education will have to be organised in such a way that everyone will receive a rightful share regardless of race, colour, socio-economic context, ethic context, *religion*, sex or geographic location.”

The De Lange Report met with massive criticism from the Afrikaner community. The Congress of Afrikaner Educationalists and Intellectuals was held in Bloemfontein to reflect on the contents of the Report. In the end the Congress accepted the Report of the Main Committee subject to the explicit qualification that Christian National Education and mother-tongue instruction not be negotiable for Afrikaners. As a result, in 1983, the government published a *White Paper* containing its response to the De Lange Report in which it reaffirmed the position that Christian National Education was to be maintained.

It should be noted that although the contents of the Report were rejected by the government at the time, it

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263 Main Report, HSRC (1981); Behr (n134) 39.
265 Emphasis added.
266 Emphasis added.
269 Squelch Teacher education and training for multicultural education in a multicultural society (1991) 34; Behr (n134) 58; Coutts *Multi-cultural education: the way ahead* (1992) 11; The National Policy for General Affairs Act 76 of 1984 provided some improvements in black education but maintained the generally segregated schooling system.
influenced educational policy in the 1990’s and left a legacy for the new democratic government.270

Similar sentiments as contained in the White Paper were further entrenched in the 1983 Constitution,271 a document which reflected Calvinist principles.272 Its Preamble stated:

“IN HUMBLE SUBMISSION to Almighty God, Who controls the destinies of peoples and nations, Who gathered our forebears together from many lands and gave them this their own, Who has guided them from generation to generation, Who has wondrously delivered them from the dangers that beset them, WE DECLARE that we ARE CONSCIOUS of our responsibility towards God and man; ARE CONVINCED of the necessity of standing united and of pursuing the following national goals: To uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship…”

This prominence of Christianity was further emphasised in section 2 of the 1983 Constitution which stated that: “The people of the Republic of South Africa acknowledge the sovereignty and guidance of Almighty God.”273

All the while, South Africa continued to endure international condemnation for its discriminatory laws and practices during the apartheid era274 and by the late 1980’s apartheid

270 Kallaway (n233) 18.
271 Under the 1983 Constitution, White, Coloured and Indian people would be represented in a Parliament consisting of three Houses: A House of Assembly (for White people); a House of Representatives (for Coloured People) and a House of Delegates (for Indian People). Black People were not represented in Parliament. The administration and control of affairs pertaining to Black people was vested in the State President. The 1983 Constitution made a distinction between “own affairs” (matters which specifically relate to a population group) (section 14) and “general affairs” (matters which were not the own affairs of a population group) (section 15). It defined education as an “own affair” (as per Schedule I). See Van Zyl The De Lange Report: ten years on (1991) 16.
273 Other examples of 1980’s legislation which reflected Christian morals include: the Liquor Act 27 of 1989, which prohibited the sale of liquor on “closed days”, which according to section 2 includes Sundays, Good Friday and Christmas - all days which are of significance to the Christian religion; Prior to Fraser v Fraser v Children’s Court, Pretoria North 1997 (2) SA 2 61 (CC), section 18(d) of the Child Care Act 74 of 1983 discriminated against fathers of certain non-Christian marital unions, for example Islamic and customary law marriages, that were not considered to be legal for being potentially polygamous. The relevant section discriminated on the basis of religion and marriage performed under that religion. The children of these unions were regarded as illegitimate, thereby discriminating against them. See Blake & Litchfield “Religious Freedom in Southern Africa: The Developing Jurisprudence” 1998 Brigham Young University Law Review 543-544.
and Christian National Education began to unravel.\textsuperscript{275} For example, Njungwe comments that the Organisation of African Unity (now African Union)\textsuperscript{276} had particular concern for the position of children living under the \textit{apartheid} regime, and, as a result, unyieldingly condemned \textit{apartheid}.\textsuperscript{277}

This resulted in the adoption of the Republic of South Africa Act 200 of 1993, known as the interim Constitution,\textsuperscript{278} in order to have constitutional provisions in place before the first

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Chetty states: “The repeal of the Population Registration Act of 30 of 1950, by which people were given racial identities, and the Group Areas Act, that prescribed specific residential areas for each race group, laid the foundation for a shift to non-racial education in South Africa.” See Chetty (n261) 49; Kallaway (n233) 18. In 1990, the South African government considers opening White schools to Black students if 90 percent of White parents vote in favour of the motion. See Hlatshwayo \textit{Education and Independence. Education in South Africa, 1658-1988} (2000) 111. This referendum materialised in 1992; In 1992, the South African Teachers Association produced a document which noted that educational policy had to recognise “the fact that South Africa is a multi-cultural and multi-faith society.” See Kitshoff (n163) 315-318; See discussion on the end of \textit{apartheid} in Louw (n233) 164-174.

Department of International Relations and Cooperation, Republic of South Africa states that: “The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, on signature of the OAU Charter by representatives of 32 governments. A further 21 states have joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994. The OAU aims to promote the unity and solidarity of African States; co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa”. See http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm (Date accessed: 19 September 2012)


The interim Constitution protected religion, children’s rights and educational rights in the following provisions:

\textbf{Section 14: Religion, belief and opinion}

“(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

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

(3) Nothing in this Chapter shall preclude legislation recognising-

(a) a system of personal and family law adhered to by persons professing a particular religion; and
(b) the validity of marriages concluded under a system of religious law subject to specified procedures.”

\textbf{Section 30: Children}

“(1) Every child shall have the right-

(a) to a name and nationality as from birth;
(b) to parental care;
(c) to security, basic nutrition and basic health and social services;
(d) not to be subject to neglect or abuse; and
(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
democratic elections took place in 1994. The need for the establishment of a culture of human rights prior to the election, was imperative. The early 1990’s therefore marked the beginning of a positive educational transformation in South Africa.

After the election in 1994, the newly established Government of National Unity immediately set about reforming the South Africa’s education system. The Review Committee on School Organisation, Governance and Funding, established by the government, suggested the urgent need for establishing multicultural education in all schools in South Africa. This would mean formulating a new curriculum which removed any content which was “racist, sexist or otherwise offensive, or which was inaccurate or outdated.” This meant that South African children would no longer be subjected to the teaching or dissemination of discriminatory and distorted values, through the school curriculum. Furthermore, religious instruction in accordance with the CNE model could not be continued in the new system.

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.”

Section 32: Education
“Every person shall have the right-
(a) to basic education and to equal access to educational institutions;
(b) to instruction in the language of his or her choice where this is reasonably practicable; and
(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.”

Dickinson & van Vollenhoven (n14) 11; For more on the drafting process of the interim Constitution and its clause on freedom of religion (section 14), see du Plessis (n242) 443-465.

Education Rights Project “Religion in schools” (2005) 1; Chetty (n261) 54.

Chetty (n261) 53-54.

Children had endured racial discrimination and the dissemination of discriminatory values through unequal/segregated schooling. Furthermore, religious education (through the CNE policy) had impacted upon children’s education rights, religious rights; equality rights and dignity into the early 1990’s. For example, according to a manual for Biblical Instruction published in 1990, learners were expected to embrace Christian principles. It stated: “Children must personally accept, and trust for their personal salvation, the triune God introduced to them in the Bible.” See Department of Didactics Biblical Instruction (HED) (1990) 30; Also quoted in Chidester “Religion Education in South Africa: Teaching and Learning About Religion, Religions, and Religious Diversity”, printed in Teaching for Tolerance and Freedom of Religion or Belief, a Report from the preparatory Seminar held in Oslo December 7-9, 2002; A widely used Pre-1994 textbook for Religious Education and Biblical Studies stated that South Africa “is a Christian country and it is only right that our children be taught in the Christian faith—also in our schools.” Furthermore, “child who follows the Christian faith is more likely to behave in a moral way than a non-Christian or an un-religious child.” See Kitshoff & Van Wyk Method of Religious Education and Biblical Studies (1995); Evidently, the rights of children adhering to minority faiths were disregarded by the education system. Also, the Child Care Act 74 of 1983 did not provide a child with a clear right to express views and wishes if able to do so, and, it did not mention the “best interests of the child”. See South African Law Commission “Review of the Child Care Act: Executive Summary” (2002) viii.

Dreyer “The National Policy on Religion and Education in South Africa: Reflections from a Public Practical Theology” Practical Theology in South Africa 2007 22(2) 40 42; See the National Policy on Religion and Education (2003) is discussed in Chapter 5.
Finally, in 1996, the Constitution was adopted as supreme law.\textsuperscript{284} The 1996 Constitution is a document which upholds the values of human dignity, equality and freedom\textsuperscript{285} and includes “freedom of conscience, religion, thought, belief” for everyone.\textsuperscript{286} The Constitution also enshrines the rights of children,\textsuperscript{287} including the “best interests of the child”\textsuperscript{288} principle. Furthermore, it includes educational rights, which entitles everyone to the right to basic education;\textsuperscript{289} also mentioning “the need to redress the results of past racially discriminatory laws and practices”.\textsuperscript{290} The inclusion of special protection for the rights of “every child”\textsuperscript{291} and educational rights was an important development for South African school-children, most of whom had suffered under \textit{apartheid} for many years. All of these rights impact on current issues relating to religion in schools.\textsuperscript{292}

5 CONCLUSION

South Africa’s history has undoubtedly been characterised by the unequal treatment of religions. The arrival of European in South Africa initiated the religious conversion of African people to one or other denomination of Christianity. Ever since then, Christianity has been promoted in many aspects of the law, including education, with little regard for other religions. By and large, Christianity was the favoured religion in education since the beginning of formalised education in South Africa, with complete disregard for pupils adhering to minority faiths.\textsuperscript{293}

The law that regulated the educational system during \textit{apartheid} established an education system that was Christian-based.\textsuperscript{294} \textit{Apartheid} education was a system characterised by segregation in education along racial, class, gender and ethnic lines, issues which are

\begin{itemize}
\item \textsuperscript{284} Section 2 of the Constitution.
\item \textsuperscript{285} Section 1(a) of the Constitution.
\item \textsuperscript{286} Section 15; Discussed in detail in Chapter 6.
\item \textsuperscript{287} Section 28.
\item \textsuperscript{288} Section 28(2).
\item \textsuperscript{289} Sections 29(1); Discussed fully in Chapter 5.
\item \textsuperscript{290} Sections 29 (2) (c).
\item \textsuperscript{291} Section 28(1).
\item \textsuperscript{292} See Chapters 4, 5 and 6.
\item \textsuperscript{293} According to Chidester, religious education: “was driven by a particular kind of Christian confessionalism and triumphalism, a confessionalism that required pupils to embrace prescribed religious convictions and a triumphalism that explicitly denigrated adherents of other religions.” See Chidester “The ICRSA RE Project” at http://folk.uio.no/leirvik/OsloCoalition-ICRSA.htm (Date accessed: 20 July 2006). Quoted in Dreyer n283 43.
\item \textsuperscript{294} Summers & Waddington (n115) 5; See Bantu Education Act 47 of 1953; National Education Policy Act 39 of 1967; Education of Training Act 90 of 1979 and National Education Policy Amendment Act 103 of 1986.
\end{itemize}
inherently interconnected with religion. As illustrated above, the apartheid education policy and curriculum, which included Christian National Education, was used as a device to promote the interests of the apartheid government. As Nicolson notes:

“In part the purpose of Christian National Education was to create a homogenous society...however those who do not share in the religion are excluded from full membership of the community. Attempting to force people into one religious mould is nationally divisive and destroys the community.”

It has been evidenced that colonialism, apartheid and Christian Nationalism were the main factors which resulted in the favouritism of one particular brand of Christianity in South African schools, thereby marginalising all other denominations and faiths. It is clear that elevating one denomination into a privileged position in the school environment does not correspond with the now constitutionally recognised freedom of religion of those belonging to other denominations.

Undoubtedly, in light of the historical overview presented in this Chapter, it was imperative that the South African government embark on an extensive transformation of the educational laws and policies on religion in schools. This is illustrated particularly in the discussion of the National Policy on Religion and Education and the analysis of the issue of teaching religion in public schools contained in Chapter 7. The next Chapter focusses on the international law principles which informed the said transformation.

295 Msila states: “The CNE principles on education for the Africans were declared as a way of maintaining the black South Africans in permanent state of political and economic subordination. The education system had been an obvious instrument of control to protect power and privilege.” See Msila (n114) 149.

296 Nicolson (n115) 44.
CHAPTER 3

INTERNATIONAL LAW ON CHILDREN’S RIGHTS,
EDUCATION RIGHTS & FREEDOM OF RELIGION

“Where after all, do human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.”

1 INTRODUCTION

The political transformation of South Africa from a racist state into “an open and democratic society based on human dignity, equality and freedom”, led to the subsequent accommodation of religious diversity that was largely informed by the principles of international law. International law principles have also stimulated changes in children’s rights and educational rights in South African law.

This Chapter deals with South Africa’s obligations to protect children’s rights, the education rights and freedom of religion, through customary international law and the various human rights instruments, at both world level and regional level. It focusses on international instruments to which South Africa has become a party or which have significantly influenced

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297 Eleanor Roosevelt, the first chairperson of the UN Human Rights Commission. She was also the United States delegate to the United Nations General Assembly from 1946-1952.

298 Section 39 (1)(a) of the Constitution.

South African law. The scope of the present Chapter does not permit a comprehensive analysis of the wide, complex and multifaceted subject of international law on the abovementioned rights. The aim is rather to clarify the place of these international obligations in South African law and discuss the impact of the various provisions of these instruments which are relevant to the legal issues around religion in South African schools. It provides an international context for the discussion on South African law contained in the Chapters to follow.

This Chapter consists of an overview of the most prominent world and regional instruments related to the topic at hand that are applicable to South Africa. These include: the Universal Declaration of Human Rights;\textsuperscript{300} the International Convention on the Elimination of All Forms of Racial Discrimination;\textsuperscript{301} the International Covenant on Civil and Political Rights;\textsuperscript{302} the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;\textsuperscript{303} the United Nations Convention on the Rights of the Child\textsuperscript{304} and the African Charter on the Rights and Welfare of the Child.\textsuperscript{305} These instruments are significant in that they assist with shaping human rights law and in establishing a world order in relation to the relevant rights and freedoms. By signing and/or ratifying these instruments, South Africa has shown its commitment to abide by international standards of human rights protection.

Subsequent to a discussion on the place of international law in South African law and an overview of each of the international instruments mentioned above; this Chapter contains a discussion of the relevant provisions of these instruments in accordance with the following themes: 1) children’s rights 2) education rights and 3) freedom of religion.

\textsuperscript{300} General Assembly resolution 217 A (III) of 10 December 1948.
\textsuperscript{301} G.A. res. 2106 (XX) of 21 December 1965.
\textsuperscript{302} General Assembly resolution 2200A (XXI) of 16 December 1966.
\textsuperscript{303} United Nations General Assembly Resolution 36/55 of 25 November 1981.
\textsuperscript{305} OAU Doc.CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.
2 THE PLACE OF INTERNATIONAL LAW IN SOUTH AFRICAN DOMESTIC LAW

International law has been defined as the body of rules and principles which are binding upon states in their relationships with one another.306 Before embarking on a discussion of the relevant instruments, it is important to establish the place of international custom and treaties, in the South African legal system.

Significantly, South Africa has adopted specific constitutional provisions regarding the status of international law in South African law.307 In terms of section 232 of the Constitution, customary international law is recognised as being part of South African law to the extent that it is not inconsistent with the Constitution or an Act of Parliament. Treaties, on the other hand, are only binding on South Africa once they have been approved by resolution by both houses of Parliament.308 A ratified treaty only becomes a part of South African law when it is incorporated into law by national legislation.309 The application of treaties depends greatly on the status of international human rights law in a national legal system. It is highly unlikely that municipal courts will make a finding based on the provisions of an international treaty if it is not regarded as part of national law. The courts would then most likely use it only as an interpretive aid.310

In this regard, section 233 of the Constitution, dealing with the application of international law, states that:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

308 Section 231 (2).
309 Section 231 (4).
Congruently, section 39 of the Constitution provides that when interpreting the Bill of Rights, a court “must consider international law”.\textsuperscript{311} This means that South African courts must use international law as an aid in the interpretation and application of legislation and the Constitution itself.\textsuperscript{312} Section 233 is very wide and if taken literally, it could mean that all courts would have to test any legislation in question before them, against international law. It is, however, doubtful that the courts will adopt such a wide approach. It is more likely that before a court will feel obliged to consider section 233, the legislation will have to demonstrate some “international element”.\textsuperscript{313}

In this regard, the Constitutional Court pronounced in \textit{S v Makwanyane} that both binding and non-binding international law can be used to interpret the Bill of Rights. Chaskalson P stated that international agreements provide “a framework within which Chapter 3\textsuperscript{314} [of the interim Constitution] can be understood” and “may provide guidance as to the correct interpretation of particular provisions.”\textsuperscript{315} This statement means that the scope of international law encompasses not only “hard law” of customary rules and treaties, but also the “soft law”\textsuperscript{316} contained in resolutions, declarations and guidelines drawn up by international bodies, and even international law not binding on South Africa.\textsuperscript{317} The Court stated that aside from custom and treaties, international law includes:

“[the] decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation…”\textsuperscript{318}

\textsuperscript{311} Section 39(1)(b); In \textit{Coetzee v Government of the Republic of South Africa} 1995 4 SA 631 (CC) at para 51, the Constitutional Court held that: “[w]e need to locate ourselves in the mainstream of international practice.”
\textsuperscript{312} Maluwa (n307) 59.
\textsuperscript{314} Chapter 3 of the interim Constitution is now Chapter 2 of the final 1996 Constitution.
\textsuperscript{316} This is the name given to rules of international law that do not provide concrete rights or obligations for the legal persons to whom they are addressed. They are rules of law but their content is inherently flexible or vague. See Dixon \textit{International Law} (2005) 47.
\textsuperscript{317} Maluwa (n307) 60.
\textsuperscript{318} \textit{S v Makwanyane} at paras 413-414; See Strydom “South Africa and the International Criminal Court” 2002 6 \textit{Max Planck Yearbook of United Nations Law} 348- 349.
Furthermore, the Constitution requires that courts must adopt an interpretation of the Bill of Rights which promotes international law where it is substantively relevant and where it reflects the constitutional values of “an open and democratic society based on human dignity, equality and freedom.” International law would thereby help to clarify and give content to those very values. However, courts are evidently precluded from following international law directives that are contrary to constitutionally protected rights. In the case of Government of the Republic of South Africa v Grootboom, (“Grootboom”) the Constitutional Court stated that:

“[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa it may be directly applicable.”

As noted above, where conflict arises between international law and the Constitution or an Act of Parliament, the Constitution or Act will prevail. However, almost every provision in the Bill of Rights has a corresponding provision in an international human rights treaty, or is governed by principles of international customary law. There would, as a result, be very few circumstances where international law would not be applicable under these provisions.

Interestingly, aside from the adoption of international charters into South African law, section 234 of the Constitution provides for the adoption of national Charters of Rights in order to “deepen the culture of democracy established by the Constitution.” The South African government has made use of Section 234 for the first time with the signing of the South African Charter of Religious Rights and Freedoms, signed by every major religious group in South African as well as representatives of leading South African Constitutional

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319 S 39(1)(a) of the Constitution.
320 Scott & Alston “Adjudicating constitutional priorities in a transnational context: a comment on Soobramoney’s legacy and Grootboom’s promise” 2000 16 SAJHR 206 222.
321 Fourie at para 565.
322 2000 (11) BCLR 1169 (CC) (“Grootboom”).
323 Para 26.
324 Sections 231 and 232 of the Constitution.
325 Maluwa (n307) 60.
326 Section 234.
Commissions in 2010. If passed into law, the Charter could serve as a guide in future cases relating to religious rights and freedoms.  

3 PROTECTION OF RELEVANT RIGHTS AT WORLD LEVEL

3.1 INTRODUCTION

As a consequence of the foregoing discussion, it may be argued that the global instruments relating to the relevant rights, which have been signed or ratified by South Africa; are relevant on a national level. This section provides an overview of the relevant global human rights instruments.

3.2 UNIVERSAL DECLARATION ON HUMAN RIGHTS

One of the most significant international instruments that provide protection for children’s rights, education rights and religious freedom, is the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948. This landmark document recognises a broad spectrum of rights relevant to the topic at hand.

In 1948, the National Party came into power in South Africa and this marked the establishment of the apartheid regime, which systematically discriminated against non-white South Africans and denied them basic human rights. Clearly, this system was contrary to the principles expounded in the UDHR. Apartheid was later declared a Crime against Humanity by the United Nations Organisation. However, after the 1994 democratic election in South Africa, a new Constitution, based on the principle of non-racialism emerged. Significantly, it contains a Bill of Rights based largely on the provisions of the UDHR, thus making the UDHR relevant to the discussion.


General Assembly resolution 217 A (III) of 10 December 1948.

Fourie at para 102.

The UDHR focuses on individual human rights and not on group protections for minorities. In other words, where a person’s rights are violated or restricted because of a group characteristic, such as race, religion, ethnic or national origin, or culture, the matter could be taken care of by protecting rights on a purely individual basis, mainly by utilising the principle of non-discrimination.³³¹

Although the UDHR is not a treaty and therefore imposes only a moral obligation upon all nations,³³² it is significant in that its adoption paved the way for later documents³³³ which created legal obligations to comply with the instrument’s principles relating to religious rights. However, many international lawyers believe that the UDHR creates at least some legal obligations on Member States and some view it as part of customary international law.³³⁴ The UDHR proclaims that it is “a common standard of achievement for all peoples and all nations.”³³⁵ As Donnelly asserts, human rights are:

“general rights that arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to be anything other than be born a human being.”³³⁶

Therefore, human rights are an inherent part of every person’s humanity and all human beings ought to be treated in accordance with the UDHR everywhere.³³⁷

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Regardless of its legal character, the UDHR has had a significant influence on the contents of the South African Constitution. This is illustrated in the discussion on various constitutional rights in the remaining Chapters.

3.3 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

In 1960, the United Nations General Assembly adopted a resolution condemning “all manifestations and practices of racial, religious and national hatred” as violations of the UDHR. It called on governments to “take all necessary measures to prevent all manifestations of racial, religious and national hatred.” Resultantly, in 1965, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted, in an effort to prevent worldwide discrimination on the basis of race. It was ratified by South Africa on 10 December 1998. The ICERD has been enacted into South African law by way of the Promotion of Equality and Prevention of Unfair & Discrimination Act 4 of 2000 (“the Equality Act”).

This significance of this instrument to the topic at hand, is that race, descent and ethnicity, are inextricably linked to religion. The ICERD defines racial discrimination as:

“any distinction, exclusion, restriction or preference based on race, colour, 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, and cultural or any other field of public life.”

Notably, there is no express reference to religion as a ground of racial discrimination in this definition. However, the elimination of racial discrimination in all forms and guarantee of the

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341 Article 1(1). It is noteworthy that the ICERD only mentions discrimination that takes place in the “field of public life” and does not expressly mention discrimination carried out in private. See “The Right to Equality and non-discrimination in the administration of Justice” at www.ohchr.org/Documents/Publications/training9chapter13en.pdf (Date Accessed: 30 June 2010).
enjoyment, without distinction, of the right to freedom of religion and cultural rights, are
encapsulated in Articles 5 (d)(vii) and 5(e) of this instrument.

In order to enforce its provisions, Article 8 of the ICERD has established a Committee on the
Elimination of Racial Discrimination consisting of eighteen experts of “high moral standing”
and “acknowledged impartiality” elected by States Parties.342 States Parties to ICERD have
undertaken to submit to the Secretary-General of the United Nations, for consideration by the
Committee, a report343 on the legislative, judicial, administrative or other measures which
they have adopted, which give effect to the provisions of this Convention within one year344
after the entry into force of ICERD and thereafter every two years.345

States Parties to ICERD condemn racial discrimination, particularly apartheid.346 In light of
South Africa’s history of discrimination and repression, as elaborated on in Chapter 2, its
ratification of this Convention is particularly noteworthy.

3.4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS347

Almost all international human rights instruments adopted by the United Nations bodies since
1948 elaborate upon principles set out in the UDHR. The International Covenant on Civil and
Political Rights 1996, (ICCPR) is an example of this. Its preamble states that:

“in accordance with the Universal Declaration of Human Rights, the
ideal of free human beings enjoying freedom from fear and want can
only be achieved if conditions are created whereby everyone may
enjoy his or her economic, social and cultural rights, as well as his or
her civil and political rights.”

Before the adoption of the ICCPR and the International Covenant on Economic, Social and
Cultural Rights (ICESCR),348 the UDHR stood alone as the international standard of

342 Article 8(1).
343 South Africa submitted its first three period reports in the form of one document (CERD/C/461/Add.3), in
2002. These reports were examined during the 69th session of the CERD 31 July - 18 August 2006. The
SAHRC has noted that report is outdated and that some information provided in the report is incomplete.
The follow-up report which was due by 18 August 2007 was not received. See SAHRC (n340) 51.
344 Article 9(1)(a).
345 Article 9(1)(b).
346 Articles 2 and 3.
347 General Assembly resolution 2200A (XXI) of 16 December 1966.
achievement in the area of human rights. Today, the UDHR, together with the two Covenants, constitute the International Bill of Rights. The Covenants place legal as well as moral obligations on member States to promote and protect human rights and fundamental freedoms.

The ICCPR opened for signature on 19 December 1966 but did not come into effect until December 23, 1975. The ICCPR has been ratified by 148 nations to date. South Africa only ratified the instrument on 10 December 1998.

For purposes of enforcement, the ICCPR established a Human Rights Committee composed of nationals of the States Parties with competence in the field of human rights. States Parties are to submit reports to the Secretary-General of the United Nations, for consideration by the Committee, on the measures they have adopted to give effect to the rights specified in the ICCPR. Reports must be submitted within one year of the entry into force of the ICCPR and thereafter upon the request of the Committee.

Significantly, the ICCPR expands significantly on the protection of religious rights afforded by the UDHR and creates a legal obligation on member States to promote children’s rights and freedom of religion.

3.5 DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF

348 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. South Africa signed the ICESCR on 3 October 1994, but has not ratified it.


350 Article 49(1) states: “The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.”

351 Strydom (n318) 345-346.

352 Article 28 (1); Discussed in Stamatopolou Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond (2007) 50.

353 Article 28 (2).

354 Article 40 (2).

355 Article 40 (1)(a).

356 Article 40 (1)(b).

357 Article 18.

The 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the Declaration) is one of the most important international documents protecting religious freedom. The Declaration contains the broadest, most comprehensive list of rights to freedom of religion of all international human rights instruments. In fact, it has been remarked that: “against the historical backdrop of civil strife, international warfare and ideological conflict fuelled by religion, the Declaration stands as the milestone in the progressive development of human rights norms.”

It is contended that although the Declaration does not have binding status, it carries the weight of a United Nations statement and therefore has persuasive force. Sullivan asserts that although the Declaration lacks the nature of an international agreement, it is “regarded throughout the world as articulating the fundamental rights of freedom of religion and belief.” However, it had been contended that the use of mandatory language in certain provisions indicates that the General Assembly intended the Declaration to be normative and not merely persuasive. In fact, Tahzib controversially contends that: “[s]tates regard the 1981 Declaration, or at least some of its provisions, as normative in nature and part of customary international law.”

Importantly, the Declaration gives more concrete content to the general provisions of the UDHR and the ICCPR on freedom of religion. It also may serve as a valuable guide for the uniform interpretation and application of the various international statements on religious freedom.

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360 Davis (n332) 230.
361 Sullivan “Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination” 1988 82 American Journal of International Law 487 487.
362 For example, Article 7 of the Declaration, which requires that the rights freedoms contained in the Declaration be given effect in national legislation.
363 Tahzib (n359) 187; Sullivan (n361) 487 (Referred to in Steiner (n3) 595).
364 See Tahzib (n359) 187; Durham notes: “A plausible case can be made that [the Declaration] articulates what has now become international customary law, even in the absence of a binding convention, but no position is being taken on that issue here.” See Durham “Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities”, Organization for Security and Co-operation in Europe Review Conference, September 1999, ODIHR Background Paper 1999/4; Davis contends that it carries “an expectation of obedience within the international community to the degree that it is seen as the standard bearer of religious human rights.” See Davis (n332) 230.
3.6 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The primary treaty related to the international protection of children is unquestionably the United Nations Convention on the Rights of the Child ("CRC"). It is the first binding universal treaty dedicated in its entirety to the protection of children’s rights. The CRC establishes in international law that States Parties must ensure that all children benefit from protection and assistance which caters to their specific needs and are informed about and participate in achieving their rights in an active manner.

Article 1 of the CRC defines a child as “every human being below the age of 18 years”, unless such person has been afforded majority status under the law applicable to him or her. The CRC therefore relates to all children within a particular country’s territory. South Africa’s Children’s Act, (South Africa’s primary legislation on children’s rights) defines a “child” as person under the age of 18 years and under the “age of majority” clause states that a child becomes a major upon reaching the age of 18.

The CRC was unanimously adopted by the United Nations General Assembly on 20 November 1989 and came into force on 2 September 1990. For the first time, human rights standards pertaining to children’s rights were encompassed into a single legal instrument. Significantly, the CRC has established legally binding principles and international standards for states to meet in their domestic legislation. The CRC has been ratified by virtually the entire community of nations, thus providing a common legal and moral framework for the development of an agenda for children. In fact it has been ratified by more countries than any other human rights treaty in history.
South Africa ratified the CRC in June 1995 and in doing so bound itself to taking measures to protect children. In fact, the Children’s Act, which was enacted to supplement the children’s rights conferred by the South African Bill of Rights, makes specific mention of the importance of the CRC in its preamble.

Primarily, the CRC constitutes a common reference against which progress in meeting the standards for children rights can be assessed and results compared. States Parties are required to submit periodic reports on their progress in achieving all the rights to the Committee on the Rights of the Child (“CRC Committee”), a committee of internationally elected and independent experts in children’s rights. The principal function of the CRC Committee is to operate this system of reporting as provided for in Articles 44 and 45.

In effect the adoption of this CRC has inspired a process of change and the implementation of its provisions in all parts of the world. The CRC contains a coherent set of legally binding norms and principles within which legal and policy development can take place in South Africa. Its provisions have served as a standard for the development of children’s religious and cultural rights within the Constitution.

4 PROTECTION OF RELEVANT RIGHTS AT REGIONAL LEVEL: THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

Significantly, African states found it necessary to give Africa a “voice” by setting out the standards for human rights in regional treaties. The adoption of regional instruments was seen to be the best way for Africa, with its unique culture, traditions and history, to resolve its

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374 Section 8.
375 Section 28.
377 Sloth-Nielsen (n367) 420.
378 Section 28.
own human rights issues. The regional document which is relevant to the topic at hand is the African Charter on the Rights and Welfare of the Child (“ACRWC”).

The CRC has been criticised for having insufficient African influence in that only three African states were involved in drafting the CRC for five out of the nine years of the drafting process. Also, there is a belief that there are certain issues, unique to Africa, that are insufficiently addressed in or absent from the CRC. The ACRWC overcomes this by confirming and strengthening the global standards in the CRC in African member states.

The ACRWC was adopted by some of the Member States of the Organisation of African Unity (now the African Union). It was ratified by South Africa on 7 January 2000. States Parties to the ACRWC agree to recognise the rights and freedoms contained within it and to take the necessary steps to adopt legislative and other means necessary to achieve its provisions. The ACRWC contains provisions related to the protection of the right to education and religious freedom of children. A child is defined as every person under the age of 18, without any limitations.

It is vital that States Parties’ compliance with their obligations to protect children be monitored. The task of monitoring and enforcement of the ACRWC lies with the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”), established in 2001. Its task, although similar to that of the CRC Committee, is far broader. The African

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383 Viljoen (n376) 200; Muthoho “Analysis of the International Instruments for the Protection of the Rights of the Child” in CDS et al (n371) 123.
384 Viljoen (n376) 206.
385 Take note that other relevant regional documents include the Southern African Development Community (SADC) Charters, Protocols and Codes. The SADC has a membership of 15 States, namely: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The SADC initially formed for the purpose of the political liberation of Southern Africa. It was preceded by the Southern African Development Coordination Conference (SADCC), which was established on April 1, 1980. On August 17, 1992, Member States signed the SADC Treaty and Declaration that transformed the SADCC into the SADC with the objective of creating a Community which provides for regional peace and security and an integrated regional economy. South Africa acceded to the SADC Treaty on 29 August 1994. See http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm (Date accessed: 14/12/11). Provisions from SADC documents are referred to in this Chapter where relevant.
386 Article 1(1).
387 Article 2.
Committee may also receive and consider communications from any person, group of persons or NGO.\textsuperscript{388}

In essence, the ACRWC is significant to the topic at hand in that it amounts to the collective recognition of the children’s rights, education rights and religious freedom of African children in particular and establishes a legal framework for their protection at regional level.\textsuperscript{389} It confirms and strengthens the global standards in the CRC. Although the ACRWC has not been incorporated into South African law by national legislation, it is still relevant in terms of sections 39 and 233 of the Constitution, as discussed above.\textsuperscript{390}

5 RELEVANT PROVISIONS OF INTERNATIONAL INSTRUMENTS

5.1 INTRODUCTION

This section contains a discussion of the relevant provisions of the above international instruments and their impact on South African law, in relation to the following themes: 1) children’s rights, 2) education rights and 3) freedom of religion.

5.2 CHILDREN’S RIGHTS

It can be argued that children are more vulnerable to human rights violations than adults.\textsuperscript{391} As a result, there is particular concern in international human rights law for the position of children. Kaime asserts that: “Conferring rights on children is viewed as recognising their moral equality with adults, thereby underscoring the moral worth of all human beings, irrespective of their situation.”\textsuperscript{392}

Undoubtedly, the healthy development of children is essential to the future well-being of any society. In this regard, the CRC requires that States Parties undertake to ensure the child the

\textsuperscript{388} Article 44(2); See Viljoen (n376) 210.
\textsuperscript{389} Lloyd (n310) 15.
\textsuperscript{390} \textit{Bhe & Others v Magistrate, Khayelitsha & Others} 2005 (1) SA 580 (CC) (“Bhe”).
\textsuperscript{391} Njungwe (n 277) 5; Sloth-Nielsen (n367) 401; Robinson (n237) 11.
protection and care as is necessary for his or her well-being. In addition, the CRC recognises the right of every child to live according to a standard that is adequate for his or her physical, mental, spiritual and moral development. This coincides with the South African constitutional right that children are not to be required or permitted to perform work or provide services that “place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.”

Importantly, Article 1 of the UDHR states that all human beings are “born free and equal in dignity and rights.” This Article stresses that all people are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. This corresponds with the principle in Article 5, which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The interpretation of this provision has effectively ended the use of corporal punishment in schools in many countries. The impact of this on education and freedom of religion is elaborated on in the discussion of Christian Education below.

Also in this regard, the CRC states that States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity. The CRC Committee has recognised the horizontal application of this provision and has urged States to adopt legislative measures to ensure that this principle is applied even in private schools. In addition, Article 37 of the CRC requires that States Parties shall ensure that: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” These provisions indicate that “human dignity” is an exceedingly important part of children’s rights.

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393 Article 3(2) states that this must be done “taking into account the rights and duties of his or her parents”; Correspondingly, section 28(1)(b) of the Constitution states that: “Every child has the rights to family care or parental care, or to appropriate alternative care when removed from the family environment.”

394 Article 27.

395 Section 28 (1)(f)(ii); In this regard, at regional level, see the SADC’s Code of Conduct on Child Labour.


397 Article 28(2).


399 Article 37(1)(a); This corresponds with South Africa’s international obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. South Africa ratified this Convention on 10 December 1998; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in its preamble recognises “the inherent dignity of the human person” and refers to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International
Furthermore, Article 19 of the CRC states that States Parties must “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence”, with no express reference to corporal punishment. However, in its General Comment 8, the CRC Committee confirmed that there was an “obligation of all State parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children.” In fact, the CRC Committee on the Rights of the Child has taken the position that corporal punishment of children is inconsistent with the CRC as a whole. It confirms that:

“In the framework of its mandate, the Committee has paid particular attention to the child’s right to physical integrity. In the same spirit, it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed the revision of existing legislation, as well as the development of awareness and education campaigns, to prevent child abuse and the physical punishment of children.”

The CRC Committee’s interpretation on this point has been explicitly rejected by several States Parties to the Convention, including Australia, Canada and the United Kingdom.

In addition, Article 11 of the ACRWC dealing with education rights, requires that States Parties take all appropriate measures to ensure that school and parental discipline is administered in a manner consistent with “humanity” and the child’s inherent human dignity; whereas the CRC only deals with school discipline and not parental discipline under educational rights. Some regard the reference to “humanity” in the ACRWC as

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400 Article 19(1).
401 CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia), CRC/C/GC/8.
405 Article 28 (2).
affording greater protection than the CRC but others argue that “human dignity” (as referred to in the CRC) and “humanity” have the same impact.\textsuperscript{406}

South African has given detailed expression to the above provisions through the inclusion of the rights to human dignity,\textsuperscript{407} freedom and security of the person\textsuperscript{408} and children rights\textsuperscript{409} in its Constitution. Correspondingly, section 10 of the South African Schools Act 84 of 1996 (“Schools Act”) provides that:

“(1) No person may administer corporal punishment at a school to a learner.

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.”

By including section 10 in the Schools Act, Parliament was merely complying with its international law obligations and following an international trend that had been undertaken by most democratic countries.\textsuperscript{410}

This provision was challenged in the South African Constitutional Court case of \textit{Christian Education}. In this case, the court held that section 10 of the Schools Act, which prohibits the administration of corporal punishment in schools, with no exception for schools operating on a Christian ethos, did indeed limit the appellant’s freedom of religion; but that the infringement was justified owing to the harm and indignity caused by corporeal punishment


\textsuperscript{407} Section 10 of the Bill of Rights states that:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

\textsuperscript{408} Section 12 of the Bill of Right states that:

“(1) Everyone has the right to freedom and security of the person, which includes

The right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes

the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.”

\textsuperscript{409} Section 28 of the Constitution, discussed in detail in Chapter 4.

\textsuperscript{410} \textit{Christian Education} at para 13.
in schools.\textsuperscript{411} In this case, the respondent, namely the Minister of Education, cited South Africa’s international obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,\textsuperscript{412} and the CRC,\textsuperscript{413} which require the prohibition of corporal punishment in schools.\textsuperscript{414} The court stated:

“The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious or Belief declares in art 5(5) that: ‘practices of a religious or belief in which a child is brought up must not be injurious to physical or mental health or to his full development…”\textsuperscript{415}

Significantly, this case recognised that South Africa’s international obligations to protect the dignity, mental well-being, and physical safety of all children, outweighed the freedom of religion of (private) schools.

To further safeguard the standards by which children live, the CRC states that in all actions concerning children, the best interests of the child must be a primary consideration.\textsuperscript{416} This means that all legislation, administrative acts, judicial decisions, political decisions and government policy should be formulated and/or applied with the best interests of the child in mind.\textsuperscript{417} It may be argued that the “best interests of the child” standard underpins all other provisions in the CRC.\textsuperscript{418} This would include provisions relating to religion and education.

A positive aspect of the ACRWC is that it emphasises that the best interests of the child is “the” primary consideration\textsuperscript{419} which is a higher standard than that provided for in the CRC,

\begin{itemize}
\item \textsuperscript{411} Paras 49-50.
\item \textsuperscript{412} South Africa ratified this Convention on 10 December 1998.
\item \textsuperscript{413} South Africa ratified this Convention on 16 June 1995.
\item \textsuperscript{414} Christian Education at para 13.
\item \textsuperscript{415} Para 40.
\item \textsuperscript{416} Article 3.
\item \textsuperscript{417} Sloth-Nielsen (n367) 409.
\item \textsuperscript{419} Article 4.
\end{itemize}
which merely refers to “a” primary consideration.\textsuperscript{420} The use of a definitive article in the provision has significant practical ramifications for children. The lower standard of considering the best interests of a child as “a” primary consideration is a procedural fairness requirement, namely that, judges must “consider” what is in the best interest of the child but the decision may not reflect these interests.\textsuperscript{421}

The Constitution reiterates the above principles in section 28(2), which states that “[a] child’s best interests are of paramount importance in every matter concerning the child.” The constitutional right is given further content by the Children’s Act,\textsuperscript{422} which also requires the best interests of the child standard,\textsuperscript{423} taking into account the child’s “physical and emotional security and his or her intellectual, emotional, social and cultural development.”\textsuperscript{424} This entails that the best interests of the child must be a paramount consideration in matters relating to the educational rights and the exercise of freedom of religion in schools. Sloth-Nielsen praised the inclusion of the best interests of the child standard as a constitutional principle and noted that with constitutional status, it will “become a benchmark for reviewing all proceedings in which decisions are taken regarding children.”\textsuperscript{425}

Although the CRC requires States Parties to recognise the rights of parents to give appropriate direction and guidance to their children in the exercise of rights by the child, this must be done in accordance with the evolving capacities of the child.\textsuperscript{426} This indicates that parental control over a child diminishes as a child evolves. Moreover, Article 12 of the CRC requires that a child who is capable of forming his or her own views, be given the right to express those views freely in all matters affecting the child and that the views of the child be given due weight.\textsuperscript{427} In addition, the ACRWC requires that a child who is capable of forming their


\textsuperscript{421} Lloyd (n310) 17.

\textsuperscript{422} Discussed in Chapter 4.

\textsuperscript{423} Section 7 (1).

\textsuperscript{424} Section 7 (1)(h).


\textsuperscript{426} Article 5.

\textsuperscript{427} Article 12(1).
own views, must be given the opportunity to express those views directly or indirectly, in all judicial or administrative proceedings affecting a child.\textsuperscript{428} Eekelaar has commented that:

\begin{quote}
“the goal is to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice.”\textsuperscript{429}
\end{quote}

In addition, the CRC requires that the child be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.\textsuperscript{430}

A criticism of ACRWC in this regard, is the confusion created by Article 31, which deals with children’s responsibilities. In terms of this provision, children are required to “respect parents, superiors and elders at all times”, which could conflict with the child’s right to express their views in decisions that affect them. Interestingly, Article 31 corresponds with South Africa’s controversial \textit{Bill of Responsibilities for the Youth of South Africa},\textsuperscript{431} which expressly places a duty on children to respect and honour their parents. The Department of Basic Education launched the Bill in March 2008, to be taught in South African schools as part of the Lifeskills curriculum. It is meant to be a tool towards the practical application of the South Africa Bill of Rights in guiding active citizenship among school children in South Africa.

Another important aspect of children’s rights is the right not to be discriminated against. Special attention is provided to the position of children in Article 24(1) of the ICCPR, which requires that children, in particular, be given the right to such measures of protection as are required by their status as minors, without any discrimination on the basis of race, language or religion, amongst other criteria.

Specifically related to discrimination in the school setting, Article 2 of the CRC requires that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination on the basis of the status, activities, expressed opinions, or beliefs

\textsuperscript{428} Article 4(2).
\textsuperscript{430} Article 12(2).
\textsuperscript{431} The Bill is the creation of the Department of Education and LeadSA. It’s also sanctified by the National Religious Leaders Forum. Its content is discussed in detail in Chapter 5.
of the child’s parents. Article 2 of the CRC was expressly referred to by the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others* (“Bhe”). 432

Furthermore, Article 3 of the ACRWC deals with non-discrimination, in which each child is given the right to equal enjoyment of the rights in the Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national or social origin.” Particularly pertinent to South Africa is Article 26 of the ACRWC, which provides protection against apartheid and discrimination and requires that States Parties undertake to “accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination” 433 and to “direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.” 434

With regard to all forms of discrimination against schoolchildren, including religious discrimination, the Special Rapporteur on the Right to Education noted that “schools reflect the surrounding setting and may reinforce prejudicial portrayals of victims of discrimination” 435 and therefore education must be the utilised to eliminate discrimination and inequality through the creation of new values and attitudes within schools. 436 This will ensure that all children, regardless of their religious affiliation, if any, are equally protected and respected at school.

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432 *Bhe* at para 9, the court stated: “In denying extra marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.” In arriving at its decision, the court emphasises South Africa’s international obligations and quotes Article 2 of the CRC to support its reasoning.

433 Article 26 (2).
434 Article 26 (3).
5.3 EDUCATION RIGHTS

International law emphasises that the right to education is part of the child’s basic rights.\textsuperscript{437} The right to education is acknowledged in Article 26(1) of the UDHR. This provision recognises that free and compulsory education must be provided at elementary level; whereas education beyond the fundamental stages, such as technical or professional education, must be generally “available” and “equally accessible.” In addition, Article 26(3) states that parents have a “prior right to choose the kind of education that shall be given to their children.” This provision guarantees parents the right of choose between public and private education.\textsuperscript{438} A corresponding provision is found in Article 11(4) of the ACRWC which states:

“States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children’s schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.”

This provision confers on parents the right to have their children educated in religion-based private schools.

Importantly, Article 28(1) of the CRC, reiterating the UDHR, requires that all States Parties recognise the right of the child to education; including making primary education compulsory and free to all.\textsuperscript{439} Furthermore, the CRC aims to “encourage the development of different forms of secondary education” and to make it available and accessible to all children.\textsuperscript{440} Importantly, Article 28(1) of the CRC refers to the child as the holder of the right to education, without reference to the rights of parents regarding the education of their children.\textsuperscript{441}

\textsuperscript{437} See Taiwo & Govindjee “The Implementation of the Right to Education in South Africa and Nigeria (Part 1)” 2012 33 Obiter 93, for a discussion on states’ obligations under the international human rights instruments regarding the right to education.

\textsuperscript{438} Ssenyonjo Economic, Social and Cultural Rights in International Law (2009) 360.

\textsuperscript{439} Article 28(1)(a).

\textsuperscript{440} Article 28(1)(b).

\textsuperscript{441} Verheyde (n398) 63.
Notably, it must be mentioned that the right to education is enshrined in the ICESCR. South Africa signed the ICESCR on 3 October 1994, but has still not ratified it. Although most of the socio-economic rights in the ICESCR are included in the South African Constitution; the ICESCR guarantees other rights that are not clearly protected in the Constitution.

Article 13(1) of the ICESCR guarantees the “right to education”, meaning free primary education with a progressive introduction towards free education even at secondary and higher education levels. De Waal and Currie comment that the ICESCR requires more than a duty on states to refrain from interfering with the enjoyment of the rights in the Convention; it requires that state’s take positive steps towards fulfilling the rights.

Furthermore, in order to effectively monitor compliance to its provisions, the ICESCR has introduced a “minimum core obligation”. According to the Committee on Economic, Social and Cultural Rights, the minimum core with respect to the ICESCR includes:

“[A]n obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a);

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.


Such as the “right to work” in Article 6.

Article 13(1) states as follows: “The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.”

Article 13(2) (b) and (c).

De Waal & Currie (n18) 437.

Committee on Economic, Social and Cultural Rights (CESCR) General Comment No.3 “The Nature of States parties Obligations (art 2, para 1)” 14/12/90 para 10.
to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with ‘minimum educational standards’ (art.13 (3) and (4)).

This aims to ensure satisfaction of at least the minimum essentials of the rights in the ICESCR.

However, the South African case of Grootboom the Constitutional Court rejected the notion of a minimum core obligation with regard to socio-economic rights, choosing instead to determine whether the government had undertaken “reasonable measures”.

The Constitution guarantees the right to “basic education” section 29. The South African government regards basic education as “…the cornerstone of any modern, democratic society that aims to give all citizens a fair start in life and equal opportunities as adults.” Moreover, section 29 states that “further education” must be made accessible and available by the state “through reasonable measures”. This provision recognises that the right to further education is largely dependent on the availability of the financial and other state resources. All other legislative rights on education in South Africa are based on this constitutional provision.

Furthermore, in order to pursue the elimination of racial discrimination in all settings-including schools, States Parties to ICERD agree to guarantee civil and political rights and
economic, social, and cultural rights in a non-discriminatory manner. Also, States Parties undertake to eliminate racial discrimination in all forms and guarantee enjoyment without distinction of the right to freedom of thought, conscience and religion, cultural rights and the right education and training. In addition, Article 2 of the ICERD encapsulates the responsibilities on States Parties toward eliminating racial discrimination. It demands that laws and regulations which have the effect of creating or perpetuating racial discrimination be abolished. It requires that measures which afford protection against racial discrimination by third parties be taken and that States Parties take special measures to ensure the adequate development of disadvantaged racial groups for the purpose of guaranteeing them the equal enjoyment of human rights and fundamental freedoms.

Reiterating the importance of “equal” accessibility mentioned in the UDHR, Article 28(1) of the CRC recognises the right of the child to education, “with a view to achieving this right progressively and on the basis of equal opportunity.” These provisions are particularly pertinent to South Africa where the education system was affected by racial divisions. In this regard, the CRC Committee stated that:

“Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values [of the aims of education], including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena. Emphasis must also be placed upon the importance of teaching about racism as it has been practiced historically and particularly as it manifests or has manifested itself within particular communities.”

459 Article 5.
460 Article 5(d)(vii).
461 Article 5(e)(vi).
462 Article 5(e)(v).
463 Article 2(1)(c).
464 Article 2(1)(d).
465 Article 2(2).
466 Article 26 (1).
An example of the implementation of these principles in South African law is section 29(3) of the Constitution, which affirms the Constitution’s commitment to respecting cultures by allowing for the establishment of private schools that cater for the particular needs of cultural, linguistic or religious groups.\textsuperscript{468} Significantly, section 29(3)(a) expressly prohibits admission criteria that are based solely on race.

Furthermore in relation to the aims of education, Article 29(1) of the CRC requires that States Parties that the education of the child be directed to:

“(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”

The CRC Committee has commented that Article 29(1):

“insists upon the need for education to be child-centred, child-friendly and empowering…” and also that “[t]he education to which every child has a right is one designed to provide the child with life skills, to strengthen the child’s capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values.”\textsuperscript{469}

Article 5(3) of the Declaration emphasises the need for education to promote understanding, tolerance and friendship among all religious groups. On this issue, the Special Rapporteur on freedom of religion referred to a study prepared under the guidance of his predecessor, which states:

“[w] hat is relevant is that education on religious trends, traditions and movements as well as convictions, be provided in a fair and objective way, stimulating the curiosity of the audience, encouraging it to question their bias and stereotypes about cultures, religions and

\textsuperscript{468} Discuss in Chapters 5 and 7.
\textsuperscript{469} CRC General Comment No. 1: The Aims of Education, 17 April 2001, CRC/GC/2001/1 para 2.
views other than the one which they see as being part of their own identity. Succeeding in portraying the others so that they can recognize themselves provides not only a valuable and inspiring educational experience; it also help create understanding and mutual respect between different communities or world-views.”

These principles correspond with the objective of South Africa’s National Policy on Religion in Education, which is to advance the role of religion in education by promoting a wide range of religious activities in school, but in a way that differs from purely providing religious instruction. This entails that religion education is to remain in the school curriculum with the aim of educating learners about religions and religious diversity within South Africa and the world in order to increase religious tolerance.

Lastly, in the context of education, Article 11 of the ACRWC requires that education be directed toward the strengthening of respect for human rights and fundamental freedoms. Similarly to the CRC, the ACRWC requires that education must promote understanding, tolerance and friendship among all nations, racial or religious groups. This is contrary to the religious exclusivity created in religion-based private schools which require non-adherent children to waive their religious freedom in order to gain admission into the school. The children in these schools are not exposed to different religions or belief systems in order to gain an understanding of them. This key issue is addressed in detail in Chapter 7.

5.4 FREEDOM OF RELIGION

Undoubtedly, freedom of religion places high on the priority list of basic human rights that have been singled out for protection in international law. In fact, it is even regarded by some as “the most sacred of all freedoms”.

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471 Discussed in detail in Chapter 5.
472 See the difference between religion education and religious instruction in Chapters 1 and 6.
474 Article 11(2)(b).
475 Article 11 (2)(d); Also at regional level, Article 5 of the SADC Protocol on Education and Training provides for co-operation and mutual assistance in basic education between Member States. Article 5(3) requires that each Member State must strive to provide universal basic education for at least nine years. The Protocol was signed on 9 September 1997 and entered into force on 31 July 2000.
476 du Plessis (n242) 463.
On the issue of the protection of religious freedom at world level, Article 18 of the UDHR, states that: “[e]veryone 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.” Importantly, the right to freedom of thought, conscience and religion is specifically conferred in children in Article 14(1) of the CRC and Article 9(1) of the ACRWC.

As explained in Chapter 1, aside from religious beliefs, people may hold opinions that are not connected to religion. In this regard, Article 19 of the UDHR contains a separate provision stating that everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media. This is translated into a constitutional provision which encompasses both freedom of religion and freedom of opinion within one right, articulated in section 15.478

The UDHR provisions articulated above, paved the way for the corresponding ICERD provision which also guarantees the right to freedom of thought, conscience and religion479 and provides that:

“As States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights….”480

Furthermore, Article 18(1) of the ICCPR includes the “freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community481 with others and in

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478 Section 15 of the Bill of Rights states that:
“(1)Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
(2)Religious observances may be conducted at state or state-aided institutions, provided that:
(a) those observances follow rules made by the appropriate public authorities;
(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary.”

479 Article 5(d)(vii).
480 Article 7.
481 Durham states: “While religion can be an intensely private matter for some, it is fair to say that most religions cannot be practiced in isolation. [M]any aspects of religious life have an associational dimension, but if anything, they deserve far stronger protection than other associational rights, because of the intimate connection between religiously motivated association and core religious beliefs and practices.” See Durham (n364).
public or private, to manifest his religion or belief in worship,\textsuperscript{482} observance, practice and teaching.” In addition, Article 18(2) states that no person shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. This coincides with section 14(3) of the CRC\textsuperscript{483} and section 15(2) (b) and (c) of the Constitution.\textsuperscript{484}

Significantly, in a General Comment on Article 18 of the Covenant on Civil and Political Rights, the Human Rights Committee\textsuperscript{485} confirmed that:

\begin{quote}
“Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief…

…

Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics.”\textsuperscript{486}
\end{quote}

This means that Article 18 protects not only religion, but also other beliefs that are not religious.

In the South African case of \textit{Wittmann v Deutscher Schulverein, Pretoria and Others} (“\textit{Wittmann}”),\textsuperscript{487} Judge van Dijkhorst held that:

\begin{quote}
“[Religion] cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is
\end{quote}

\textsuperscript{482} According to the Human Rights Committee in General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 1993/07/30. CCPR/C/21/Rev.1/Add.4, para 4: “The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private. 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 direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and 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. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”

\textsuperscript{483} Article 14(3) 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.”

\textsuperscript{484} Section 15 of the Constitution is discussed in detail in Chapter 6.

\textsuperscript{485} Created by Article 28 (1) of the ICCPR.


\textsuperscript{487} 1999 (1) BCLR 92 (T); 1998 SACLIR LEXIS 43; 1998 (4) SA 423 (T). Discussed in Chapters 5 and 7.
afforded his protection under the freedom of thought, belief and opinion part of this section [on freedom of religion, belief, and opinion]. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion.\textsuperscript{488}

The nature of freedom of religion is a pertinent issue that is explored in greater detail in Chapter 6.

The Declaration is yet another instrument which recognises freedom of religion. According to the Declaration, the right to freedom of thought, conscience and religion, includes the right have a religion, “or whatever belief” of a person’s choice; as well as the freedom to manifest that belief as an individual or in group, whether publicly or privately.\textsuperscript{489} The insertion of the word “whatever” before the word “belief” in the Preamble and in Article 1 can be interpreted as protecting all world views, including agnosticism, atheism, and rationalism.\textsuperscript{490} Also included under freedom of religion is the right to be free from any coercion which would impair the freedom to have a religion or belief.\textsuperscript{491}

In addition to Article 1, the Declaration provides a comprehensive list of rights to freedom of thought, conscience, and religion.\textsuperscript{492} This list sums up all components of the content of the

\textsuperscript{488} Para 449.
\textsuperscript{489} Article 1(1).
\textsuperscript{490} Davis (n332) 229; See U.N. Doc. A/c.3/SR.43; The Special Rapporteur on religious intolerance confirms that the scope of Protection in the Declaration includes theistic, non-theistic, and atheistic beliefs. See Amor, Implementation of the Declaration on the elimination of all forms of intolerance and of Discrimination based on Religion or Belief, U.N.Doc. E/CN.4/1995/91. At 147 (1995); In a comparison of this provision to UDHR and ICCPR clauses on religion, an expert has concluded that: “although they varied slightly in wording, all meant precisely the same thing: that everyone has the right to leave one religion or belief and to adopt another, or to remain without any at all. This meaning…is implicit in the concept of the right of freedom of thought, conscience, religion and belief, regardless of how the concept is presented.” See Obio Benito, Study of the Current Dimensions of the Problems of Intolerance and Discrimination on Grounds of Religion or Belief, U.N. Doc E/CN/4/Sub.2/1987/26 (1986) para 21.
\textsuperscript{491} Article1(2).
\textsuperscript{492} “(a) [t]o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
(b) [t]o establish and maintain appropriate charitable or humanitarian institutions;
(c) [t]o make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
(d) [t]o write, issue and disseminate relevant publications in these areas;
(e) [t]o teach a religion or belief in places suitable for these purposes;
(f) [t]o solicit and receive voluntary financial and other contributions from individuals and institutions;
(g) [t]o train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
(h) [t]o observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
right more comprehensively than any other international instrument. It lists the right to teach religion as part of the right, however, it must be mentioned that section 15 of the Constitution does not include the right to receive religious instruction in schools. This was further confirmed by the Constitutional Court’s interpretation of the components of the right.\footnote{493}

Importantly, Article 18(3) of the ICCPR states that the freedom to manifest one’s religion or beliefs may be limited by the law as necessary to protect public safety, order, health, or morals or the fundamental rights of others.\footnote{494} A noteworthy case from an international context, relevant to the principles contained in Article 18(3) of the ICCPR, is \textit{Sahin v Turkey (“Sahin”)},\footnote{495} in which the European Court of Human Rights had to decide whether or not there was a violation of the applicant’s right to education\footnote{496} arising out of the restriction on the applicant from wearing an Islamic headscarf to University lectures. The case was determined in terms of Article 2 of Protocol 1\footnote{497} and Article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\footnote{498}, which states, similarly to Article 18(3) of the ICCPR, 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 interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

The applicant in this case was a 24 year old\footnote{499} Muslim female who considered it her religious duty to wear the Islamic headscarf. She was denied access to a lecture on the basis that a

\footnote{493}{\textit{The court in Prince} at para 38, set out the content of the right and affirmed that the right to freedom of religion entailed: “(a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one’s religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice....”; Discussed further in Chapter 6.}

\footnote{494}{\textit{Article 18(3)}.}


\footnote{496}{Para 157.}

\footnote{497}{Article 2 of Protocol 1 of the ECHR states: “[n]o 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.”}


\footnote{499}{Reference to age indicates that the case involved an adult, therefore children’s rights were not a concern.}
university circular had forbidden admission of students who wore the headscarf to lectures. The court held that there was “no violation of the first sentence of article 2 of Protocol 1” and furthermore that the state headscarf ban did not overstep the “limits imposed by the organizational requirements of State education”, that the prohibition was “amenable to judicial review in the administrative courts” and it was “justified in principle and proportionate to the aims pursued and, therefore, could be regarded as “necessary in a democratic society.” The decision was partly based on the fact that the restriction pursued the legitimate aims of protecting the rights and freedoms of others and to maintain public order.

Brems notes that had the case involved a child, the decision would have been contrary to Article 14(1) of the CRC, which protects the right of the child to freedom of thought, conscience and religion, especially since the CRC has taken an alternate stance on the wearing of headscarves by schoolgirls. In commenting on the French law which prohibits the wearing of religious symbols in public schools (Laicité), the CRC Committee stated:

Saxena “The French Headscarf Law and the Right to Manifest Religious Belief” (2007) 1 61; Turkey is predominantly a Muslim country, however, the State sought in terms of a proclamation of the Republic on October 29, 1923, to create a religion-free zone in which all citizens were regarded as equal, without distinction on the grounds of religion or denomination. See Abolition of the Caliphate on Mar. 3, 1923, the repeal of the Constitutional provision declaring Islam the religion of the State on Apr. 10, 1928; Consequently, Turkey passed the Dress Regulation Act, imposing a ban on wearing religious attire in places other than places of worship or at religious ceremonies, regardless of the religion or belief concerned. In addition, the state closed all religious schools. Law no. 2596, Dress (Regulations) Act of Dec. 3, 1934 (Turkey).

Sahin at para 162.
Para 111.
Para 112.
Para 113.
Para 158.

The CRC Committee has observed that Article 14 entails: “1) that government must respect the freedom of its citizens to practice their own religion and 2) that children must be aware of this right.” (as per CRC Committee, Concluding Observations of the Committee on the Rights of the Child: Barbados, U.N. GAOR, Comm, on the Rts, of the Child, 21st Sess at 18, U.N. Doc. CRC/Cl/.15/Add.103.). See Lantier “Freedom of thought, conscience and religion” in Todres et al (n420)157.

Brems A Commentary on the United Nations Convention on the Rights of the Child: Article 14, The Right to Freedom of thought, conscience and religion (2006) 37; CRC Committee, Concluding Observations: Tunisia, U.N. Doc. CRC/C/.15/Add.181, 2002, states: “The Committee is concerned about information brought to its attention which indicates that the exercise of the right to freedom of religion may not always be fully guaranteed, particularly with regard to regulations prohibiting the wearing of a headscarf by girls in schools.” (para 29) “The Committee recommends that the State party take all necessary measures to ensure the full implementation of the right to freedom of thought, conscience and religion” (para 30).

In March 2004, the law was passed in the French Senate in terms of which all ostentatious forms of religious dress were forbidden in French public schools. The “Laicité”, as it is known, is used in France to summarise prevailing beliefs regarding the proper relationship between religion and the French state. Laicité entails the free exercise of religion where the State neither recognises nor finances any religion, in other words it encompasses complete secularity where the state is neutral on issues of religion, thereby making all religions equal before the law. Religious symbols can be construed as marks of difference and
“The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children.”

In this regard, South Africa constitutionally protects religious observances/manifestations in public institutions. Public schools and universities are therefore not religion-free zones and are instead required to reasonably accommodate diversity. The case of Sahin stands in contrast to the landmark Constitutional Court decision of *MEC for Education: KwaZulu-Natal v Navaneethum Pillay* ("Pillay"), in which the court found that the wearing of a nose stud as a religious adornment would not disrupt order within a school and accordingly, ruled in favour of not only accommodating, but celebrating religious diversity in a school setting. This is in line with the CRC Committee’s position on religious dress.

Integrally connected to religious rights, are the rights to equality and the right not to be discriminated against on the basis of religion. Article 2 of the UDHR expresses that everyone is entitled to all the rights and freedoms mentioned, without distinction of any kind, for example race, colour, sex, language, religion or other status. Furthermore, Article 7 states that all are persons are equal before the law and are entitled, without any discrimination, to equal protection of the law. Also in this regard, Article 3 of the Declaration expressly states that therefore obstacles to true equality as their display could lead to segregation and hostility. Disallowing their display in public spaces meant that all religions were treated in the same way in the public sphere. According to this perspective, neutrality and equality go hand in hand. A segment of the population supports the law in the name of secularity. However, it is important to note that some view it as masked intolerance. See Article 141-5-1 of Law No. 2004-228, National Code of Education, (2004); Stasi Commission Report 4.2.2.1, at 56 A; Weil “Lifting the Veil” 2004 22(3) French Politics, Culture and Society 141–149; Thomas “On Headscarves and Heterogeneity: Reflections on the French Foulard Affair” 2005 29 Dialectical Anthropology 373 -382; Saxena (n500) 4 -5; Gunn (n51) 441; AFP "France moves to toughen ban on religion in schools" at http://news.howzit.msn.com/france-moves-to-toughen-ban-on-religion-in-schools-3 (Date accessed: 18 October 2013).

510 Section 15(2).  
511 Discussed in Chapter 6.  
512 See discussion of Pillay in Chapter 6.  
513 Pillay at para 107.  
514 Sieghart comments: “The principle on non-discrimination is fundamental to the concept of human rights. The primary characteristic which distinguishes ‘human rights’ from other rights is their universality: according to the classical theory, they are said to ‘inhere’ in every human being by virtue of his humanity alone. It must necessarily follow that no particular feature or characteristic attaching to any individual, and which distinguishes him from others, can affect his entitlement to his human rights, whether in degree or in kind, except where the instruments specifically provide for this for a clear and cogent reason- for example, in restricting the right to vote for adults, or in requiring special protection for women on children. Strictly, therefore it should not be necessary to include non-discrimination provisions in human rights instruments, let alone to draw up categories of grounds on which it is illegitimate to discriminate between individuals in securing or respecting their entitlement to, or their exercise or enjoyment of, the universal human rights.” See Sieghart *The International Law of Human Rights* (1983) 75.
discrimination on the basis of religion or belief is an offence against human dignity. These provisions impact on issues relating to discrimination on the basis of religion and religious favouritism in schools.

Furthermore, Article 26 of the ICCPR states that all people are equal before the law and are entitled to equal protection of the law, which requires that there be no discrimination on any ground such as race, colour, sex, language, religion or other status. With regard to the term “discrimination” in the ICCPR, the Human Rights Committee has commented that:

“the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

However, the CRC Committee has also noted that: “the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance.” For example, religious exemptions may be granted to persons of a particular faith based on sincerely held beliefs, whereas others who are not of that faith, will have to comply with the laws/rules as they stand.

Primarily, the Declaration requires that all states take effective measures to prevent and eliminate discrimination on the grounds of religion or belief. In this regard discrimination is 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.” Moreover, the ICCPR also includes a prohibition against the incitement of hatred against others on the basis of religion. The Constitution expressly mentions advocacy of hatred

515 See General Comment No. 18, in “United Nations Compilation of General Comments” p. 135 para 7.
516 p. 135-36 para 8; CRC General comment no. 5 (2003), General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 para 12 states: “It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment.”
517 Pillay para 103.
518 Article 4.
519 Article 2.
520 Article 20.
based on race, ethnicity, gender or religion as a specific exclusion to the constitutional right to freedom of expression.\textsuperscript{521}

Furthermore, the Constitution encapsulates the above international principles by guaranteeing the right to equality of everyone before the law and the right to equal protection and benefit of the law.\textsuperscript{522} The Constitution likewise prohibits unfair discrimination, directly or indirectly, by the State, as well as by any other person, based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, or other similar grounds.\textsuperscript{523} It is noteworthy that the Constitution encapsulates a wider set of grounds for discrimination than any of the instruments discussed in this section.

Correspondingly, South Africa has also enacted the Equality Act to give further content and meaning to the Constitution’s equality clause. The Employment Equity Act 55 of 1998\textsuperscript{524} and the Labour Relations Act 66 of 1995\textsuperscript{525} serve the same purpose in the context of employment. The Equality Act states that one of its objectives is “to facilitate further compliance with international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women.”\textsuperscript{526} The Act states that persons charged with interpreting its provisions “may be mindful of international law particularly the two Conventions just mentioned, as well as comparable foreign law.”\textsuperscript{527}

\textsuperscript{521} Section 16(2)(c).
\textsuperscript{522} Section 9(1).
\textsuperscript{523} Section 9(3).
\textsuperscript{524} Section 5 states: “Elimination of unfair discrimination.-Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.” Section 6 states: “Prohibition of unfair discrimination.—(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”
\textsuperscript{525} Section 187(1)(f) states: “A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is- that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”
\textsuperscript{526} Section 2(h); See Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).
\textsuperscript{527} Section 3(2)(c).
Relevant to both freedom of religion and education rights, Article 18 (4) of the ICCPR requires that States “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.” This principle is also affirmed by Article 5(1) of the Declaration according to which: “The parents or, as the case may be, the legal guardians of the child have the right to organise the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up”.

In this regard the Human Rights Committee commented:

“The Committee is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”

In this regard, Professor Amor states that: “[p]rovision of religious education, provided it is neutral and objective, can make a real contribution to the prevention of intolerance and discrimination by helping pupils realize their own individual and communal cultural identity and provide ethical guidance.” However, he has advised that: “…whenever education in the field of religion and conviction is part of the curriculum in state and/or private schools, provisions should be envisaged for it to be optional, at least in terms of allowing for a conscientious right of withdrawal to be exercised by the parents, guardians or mature pupils.” This is a key issue for discussion in this thesis.

528 HRC, General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18) UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para 6; The HRC has commented further, that “where parents or guardians object to religious instruction for their children at school; it is not incompatible with Article18 (4) of the ICCPR, for domestic legislation to require that instruction should instead be given in the study of the history of religions and ethics, provided that this is done in a neutral and objective way and shows due respect to the convictions of the parents who do not believe in a religion.” See Hartikainen v. Finland (40/1978) (R.9/40), ICCPR, A/36/40 (9 April 1981) 147 at paras. 10.4 and 10.5.

Also important is Article 5 of the Declaration, which deals comprehensively with the religious rights of children and their parents, particularly with regard to religious rights within an educational setting. Article 5 includes the right of parents or legal guardians to raise the child in accordance with their religion or belief; the right of the child to education in religion or belief, in accordance with the wishes of parents with the best interests of the child being the guiding principle; the right of a child not to be compelled to receive education against the wishes of his or her parent; the right of the child to protection from discrimination on the grounds of religion; the right of the child’s views on religion to be taken into account when the child is not under the care of parents or legal guardians and the right of the state to limit practices injurious to child’s development or health.

Furthermore, Article 5(2) of the Declaration coincides with Article 14(2) of the CRC which requires States to “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.” This recognises the rights of parents to direct a child’s religious upbringing until the child is sufficiently mature to exercise their own religious rights in terms of Article 14(1) of the CRC. Similarly to Article 14 of the CRC, Article 9 of the ACRWC states that States Parties shall respect the right of the child to freedom of thought, conscience and religion and, in addition, shall respect the rights and duties of the parents to provide direction to the child in this regard, subject to national laws.

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530 Tahzib points out that the Declaration does not define who is considered to be a child under Article 5. See Tahzib (n359) 175.
531 Article 5(1).
532 Lerner notes that the drafting of Article 5 “created controversy, a fact hardly surprising, considering the close relationship between religion, education the role of parents, and the aspiration of all religions and ideologies to influence the mind of the child at all stages of the formative process.” See Lerner Group Rights and discrimination in International Law (1991) 87.
533 Article 5(2); Lerner notes further that: “the Declaration does not attempt to resolve the many questions likely to arise in the case of clash between the wishes of parents and, or legal guardians, and the best interests of the child. This is a delicate matter likely to create difficulties, particularly in the case of totalitarian or ideological states, where an officially adopted philosophy might become a major consideration on the determination of the best interests of the child. In general, limitations on parental authority regarding rights related to religion or belief have been a frequent cause of conflict, often requiring adjudication.” (footnote omitted). See Lerner (n532) 87.
534 See Chapters 4 and 6.
535 Article 14(2); Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt (December 2010) para 25. See Study prepared under the guidance of Abdelfattah Amor (n529) 55-56; In relation to Article 14, the CRC Committee “emphasizes that the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large.” See CRC Committee, Concluding Observations of the Committee on the Rights of the Child: Iran (Islamic Republic of), U.N. GAOR, Comm, on the Rts, of the Child, 24th Sess at 35, U.N. Doc. CRC/C/IRI/CO/15/Add.123.).
536 Article 9 (1).
and policies.\textsuperscript{537} Contrastingly, South Africa does not mention the rights of the parent in its constitutional provisions on children’s rights\textsuperscript{538} or educational rights.\textsuperscript{539} The state does, however, generally defer to the viewpoint and decisions of parents in these matters.\textsuperscript{540}

Giving further content to the rights encompassed in Article 14 of the CRC (discussed above), is Article 30, which recognises the rights of children who are ethnic, religious or linguistic minorities or of indigenous origin, to be afforded the right, in community with other members of a group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. This corresponds with Article 27 of the ICCPR.\textsuperscript{541} Furthermore, in terms of the CRC children are conferred the right to participate freely in cultural life and States Parties are called upon to encourage the provision of appropriate and equal opportunities for cultural activity.\textsuperscript{542}

Importantly, special protection for the unique situation of the African child is evident in the obligation on States Parties to the ACRWC to discourage any custom, tradition, cultural or religious practice contrary to the provisions of the Charter,\textsuperscript{543} which includes those which affect the welfare and dignity of the child and those which discriminate against the child on the basis of sex or other status.\textsuperscript{544} This provision deals with aspects identified as lacunae in the CRC.\textsuperscript{545} For example, cultural practices, such as virginity testing and female circumcision foster the image of girls as sexual objects, thereby encouraging their subordinate status. Issues such as these are not addressed at all in the CRC.\textsuperscript{546} In addition, the ACRWC mirrors Article 31 of the CRC by conferring on children the right to participate freely in cultural life.\textsuperscript{547}

\textsuperscript{537} Article 9 (3).
\textsuperscript{538} Section 28.
\textsuperscript{539} Section 29.
\textsuperscript{540} Discussed in Chapter 4.
\textsuperscript{541} See below.
\textsuperscript{542} Article 31.
\textsuperscript{543} Article 1(3). See also Article 21.
\textsuperscript{544} Article 21; Kaim “The Convention on the Rights of the Child and the cultural legitimacy of Children’s Rights in Africa: Some Reflections” 2005 5(2) African Human Rights Law Journal 221 227-228. Although no practice is specifically mentioned, it is presumed that female genital mutilation is included, as well other practices which threaten the health (and life) of children. See Gose (n406) 52.
\textsuperscript{545} Viljoen (n376) 211.
\textsuperscript{546} 206.
\textsuperscript{547} Article 12; Also at regional level, Article 11 of the SADC Protocol on Culture, Information and Sport sets out the objectives of member states with regards to the issue of culture which include: ensuring that culture plays a vital role in the economic development of the SADC and evaluation of all SADC projects and programmes; developing institutions of cultural heritage such as libraries, museums and archives and promoting indigenous languages as part of the promotion of cultural identity. Article 13 of the Protocol is aimed towards the preservation and promotion of the Region’s cultural heritage. Part of the promotion of
Evidently, the ACRWC increases the level of protection afforded to African children in a number of ways.\textsuperscript{548}

In addition to protecting freedom of religion, the UDHR states that everyone has the right to participate in the cultural life of their community.\textsuperscript{549} Correspondingly, the Constitution contains separate clauses protecting cultural, religious and linguistic groups. This is as a result of the cultural, religious and linguistic (and other) divisions that existed in the \textit{apartheid} era where the minority population group monopolised political power.\textsuperscript{550} The Constitution gives cultural, religious, and linguistic communities the right “to enjoy their culture, practise their religion and use their language,”\textsuperscript{551} and “to form, join and maintain cultural, religious and linguistic associations.”\textsuperscript{552} These rights are important in protecting members of religious, cultural and linguistic communities who fear being dominated by larger or more powerful groups. Sections 30\textsuperscript{553} and 31 of the Constitution are specifically aimed at minority protection. They are express declarations of the equal worth of various cultural and other groups in South Africa, whose community practices and associations must be treated with reverence.\textsuperscript{554} Importantly, the Constitutional Court recognises that cultural groups\textsuperscript{555} are by definition, a combination of religion, language, geographical origin, ethnicity and artistic tradition;\textsuperscript{556} thereby making provisions with regard to culture, language and ethnicity, relevant to the topic at hand.

culture includes the organisation of art and cultural festivals which pursue the ideals of regional integration. The SADC Member States signed a Protocol in 14 August 2001 with the objective of strengthening and consolidating historical, social and cultural affinities and relations within the Region (see Preamble). South Africa ratified this Protocol in 2005 and has thereby formally agreed to its provisions. The Protocol entered into force on 7 January 2006. It focuses on harmonising policies on culture by SADC Member States. See http://www.communitymedia.org.za/alt-media-resources/132-legislation-and-regulation (Date accessed: 14 December 2011). Also, Article 12 of the SADC Protocol on Culture, Information and Sport deals with language policy formulation and it requires that Member States: “formulate and implement language policies that will aim at promoting indigenous languages for national socio-economic development”; “institute and put into practical effect policy measures that will aim at encouraging the learning and wider use of the official languages of Member States”; and “promote the use of indigenous languages as medium of instruction.”

\textsuperscript{548} Davel (n420) 282.
\textsuperscript{549} Article 27; See Stamatopolou (n352) 199-200.
\textsuperscript{550} De Waal &Currie (n18) 470.
\textsuperscript{551} Section 31 (1)(a).
\textsuperscript{552} Section 31 (1)(b).
\textsuperscript{553} Section 30 entrenches the right to language and culture in the following terms: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill rights.”
\textsuperscript{554} Pillay at para 151; Amoah and Bennet argue that religious rights are often treated as more important than cultural rights and that African traditional beliefs are often treated as incidences of African culture and thereby devalued. See Amoah and Bennet (n107) 1-2.
\textsuperscript{555} See discussion on the relationship between religion and culture in Chapter 6.
\textsuperscript{556} Pillay at para 50.
Similarly to Article 30 of the CRC, Article 27 of the ICCPR, protects members of ethnic, religious, or linguistic minorities from being denied the enjoyment of their own culture or the practice of their own religion, or use their own language. Dr. Francesco Capotorti, who was appointed Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, provided probably the most widely quoted definition on what constitutes a minority, namely: “a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”

Significantly, Article 27 was the first international provision dealing specifically with rights for ethnic, religious and linguistic groups that was capable of, and intended for, universal application. However, Article 27 has been criticised, firstly, for being too timid in that it protects “persons belonging to minorities” and not to minorities as such, and therefore is more individualistic than group orientated. Secondly, it is stated in the negative, that is, “shall not be denied”, as opposed to “shall be provided”, meaning that minorities do not have right to demand that the state should adopt positive measures to protect their cultural rights. This could be construed as “nervousness in handling minorities’ issues”.

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557 General Comment No. 23 states: “With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”. See “United Nations Compilation of General Comments” p. 149.

558 Article 27: It has been noted in international case law that “measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27.” However, “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.” See Communication No. 671/1995, J. E. Länsman et al. v. Finland (Views adopted on 30 October 1996), in UN doc. GAOR, A/52/40 (II), p. 203, para. 10.3.


560 Gauteng Education at para 60; See also Currie “Minority Rights: Language, Education and Culture” in Chaskalson et al (n801) at 35-2 to 35-3.


562 Gauteng Education at para 60.
Despite the above criticisms of the ICCPR, the very inclusion of a provision dealing specifically with rights for ethnic, religious and linguistic groups, is laudable.\textsuperscript{563} This provision inspired the drafting of a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities\textsuperscript{564} which encompasses a “right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”\textsuperscript{565}

6 CONCLUSION

To conclude, South Africa has ratified numerous Conventions, Protocols and Charters dealing with children’s rights, education rights and freedom of religion; all of which are relevant to the issue of religion in schools and all of which impact directly or indirectly on the protection of these relevant rights at municipal level.

As mentioned, the most significant of all the major international instruments is by far is the UDHR, which recognises a broad spectrum of rights relating to religion in schools and constitutes the primary inspiration for the contents of the South African Constitution. The ICERD is also significant in that its ratification marked South Africa’s commitment to preventing discrimination on the basis of race which is interlinked with religion and culture.

In addition, the ICCPR expands on the protection of children’s rights and religious freedom afforded by the UDHR and creates not only a moral but a legal obligation on member States to promote these rights. The Declaration gives more concrete content to the general provisions of the UDHR and the ICCPR. It also may serve as a valuable guide for the uniform interpretation and application of the various international statements on religious freedom in future.

\textsuperscript{563} These issues were addressed extensively in the South African Constitutional Court case of Gauteng Education.


\textsuperscript{565} Article 2.1.
The adoption of the CRC resulted in human rights standards pertaining to children rights being encompassed into a single legal instrument.\textsuperscript{566} By ratifying it, South Africa has bound itself to taking measures to protect children. As the next Chapter illustrates, its provisions have served as a standard for the development of children’s rights within the South African Constitution.\textsuperscript{567} The Children’s Act, South Africa’s primary legislation on children’s rights, which was enacted to supplement the children’s rights\textsuperscript{568} conferred by the South African Bill of Rights,\textsuperscript{569} makes specific mention of the importance of the CRC in its preamble. The CRC has established legally binding principles and international standards for states to meet in domestic legislation. Importantly, South Africa has incorporated the “best interests of the child” standard into its Constitution as well as into its child protection legislation, meaning that the best interests of the child are paramount in all matters pertaining to children.\textsuperscript{570}

The ACRWC is central to the topic at hand in that it amounts to the collective recognition of the education rights and religious rights of African children in particular and establishes a legal framework for their protection at regional level.\textsuperscript{571} It confirms and strengthens the global standards in the CRC. Although the Charter has not been incorporated into South African law by national legislation, it is still applicable in terms of section 233 of the Constitution, as discussed above. South Africa has also adopted numerous laws and other measures to give effect to the provisions of the Charter and its provisions have been referred to by the Constitutional Court.\textsuperscript{572} This indicates that the South African legal system is beginning to mirror the protection of rights as provided for in the Charter.

To sum up, South Africa has adopted specific constitutional provisions regarding the status of international law in South African law.\textsuperscript{573} In doing so, South Africa has made a commitment to honour their provisions and give effect to them.\textsuperscript{574} The influence of these international instruments is illustrated in Chapters 4, 5 and 6, which outlines and assesses the current South African law on children’s rights; education rights and freedom of religion respectively. In

\begin{itemize}
  \item\textsuperscript{566} Lloyd (n310) 30.
  \item\textsuperscript{567} Section 28.
  \item\textsuperscript{568} Section 28.
  \item\textsuperscript{569} Discussed in Chapter 4.
  \item\textsuperscript{570} Discussed in Chapter 4.
  \item\textsuperscript{571} Lloyd (n310) 15.
  \item\textsuperscript{572} Bhe at para 53-55.
  \item\textsuperscript{573} Maluwa (n307) 52.
  \item\textsuperscript{574} Follentine, A response by the Department of Social Services on “Sexual Exploitation of Children” 16 October 2001 3; Also, as mentioned above, South Africa has indicated its intention to ratify the ICESCR.
\end{itemize}
addition specific provisions of these international instruments form part of the discussion and analysis of some of the major problem areas pertaining to religion in schools.\textsuperscript{575}

\textsuperscript{575} See Chapter 7.
CHAPTER 4
CHILDREN’S RIGHTS

“The idea of children’s rights, then, may be a beacon guiding the way to the future- but it is also illuminating how many adults neglect their responsibilities towards children and how many children are too often the victims of the ugliest and most shameful activities.”\textsuperscript{576}

1 INTRODUCTION

Since the exercise of rights in a school setting concerns children in particular, it is submitted that children’s rights are vitally important to the discussion of the issues pertaining to religion in schools. Children’s rights are specifically protected in section 28 of the Constitution. Particularly important is the provision that in \textit{all matters} concerning the child, the best interests of the child are of paramount importance.\textsuperscript{577}

Aside from these specific children’s rights, children are also entitled to other rights in the Bill of Rights, such as the right to dignity;\textsuperscript{578} the right to equality;\textsuperscript{579} the right to basic education;\textsuperscript{580} freedom of religion;\textsuperscript{581} freedom of expression\textsuperscript{582} and freedom of association.\textsuperscript{583} With the exception of a few fundamental rights which are expressly not applicable to children due to their youth and stage in human development (for example the right to vote is restricted to “every adult citizen”),\textsuperscript{584} children are entitled to the same protection under the Bill of

\textsuperscript{576} Kofi Annan, United Nations Secretary General, September 2011.
\textsuperscript{577} Section 28(2) of the Constitution.
\textsuperscript{578} Section 10 of the Constitution.
\textsuperscript{579} Section 9 of the Constitution.
\textsuperscript{580} Section 29(1); Discussed in Chapter 5.
\textsuperscript{581} Section 15 of the Constitution; Discussed in Chapter 6.
\textsuperscript{582} Section 16 of the Constitution; Discussed in Chapter 6.
\textsuperscript{583} Section 18 of the Constitution; Discussed in Chapters 5 and 6.
\textsuperscript{584} Section 19(3) of the Constitution.
Rights as their adult counterparts. As is elaborated upon below, these rights can be utilised by children in asserting their own individual autonomy, depending on their age/maturity. These rights must be interpreted in line with the constitutional values of dignity, equality and freedom.

This Chapter discusses children’s rights, as protected by section 28 of the Constitution and the applicable provisions of the Children’s Act. It also discusses the best interests of the child principle and the relevant case law dealing with its application. Included in the discussion on the best interests of the child, is the consideration of the child’s views in matters pertaining to the child. Furthermore, this Chapter discusses the rights to dignity and equality - rights which are inherently connected to children’s rights. Other rights pertaining to children are more relevant to the topics discussed in Chapters 5 and 6 of this thesis and are therefore not discussed in this Chapter.

Overall, this Chapter forms the theoretical foundation for the recommendations (contained in Chapter 7) on the role that children’s rights should play when it comes to education legislation, policies and actions taken by school authorities on issues pertaining to religion in schools.

2 RELEVANT CHILDREN’S RIGHTS IN SECTION 28(1)

2.1 PROTECTION AND SUPPORT OF CHILDREN

During the years of colonial rule and apartheid many children endured profound suffering due to unequal education systems, religious discrimination and language disputes in education (amongst other reasons). Accordingly, the Bill of Rights, affords special protection to children in the form of children’s rights in section 28 of the Constitution, a section which

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585 De Waal & Currie (n18) 456.
586 Section 39(1) of the Constitution.
587 Namely, the right to basic education; freedom of religion; freedom of expression and freedom of association.
588 Discussed in Chapter 7.
589 Discussed in Chapter 2.
590 Section 28 states as follows:
"(1) Every child has the right-
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when
Devenish refers to as a “mini charter of rights” for children. A child is defined in this section as a person under the age of 18 years. In addition, the Children’s Act supplements the children’s rights afforded by section 28.

According to section 28, children’s rights, include: the right of all children “to be protected from maltreatment, neglect, abuse or degradation” and the right not to be required or permitted to perform work that interferes with the “child’s well-being, education, physical or mental health or spiritual, moral or social development.” These provisions further supplement the child’s rights to bodily and psychological integrity, dignity, equality and freedom and security of the person, enshrined in the Bill of Rights. They place a duty on the

removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that-
   (i) are inappropriate for a person of that child's age; or
   (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
   (i) kept separately from detained persons over the age of 18 years; and
   (ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.”

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591 Devenish (n52) 140.
592 Section 28(3). This provision coincides with Article 1 of the CRC.
593 Section 8 of the Children’s Act.
594 Section 28(1)(d).
595 Section 28(f)(ii); Correspondingly, the Basic Conditions of Employment Act 75 of 1997 prohibits children under the age of 15 from working, and prohibits those between the ages of 15 and 18 from performing unsuitable work, meaning work that places their well-being, education, physical or mental health, or spiritual, moral or social development at risk.
596 Section 12(2) of the Constitution.
597 Section 12 of the Bill of Right states that:
   “(1) Everyone has the right to freedom and security of the person, which includes
   The right-
   (a) not to be deprived of freedom arbitrarily or without just cause;
   (b) not to be detained without trial;
   (c) to be free from all forms of violence from either public or private sources;
   (d) not to be tortured in any way; and
   (e) not to be treated or punished in a cruel, inhuman or degrading way.
   (2) Everyone has the right to bodily and psychological integrity, which includes the right-
state and private persons to protect the safety and well-being of all children. In addition the Children’s Act lists as one its objectives, the protection of children from “discrimination, exploitation and any other physical, emotional or moral harm or hazards.” Accordingly, there is a duty on schools (including private schools) to protect learners’ safety, well-being and development so that the educational obligations of the institution can be fulfilled.

Correspondingly, section 24 of the Constitution provides that everyone has the right to an environment that is not detrimental to their health or well-being. This right protects learners from being exposed to a harmful environment at school. In order to implement this, section 8 of the Schools Act requires School Governing Bodies (SGB’s) to develop codes of conduct for learners which include policies relating to safety and school discipline. Prinsloo notes that:

“A safe school may be seen as one that is free of danger and where there is an absence of possible harm; a place in which all learners may learn without fear of ridicule, intimidation, harassment, humiliation or violence.”

In this regard, developmental harm to a child has been defined as: “harm that occurs due to events or conditions that prevent or inhibit children from achieving their maximum physical, social or academic potential.” This may include psychological harm caused by

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598 Section 2(f).
599 Section 8(2) of the Constitution.
600 Section 32 of the Children’s Act states that: “(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person’s care- (a) safeguard the child’s health, well-being and development”;
602 Bray “Codes of conduct in public schools: a legal perspective” 2005 25(3) SAJE 133 133.
603 Prinsloo “Sexual harassment and violence in South African schools” 2006 26(2) SAJE 305 312; Section 4(1) of the Regulations for Safety Measures at Public Schools proclaim all schools to be “dangerous object free zones.”
605 Section 7(1)(k) of the Children’s Act includes that “the need to protect the child from any physical or psychological harm” as a factor in determining the best interests of the child.
intimidation, exclusion from peer groups and discrimination, whether it be racial, classist or homophobic. The psychological harm to a child is a factor that must be considered in determining the best interests of the child. One could argue that religious pressure or coercion to conform to the majority’s beliefs or the stigma of being singled out as being “different” in an insensitive or degrading manner; could be included as development harm.

Also connected to the protection of children, section 28(1)(c) entitles every child to the right to “basic nutrition, shelter, basic health care services and social services.” This provision supplements the socio-economic rights provided for in sections 26 and 27 of the Constitution. Whereas sections 26(1) and 27(1) are both qualified by the statement “within its available resources”, meaning that the state must achieve the progressive realisation of the particular rights; section 28(1)(c) prima facie is not subject to any qualification. However, the case of Grootboom, confirmed that section 28(1)(c) does not impose on the state an obligation to provide shelter on demand to children and through them, to their parents. Ultimately, this means that the primary responsibility to provide support for children rests with their parents and only alternatively on the state. This case emphasised that children need to be protected from becoming “stepping stones …for their parents instead of being valued for who they are.”

2.2 PERSONAL AUTONOMY OF THE CHILD VERSUS THE DUTY OF CARE

Although a child has individual rights and personal autonomy (subject to age/maturity) from rights, such as freedom of religion, cultural rights, freedom of expression and the right to privacy, the Constitution recognises that children have a relationship of dependence with their parents. Parents have the responsibility of making decisions on behalf of children until such time as the child is of a certain age or is sufficiently mature to do so themselves. The

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607 Shariff (n606) 224.
608 Section 7(1)k).
610 Grootboom at para 71.
611 De Waal & Currie (n18) 457.
612 Robinson (n237) 11; De Waal & Currie (n18) 26.
613 Article 5 of the CRC recognises the right of parents to provide appropriate direction and guidance in the exercise by the child of the rights, in a manner consistent with the evolving capacities of the child.
relationship a child has with his or her parents is a relationship of responsibility, where the parental rights and duties exist to the benefit of the child.614

For example, parents (or guardians) are given the authority to conclude juristic acts on behalf of minor children, such as contracting on their behalf or assisting them with contracts.615 Some authors refer to this authority as an implied “agency” between the parent and child.616 Importantly, however, the contract law emphasises that a parent must “proceed in this matter with particular caution” in order to ensure that the minor is not prejudiced by actions taken on their behalf. Ultimately, the High Court, as upper guardian of all minors, has the power to protect the interests of the minor child, by replacing any consent given by a parent with its own.619 It is for this reason, for example, that the contract law would render unenforceable a contract in terms of which the vital interests of a minor are traded for money by a parent and that a guardian is forbidden in law to purchase a ward’s property.621

Although the Constitution does not expressly confer on parents the constitutional right of parental authority over their children,622 the reference to “care” in section 28(1)(b) acknowledges the particularly vulnerable position of children due to their lack of maturity and experience. Parental, family or alternative care assists the child to overcome this vulnerability.623 In this regard, Smith notes that schools and educators have a duty of care towards all learners since they act in loco parentis, that is, they assume the position of a

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615 Section 18(3)(b) of Children’s Act states that: “a parent or other person who acts as guardian of a child must assist or represent the child in administrative, contractual and other legal matters”; In terms of the common law, minors under the age of seven have no capacity to conclude contracts. The law confers upon their parent or guardian the right to concludes contracts on their behalf. Whereas, minors between the ages of seven and eighteen have limited capacity - they must be assisted by or obtain consent from their parent or guardian. See Nagel Commercial Law (2006) 66- 67.
617 See Grotius (translated) quoted in Visser et al (n616) 23.
618 23.
622 Article 18 of the CRC states that parents or legal guardians have the primary responsibility for the upbringing and development of the child.
623 Section 18 of the Children’s Act states that: “The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right- (a) to care for the child; (b) to maintain contact with the child.”
responsible parent over their learners.624 This would include not only looking after the safety and (physical and psychological) well-being of learners, but also maintaining school discipline.625 De Waal and Currie contend that the teachers of a child are “care-givers”, who although having no parental rights and responsibilities towards the child as such, must safeguard the child’s health, well-being and development.626

It is clear that the interest of children in maintaining a degree of personal autonomy should be seen within the context of the relationship of dependence that exists between a child and his or her parents or care-givers.627 However, it is also apparent that the older the child becomes, the more difficult it is to limit the child’s personal autonomy,628 since the duty to care for the child exists by virtue of the child’s age and lack of maturity.629

In fact, there are circumstances where the law has granted minor children the capacity to act independently, for example, in terms of section 129(3) of the Children’s Act, a child over the age of 12 may consent to surgical operations if he/she: a) has “sufficient maturity630 and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation”; and (b) is assisted by a parent or guardian. Provisions such as these recognise the state’s respect for the evolving capacities of children as they age/mature.631 It

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627 Bekink “‘Child Divorce’: a Break from Parental Responsibilities and Rights due to the Traditional Socio-Cultural Practices and Beliefs of the Parents” 2012 15(1) PER 178 184.

628 Bekink states: “[A]s a child grows older and the duty of care and support diminishes, justification for such intrusion will become progressively more difficult to prove as the child’s right to self-determination increases.” See Bekink (n627)185.

629 De Waal & Currie (n18) 457.

630 The importance of sufficient maturity was recognised in Gillick v West Norfolk and Wisbech Area Health Authority (1986 1 AC 112, 1985 3 All ER 402). The court quoted from R v D, 1984 AC 778, 1984 2 All ER 449, as follows: "In the case of a very young child, it would not have the understanding or the intelligence to give its consent. In the case of an older child, however, it must I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent.” Discussed in Elliston The Best Interests of the Child in Healthcare (2007) 78-85.

631 Strode et al “Child consent in South African law: Implications for researchers, service providers and policymakers” 2010 100(4) S Afr Med J 247 247; Alderson comments that “evolving capacities” can be interpreted in an emancipating way to mean that “as children gradually become more competent and independent there is a ‘dwindling’ need for adult control.” See Alderson Young Children’s Rights: Exploring Beliefs, Principles and Practices (2008) 86.
also recognises that in some instances children are capable of “acting autonomously and in their own best interests.”

A further example of the state curbing parental authority in order to protect the safety and well-being of children, is found in section 12 of the Children’s Act which states that: “Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.” This gives children the right to refuse to participate in the potentially detrimental religious/cultural practices customarily enforced upon them by their parents or communities. This provision places the state’s concern for the well-being of children above the religious and cultural rights of parents. It also gives domestic effect to Article 21 of the ACRWC.

In general, the state does defer to the methods utilised by parents in fulfilment of their duties towards their children, that is, unless state interference is required to protect the child. For example, in the case of Christian Education, the court found that the consent of

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632 Bentley “Can there be any universal children’s rights?” 2005 9(1) International Journal of Human Rights 119; In the High Court case of Christian Lawyers Association v Minister of Health 2005 1 SA 512 (T), the court upheld the constitutionality of legislation which allowed minors to consent to abortions without parental consent. The court stated (at para 56) that: “[T]he Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities.”

633 Discussed in Le Roux Harmful Traditional Practices, (Male Circumstances and Virginity Testing of Girls) and the Legal Rights of Children (2006); In terms of 7(1)(c)(ii) of the Children’s Act, a factor in determining the best interests of the child includes the child’s culture and traditions. This was confirmed in Ryland v Edrov 1997 (2) SA 690 (C): 707G, 1997 (1) BCLR 77 (C) at 90F-G, wherein the court found that “it is quite inimical to all the values of the new South Africa for one group to impose its values on another.” This implied that “the best interests of the child” requires taking into account the cultural and religious circumstances of each child. However, in Bhe at paras 234 and 235 the court noted that: “respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family.” This implies that religious and cultural rules should be respected without compromising the best interests of the child.

634 The Children’s Act lists marriage below the minimum age set by law, virginity testing, male circumcision and female genital mutilation as potentially harmful practices in section 12; This provision coincides with Article 24(3) of the CRC and Articles 1(3) and 21(1) of the ACRWC. See discussion in Sloth-Nielsen “A foreskin too far? Religious, ‘medical’ and customary circumcision and the Children’s Act 38 of 2005 in the context of HIV/Aids” 2012 16 Law, Democracy and Development 69.

635 Article 21(1) requires that: “States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.”

636 Article 5 of the CRC requires that States Parties respect the rights, duties and responsibilities of parents to provide guidance and direction to their children.

637 This is in accordance with international law. In referring to Articles 14(2) and 18(1) of the CRC, which recognise the rights of parents to guide their children, Moyo states that: “These provisions confer on parents considerable autonomy to educate, direct and guide their children as they see fit and in the absence of child abuse, the state should refrain from interfering with family autonomy and privacy.” See Moyo
the parent does not override the state’s concern for the safety and well-being of children. Similarly, in the case of *Hay v B*, the court held that parents may not withhold consent to medical treatment solely on religious grounds where a medical emergency and the child’s best interests require that consent to treatment be given. This case coincided with the Canadian Supreme Court case of *B(R) v Children’s Aid Society of Metropolitan Toronto*, in which the court ordered the temporary removal of a baby from its Jehovah’s Witness parents in order for the child to receive a life-saving blood transfusion.

These cases indicate that the ultimate responsibility for the protection of children rests with the state (with the High Court as upper guardian). This means that the rights of parents to

**638** See *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) para 52 (“Williams”); The issue of whether corporal punishment in schools is in itself degrading was touched upon but not decided by the court in *Williams*. Holding that judicially ordered corporal punishment of juveniles was in conflict with the Bill of Rights, Langa J stated that “the issue of corporal punishment in schools [was] by no means free of controversy” and that “the practice [had] inevitably come in for strong criticism”. In his view, the “culture of authority which legitimate[d] the use of violence [was] inconsistent with the values for which the Constitution stands.” (para 52); This opinion coincides with other foreign judgements, for example, in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NamSC), the court had to decide whether the use of corporal punishment in government schools was contrary to article 8 of the Namibian Constitution. Becker CJ stated: “that once one has arrived at the conclusion that corporal punishment per se is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind — even if very moderately applied and subject to very strict controls, the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.” (para 97C-E); Also, in the dissenting judgement of the European Commission of Human Rights case of *Campbell and Cosans v United Kingdom* (1980) 3 E.H.R.R. 531 para 531 at 556. Mr Klecker stated: “Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being . . . The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention.”

**639** 2003 3 SA 492 (W).

**640** See Malherbe & Govindjee “A question of blood: Constitutional perspectives on decision-making about medical treatment of children of Jehovah’s Witnesses” 2010 74 THRHR 61 -73; See also the UK case of *Re O (A Minor) (Medical Treatment)* (1993) 2 FLR 149; *Re R (A Minor) (Blood Transfusion)* (1993) 2 FLR 757.

**641** (1995) 122 DLR (4th) 1 (SCC); See also *The Queen v RJ and DA Moorhead*, TO 11974 High Court of New Zealand Auckland registry 2002 (unreported), in which Seventh Day Adventist parents, who observed strict dietary rules in the home, were convicted of manslaughter for (despite doctors warnings) refusing medical treatment to their child who died of broncho-pneumonia associated with anaemia and brain damage caused by a vitamin B-12 deficiency.

This is in accordance with Article 6(2) of CRC which states that: “States Parties shall ensure to the maximum extent possible the survival and development of the child.”

In [*Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 229G, in relation to section 28(1)(b) of the Constitution, the court held that: “[t]he duty to provide care and social services to children removed from the family environment rests upon the State. The government must provide appropriate facilities and meet the children’s basic needs. The duty cannot be restricted to pleading, on behalf of children, with private interests to furnish it with resources.” Couzens comments that the same can be said to apply in the context of the right to basic education in section 29(1)(a). See Couzens “Procurement
control the religious upbringing and decision-making with respect to their children may be limited by the state if necessary to protect children from harm.644 Ultimately, the state must oversee the well-being of children whether they are in the care of their parents or not.645 The state will restrain parental rights/consent where these rights undermine the legitimate interest of the state in protecting children or where these rights are seen to undermine the best interests of the child concerned.646

This standpoint coincides with comparable North American jurisprudence. For example, in the United States Supreme Court decision of Prince v Massachusetts,647 Rutledge J stated:

“And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well-being, the state as parens patriae may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor [sic] and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.” 648

Furthermore, in the Canadian case of P v S,649 L’Heureux-Dube J pointed out:

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644 Bekink (n607) 67.
645 Venter (n626) 93.
646 Moyo The relevance of culture and religion to the understanding of children’s rights in South Africa (2007) 70.
648 Paras 166-8; See Malherbe & Govindjee (n640); Contrastingly, in another United States example, Wisconsin v Yoder 406 US205 (1972), Burger CJ held that Amish parents could not be compelled to keep their children in school beyond the elementary level if they object to doing so on religious grounds – but the question was asked in the dissenting judgment as to whether the best interests of Amish children would be served by such a decision by denying them to access to basic secondary education. This decision can be criticised for putting the religious convictions of parents above the best interests of the child. See discussion in Freedman “Protecting religious beliefs and religious practices under s 14 (1) of the Interim Constitution: What can we learn from the American Constitution?” 1996 THRHR 667 671 and Carpenter “Beyond Belief - Religious Freedom under the South African and American Constitutions” 1995 3 THRHR 684 689.
“[I]n ruling on a child’s best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child’s best interests.”

Parental authority is often said to ground the legitimacy of parental attempts to transmit particular religious values to their children. The Constitutional Court has noted that:

“[p]arents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children.”

Parents are generally permitted to raise their children in accordance with their own religious or other beliefs. However, this must be done in a manner that is consistent with best interests of the child. In this regard, De Waal and Currie point out that the state has a strong interest in ensuring that parents do not further their own religious beliefs “through their children”, in a manner that is inconsistent with the rights and best interests of the child.

This was illustrated in the case of Kotze v Kotze, in which the court was presented with a divorce custody settlement between the parents of a three-year-old boy. The settlement agreement entailed that the minor child would be educated in and would fully participate in the activities of the Apostolic Church. The court refused to make the clause a part of the divorce order, holding that the clause was unenforceable and not in the best interests of the child.

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650 Para 317.
652 Christian Education at para 15.
653 De Waal & Currie (n18) 457; In the Danish case Kjeldsen, Busk Madsen & Pedersen v Denmark, Comm Rep, 1 E.H.R.R. 737 (Application no. 5095/71; 5920/72; 5926/72), 7 December 1976, the European Human Rights Court found that the inclusion of compulsory sex education into the school curriculum, did not constitute a failure to respect parent’s convictions on the matter.
654 2003 (3) SA 628 (T).
655 A child acquires religious rights through section 15 of the Constitution and Article 14 of the CRC.
656 Quoting from Girdwood v Girdwood (1995 4 SA 698 (C)), the court in Kotze v Kotze held that: “as upper guardian of all dependent and minor children, this court has an inalienable right and authority to establish what is in the best interest of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between parties can encroach on this authority.” (para 630H I).
clause restricted the freedom of choice of the child and placed him in “constraints from which he might never be freed.”

This case recognised that by a certain age/level of maturity the child may have his or her own opinion about religion that may run contrary to that of his or her parents. In other words, once a child a capable of making a decision about his or her religious beliefs, it is the child’s decision alone. The court in Kotze v Kotze held that indoctrination and forced observance of religious activities takes away a child’s freedom of choice and is detrimental to his or her development. Furthermore, the court rejected the argument that it is essential or at least useful to ensure that a child attends a church or participates in religious activities at a young age so that he/she can understand what the religion entails, until such time as he/she is mature enough to exercise his or her own “freedom of choice”.

This case has been criticised for not giving sufficient recognition to the rights of the parents regarding the religious upbringing of their children and for not taking sufficient cognisance of the child’s age. However, these criticisms aside, two important points can be derived from this discussion, namely that: 1) the best interests of the child is a crucial factor in decisions relating to the religious upbringing of a child and 2) freedom of choice when it

657 Paras 631-632: Feinberg quotes Jean-Jacques Rousseau who advised that “children must be allowed to grow up free of religion instruction until they were able to decide moral issues on their own terms.” See Feinberg Religious Schools and Education for Democratic Citizenry (2006) 125.
659 The court stated: “If a child is forced, be it by order of the parents, or by order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution, and which is expressly referred to in the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religious Belief, which is part of the United Nations Convention on the Rights of the Child, of which the State is a signatory.” (para 631E G). Discussed in Robinson “Children and the Right to Freedom of Religion: Kotze v Kotze 2003 3 SA 628 (T)” 2004 1 TSAR 203. Also discussed in Moyo (n646) 62.
660 The court stated at para 631E G: “there is a fallacy in this argument. It fails to appreciate fully the nature of the human being within the framework of religious dogma on it. Indoctrination (in the neutral sense) and the slavish adherence to certain oft repeated canons that seem to be generally accepted by one’s peers as the only truth often not only negates, but essentially destroys a person’s freedom of choice, inasmuch as it is extremely difficult to free oneself from these bonds, even if one has the intellectual and emotional capacity to do so at a later stage.”
661 Article 14(2) of the CRC states: “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…” and Article 5(1) of the Declaration states: “The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.”
662 Robison argues that a child’s own religious rights should not be recognised at three years old. See discussion in Robinson (n659) 206-207.
comes to the practice of religion, is essential to each (sufficiently mature) person’s development.\footnote{663}

Nonetheless, the clash between the authority of parents and the individual rights and best interest of the child, continues to be a controversial issue which requires frequent adjudication.\footnote{664}

\section{BEST INTERESTS OF THE CHILD: SECTION 28(2)}

\subsection{MEANING OF THE BEST INTERESTS OF THE CHILD}

This section deals with two key issues, namely: 1) the meaning of the best interests of the child and 2) the factors to be considered in determining the best interests of the child.

It is arguable that “the standard of the best interests of the child is the universal principle guiding the adjudication of all matters concerning the welfare of the child.”\footnote{665} Significantly, section 28(2) of the Constitution emphasises that the best interests of the child is the paramount concern in every matter relating to the child. This would include matters relating to education rights and the exercise of religious freedom in school. Correspondingly, section 6(2)(a) of the Children’s Act requires that the best interests of the child be respected, protected, promoted and fulfilled in all proceedings, actions or decisions in matters concerning a child. In addition, section 9 of the Children’s Act echoes this sentiment by stating that in all matters relating to the protection and well-being of children, the best interests of the child is paramount. It is important to take note that the best interests of the learner is only mentioned in the context of disciplinary hearings in the Schools Act\footnote{666} and is

\footnote{663}{This concept of freedom of choice and the limitation of freedom of choice is raised again in the discussion on compulsory religion education in Chapter 7; Alderson comments that: “Freedom of religion is often seen in liberal democracies as freedom to choose preferred religion and, for children, the right not to follow their parent’s religion.” See Alderson (n631) 103.}

\footnote{664}{Lerner (n534) 87.}

\footnote{665}{See Breen The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law (2002) 1.}

\footnote{666}{Section 8(5) mentions “safeguarding the interests of the learner and any other party involved in disciplinary proceedings.” Other than that, section 20(1) of the Schools Act states: “the governing body of a public school must- (a) promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school.”}
not mentioned at all in the National Policy on Religion in Education – the primary policy relating to religion in schools.\textsuperscript{667}

The best interests of the child standard developed from the common law rule that the best interests of the child must prevail in family disputes over custody.\textsuperscript{668} As a result, the principle has been applied primarily in cases relating to child custody. However, since the constitutionalisation of the principle, its application has been extended to all areas of law which affect children, including religious and educational matters (illustrated below). In the case of Minister of Welfare and Population Development \textit{v} Fitzpatrick and Others,\textsuperscript{669} the Constitutional Court stated that:

\begin{quote}
“In Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) must be interpreted to extend beyond those provisions.”\textsuperscript{670}
\end{quote}

This case emphasised that the application of the principle extends beyond the rights contained in section 28 of the Constitution.

The “best interests” principle has not been given exhaustive content in either South African law or in international or foreign law.\textsuperscript{671} It is an indeterminate concept, meaning that it has no specific definition.\textsuperscript{672} According to Heaton:

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\textsuperscript{667} This issue is dealt with in Chapter 7.\textsuperscript{668} Malherbe (n457) 267; Fletcher \textit{v} Fletcher 1948 (1) SA 130(A).\textsuperscript{669} 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).\textsuperscript{670} Para 17; Bekink & Bekink state: “With the emphasis on ‘every matter’, one can conclude that the standard of the best interest of the child is not only applicable to traditional family law matters, but to all legal matters concerning children.” See Bekink & Bekink “Defining the standard of the best interest of the child: Modern South African perspectives” 2004 1 \textit{De Jure} 21 22.\textsuperscript{671} Minister of Welfare and Population Development \textit{v} Fitzpatrick CCT 08/00; 2000 3 SA 422 (CC); 2000 7 BCLR 713 (CC) at para 18.\textsuperscript{672} Parker “The Best Interests of the Child – Principles and Problems” in Alston (ed) \textit{The Best Interests of the Child: Reconciling Culture and Human Rights} (1994) 26; Elliston writes that the meaning is unspecified since setting out all possible considerations would be a “Herculean task”. See Elliston (n630)10; Visser “Some ideas on the ‘Best interests of the Child’ Principle in the context of Public Schooling” 2007 (70) \textit{THHR} 459 459. See criticisms of this indeterminate nature in Schäfer (n658)159; de Waal \textit{et al} states: “Although the Constitution has been widely applauded for pledging to uphold the paramount importance of the best interests of the child (s 28(2)), it is still a controversial topic, because it has not yet provided a reliable and determinate standard. In the absence thereof, educators need to explore all avenues opened up by the Constitution (and the Schools Act) to consolidate a firm foundation for accountable education.” See de Waal \textit{et al} “An education law analysis of “the learner’s best interests” 2001 19(4) \textit{Perspectives in Education} 151 152.
“it is impossible and undesirable to try to give a comprehensive definition of what should be understood under the concept ‘best interest of the child’, because the concept cannot have a fixed meaning and content that are valid for all communities and all circumstances.”

To answer what would be in the best interests of the child:

“all options must be known…all possible outcomes of each option must be known…the probabilities of each outcome occurring must be known and …the value attached to each outcome must be known.”

Correspondingly, in the case of S v M, the Constitutional Court held that when determining the best interest of a child, courts must focus on each individual child and examine “the real life situation of the particular child involved.” This means that the unique circumstances of each individual child should be considered. To apply a fixed meaning or formula for the sake of certainty, regardless of the circumstances, would in fact be contrary to the best interests of the child concerned.

Since the best interest of the child principle is not constitutionally defined, its application is dependent upon judicial interpretation, meaning that what is in a child’s best interest, is obviously a question of fact that must be determined according to the circumstances of each case. It requires an individual, contextualised assessment of all the factors in relation to each child concerned.

Significantly, in the case of McCall v McCall ("McCall"), the court formulated a comprehensive list of criteria to determine which custody arrangements would best serve the interests of the child concerned. Although the factors in McCall were specific to custody

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673 Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 53 THRHR 95 98.
674 95.
676 Para 24.
677Para 24.
678 Barrie “The Best Interests of the Child: Lessons from the First Decade of the New Millennium” 2011 1 TSAR 126 126.
680 1994 3 SA 201 (C).
681 In paras 204 1/J- 205G the court set out the criteria as follows: “(a) the love, affection and other emotional ties which exist between parent and child,
cases, the list provided guidance to courts as to what factors should be considered in determining the best interests of the child in other cases. Subsequent to *McCall*, the courts were provided with a list of factors developed for and included in the Children’s Act, which

and the parent’s compatibility with the child;
(b) the capabilities, character and temperament of a parent, and the impact thereof on the child’s needs and desires;
(c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of and sensitivity to the child’s feelings;
(d) the capacity and disposition of the parent to give the child the guidance which he or she requires;
(e) the ability of the parent to provide for the basic physical needs of the child, the so-called creature comforts, such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
(j) the desirability or otherwise of keeping siblings together;
(k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same sex matching.”

Barrie states that: “King J’s criteria have been quoted extensively in custody cases and have been accepted by South African courts as instructive and valuable in the application of the best interests of the child standard.” See Barrie (n678) 126; See Bethell v Bland 1996 2 SA 194 (W) 208F-209F; Krasin v Ogle 1997 1 All SA 557 (W) 567f-569c; Madiehe (born Ratlehogo) v Madiehe 1997 2 All SA 153 (B) 157g-158c; Ex parte Critchfield 1999 3 SA 132 (W) 142E-F; Meyer v Gerber 1999 2 SA 650 (O) 655H-I; Fitschen v Fitschen 1997 JOL 1612 (C) par 6-7, 34-37.

Section 7 states:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
(a) the nature of the personal relationship between-
   (i) the child and the parents, or any specific parent; and
   (ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards-
   (i) the child; and
   (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child’s circumstances, including the likely effect on the child of any separation from-
   (i) both or either of the parents; or 40
   (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; the need for the child-
   (i) to remain in the care of his or her parent, family and extended family; and
   (ii)to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child’s-
   (i) age, maturity and stage of development;
   (ii) gender;
   (iii) background; and
can be considered in determining the best interests of the child. This includes factors such as: taking into account the child’s “physical and emotional security and his or her intellectual, emotional, social and cultural development”\(^\text{684}\) and the “need to protect the child from any physical or psychological harm” that may be caused by exposing the child to maltreatment, abuse or degradation.\(^\text{685}\) It is evident that the application of section 7 is wider than the list provided in \textit{McCall}. It is not limited to parents but applies equally to a care-giver or other relevant person in the child’s life - which could include teachers/school staff. The inclusion of section 7 in the Children’s Act is commendable in that it may assist in achieving consistency in the way in which the best interest of the child standard is applied.\(^\text{686}\) However, its impact on judicial decision-making, remains to be seen.\(^\text{687}\)

Although section 7 does not expressly suggest it,\(^\text{688}\) it can be argued that courts must consider all factors including, but not limited to those mentioned in section 7, when determining what is in the best interest of a child.\(^\text{689}\) These sentiments were expressed by Sachs J in \textit{S v M}\(^\text{690}\) where he referred to a list of factors enumerated in section 7 of the Children’s Act and stated that:

“[s]uch factors include, but are not limited to, the nature of the personal relationship between the child and the parents; the

(h) the child’s physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; the need to protect the child from any physical or psychological harm that may be caused by-
   (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
   (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment,
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or
(2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.”

\(^{684}\) Section 7(1)(h).
\(^{685}\) Section 7(1)(k); Similar ‘best interests’ checklists were introduced in other jurisdictions, such as section 1(3) of the English Children’s Act 1989 (UK).
\(^{687}\) In \textit{Blumenow v Blumenow} Unreported 2007/5408 (2007, W), \textit{Ngobeni v Ngobeni} Unreported 39972/05 (2008, T) and \textit{R v R} Unreported 1452/2008 (2009, GNP), the court relied on the checklist set out in \textit{McCall v McCall} and ignored the more comprehensive list in section 7 of the Children’s Act. See Schäfer (n658) 159.
\(^{688}\) Heaton notes that a major criticism of section 7 is the fact that the list of factors is a closed list- however; it is unlikely that the provision will be interpreted that way. See Heaton (n679) 4.
\(^{689}\) Songca (n686) 348.
\(^{690}\) Mentioned above.
child’s physical and emotional security; the need for a child to be brought up within a stable family; and the relevant characteristics of the child.”

As for the meaning of the phrase “paramount importance” with reference to the best interests of the child, South African jurisprudence reflects that this phrase does not mean that children’s interests are absolute or automatically supersede the rights of others in circumstances where a conflict of rights arises. According to Skelton:

“[d]espite the emphatic words of “paramount importance”, [section 28(2)] does not serve as a trump to automatically override other rights, and as a right in a non-hierarchical system of rights, is itself capable of being limited.”

Correspondingly, in S v M, the court confirmed that although the word “paramount” is emphatic, it cannot be understood to mean that the interests of children must in all circumstances override all other considerations. In other words, the term “paramount” does not mean that all other constitutional rights may simply be disregarded, or that the best interests of the child may not be limited. This means, for example, if a child wishes to assert their individual religious freedom at school, a balance would need to be struck between the interests of the child; the interests of other learners and the interests of the state and school. In the case of very young children, the interests of the parents may also be a factor. It must be borne in mind that the educational objectives of the school, as the place where

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691 Para 12 fn10.
694 Para 249 B–C; In Centre for Child Law v Minister of Constitutional Development CCT 98/08 [2009] ZACC 18, para 29, Cameron J interprets the provision that the “child’s best interests are of paramount importance” to mean that the child’s interests are “more important than anything else.” However, Cameron J notes that a wide spectrum of factors is relevant in determining the best interests of the child.
695 Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC); para 20; Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC) (also reported as LS v AT and Another 2001 (2) BCLR 152 (CC): para 29; S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC) (also reported as M v S 2007 (12) BCLR 1312 (CC)): paras 25, 26, 42. See also the obiter statement in De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others 2004 (1) SA 406 (CC), 2003 (2) SACR 445 (CC), 2003 (12) BCLR 1333 (CC): para 55; See Discussion in Heaton (n679) 4.
children realise their right to a basic education, cannot be completely undermined in favour of other rights.\textsuperscript{696}

\section*{3.2 \textsc{interpretation of the best interests of the child in case law}}

Since the adoption of the Constitution, there have only been a few cases in which the “best interests of the child” principle has been applied in the context of education. These cases are briefly discussed below.

In \textit{Laerskool Middelburg en \textquotesingle n ander v Departmentshoof: Mpumalanga Department van Onderwys en andere} ("Laerskool Middelburg"),\textsuperscript{697} the applicant, an exclusively Afrikaans-medium school, sought to set aside a decision to declare the school a dual-medium institution and in turn, admit learners who required to be taught in English. The court emphasised that the capacity of other schools which utilised the desired medium of instruction (English) had to be considered before the status of a single-medium school could be altered. However, the court found that the parents had selected this particular school because it had an excellent reputation. Therefore, on the basis of the best interest of the child principle, the court ordered that the learners be allowed to remain in the school and that they be taught in English.\textsuperscript{698} The court in \textit{Laerskool Middelburg} found that the best interests of the child outweighed the rights of the school to maintain is language medium in this case.

In the case of \textit{Western Cape Minister of Education and others v Governing Body of Mikro Primary School and another} ("Mikro"),\textsuperscript{699} the Department of Education attempted to persuade the school to change its language policy from a single-medium (Afrikaans) school into a parallel medium school, where English learners could receive instruction in English. The school refused to do so, but eventually received a directive from the Head of the Provincial Education Department, instructing the school principal to admit certain learners, and to have them be taught in English. The Supreme Court of Appeal ordered the removal of learners from Mikro Primary and the placement of the learners at another suitable school, taking into

\begin{itemize}
\item \textsuperscript{696} The school’s duty to limit religious freedom is discussed in Chapter 6.
\item \textsuperscript{697} (2002) 4 All SA 745 (T); See discussion in Arendse “The Obligation to Provide Free Basic Education in South Africa: an International Law Perspective” 2011 14(6) PER 97 108.
\item \textsuperscript{698} At 754-756.
\item \textsuperscript{699} (2005) 3 All SA 436 (SCA).
\end{itemize}
The divergent outcomes of *Laerskool Middelburg* and *Mikro* illustrates that the best course of action to take in order to serve the best interests of the child is different in each case.

More recently, the Constitutional Court delivered a landmark judgment pertaining to children’s rights in the context of education, in the case of *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (“*Rivonia*”). In this case, the Head of the Gauteng Department of Education (HoD) instructed the school principal to enroll a Grade 1 learner in the school, after the learner had been told by the school that the school was already full. The SGB and the school argued that the HoD’s instruction was unlawful in that it violated the SGB’s right to determine the school’s admissions policy. In the High Court it was held that SGBs do not have the unqualified power to determine admission policies or the maximum capacity at state schools. The final say rests with the provincial education department. This serves as a safeguard for the HoD to address any systemic imbalances in the admission process in Gauteng schools, thereby ensuring that provision is made for unplaced learners in the schools that are best placed to admit them.

The school contended that it had utilised private funding to ensure that its learner-to-class ratio was kept low in order to guarantee a certain quality of education for its learners. In this regard, the High Court held that the Constitution does not allow for the interests of a few learners to supersede the right of all other learners in the area to receive a basic education.

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700 Para 48.
701 CCT 135-12 (“*Rivonia*”).
703 Governing Body of Rivonia Primary School v MEC for Education: Gauteng Province Case 11/08340 at para 78.
704 Para 80. In 2010, the HOD distributed the Circular (Circular 21 was issued in terms of section 5(7) of the Act and Regulation 2(1) of the Admission Regulations promulgated by General Notice No. 4138 of 2001 under the Gauteng School Education Act No. 6 of 1995) regulating the admissions to public schools in Gauteng, Regulation 13(1)(a) of which provides that if a principal refuses to admit a learner to a school, he or she must provide reasons in writing for his or her decision to the HoD and the parent and the HOD must either confirm or set aside the decision made by the principal before there is a need for the MEC to consider an appeal against a refusal of admission (para 49).
705 Para 49.
706 Para 72. The High Court stated that: “although all schools are now open to all races, the effects of apartheid’s racially exclusive zoning and forced removals still meant that the majority of formerly white schools remain disproportionately white, while the majority of black schools are still predominantly
Furthermore, it is government’s responsibility to intervene and ensure an equitable distribution of learners across all schools. The High Court therefore made a decision based on the best interests of all learners. This decision was, however, overturned on by the Supreme Court of Appeal - with less emphasis on the best interest of the child principle.

Significantly, the Constitutional Court found that the Supreme Court of Appeal had “erred in finding that the Gauteng HoD could only exercise ... power ‘in accordance with the [school’s admission] policy.’” The court held that although the SGB may determine capacity as part of its admissions policy, “the scheme of the Schools Act in relation to admissions indicates that the Department maintains ultimate control over the implementation of admission decisions.”

In its judgment, the Constitutional Court placed significant emphasis on the best interests of the child principle. It emphasised that the duty on the state and SGB’s “to cooperate and attempt to reach an amicable solution is intimately connected to the best interests of the child.”

“The question we face as a society is not whether, but how, to address this problem of uneven access to education. There are black. Moreover, traditionally “white” schools have systemically lower learner-to-class ratios than “black schools.” (paras 70-71). See also City Council of Pretoria v Walker 1998 (2) SA 363; 1998 (3) BCLR 257 (CC) at para 32 in which the court stated that: “The effect of apartheid laws was that race and geography were inextricably linked.”

Para 74; Section 7 (2) of the Constitution; See Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 74; “In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.”


See also Bannatyne v Bannatyne and Another 2003 (2) SA 363 (CC); 2003 (2) BCLR 111, in which the court stated that the best interest of the child should override in the enforcement of a maintenance order.

Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others Case (161/12) [2012] ZASCA 194; 2013 (1) SA 632 (SCA); [2013] 1 All SA 633 (SCA) (30 November 2012). The SCA held that in terms of s 5(5) read with s 5A of the South African Schools Act 84 of 1996, the SGB of a public school has authority to determine its admission policy, including the capacity of the school (para 37). The SGB must apply that policy rationally and reasonably (para 40). Although the court briefly mentioned the importance of a school upholding the best interests of the child principle, it held that that there was no indication that the school has set its capacity unreasonably or irrationally (para 7).


Para 52; Phakathi “Province has final say on school admissions, says Constitutional Court” at http://www.bdlive.co.za/national/education/2013/10/03/province-has-final-say-on-school-admissions-says-constitutional-court (Date accessed: 4 October 2013).

Para 77.
various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children. The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.”

This decision will have significant impact on the education of thousands of South African learners.

Lastly, in the case of Freedom Stationery (Pty) Ltd v The Member of the Executive Council for Education, Eastern Cape (“Freedom Stationery”),^714^ the Centre for Child Law was admitted as *amicus curiae* to represent the rights of children affected by an irregular tender process which involved the supply of textbooks to Eastern Cape schools. The court considered children’s rights, including children’s education rights in deciding whether or not to grant an interim interdict in favour of the applicants. Couzens comments that this case is a clear indication that children’s constitutional rights may shape the rights and duties of the state and the bidders in the tender process.^715^

The *amicus* argued that the interests of the learners had to be considered in balancing the rights of the parties in the case and furthermore, that the best interests of the children involved, should be the paramount concern.^716^ This argument entailed that right to education (as a children’s right) should outweigh the rights of the applicant to just administrative action. The court rejected this argument,^717^ but nevertheless, acknowledged the importance of protecting the rights of children by holding the state accountable for their provision of services to schools. Unfortunately, the court did not address the application of the best interests of the child principle in this case, despite it being relied upon. Had it done so, the jurisprudence on the principle may have been enriched.^718^

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713 Para 2.
715 Couzens (n643) 392.
716 Freedom Stationary at para 31.
717 Para 33.
718 Couzens (n643) 400.
From the above, it is clear that the best interest of the child principle is indeterminate and its application is not without complications. Despite this, it is a principle that aims to protect the interests of children both collectively and individually and promote a child-centred approach in all cases involving children. In general, it creates “a framework for addressing the entire range of major issues affecting children”\textsuperscript{719} and may therefore be useful as a safe-guard on the official action taken against children in the school environment.\textsuperscript{720}

### 3.3 THE SCHOOL’S INTERESTS VERSUS THE CHILD’S INTERESTS

As alluded to above, there are circumstances in which the best interests of the school may come into conflict with the best interests of the children within the school.\textsuperscript{721} Section 20(1)(a) of the Schools Act states: “the governing body of a public school must promote the best interests of the school.” Furthermore, in the case of \textit{Head of Department of Education: Mpumalanga v Hoerskool Ermelo (“Hoerskool Ermelo”)},\textsuperscript{722} the Constitutional Court had to consider the best interests of the learners in a school setting. The court directed the SGB to reconsider the school language policy with due regard not only for the best interests of its learners and of the school but also the interests of the community in which the school is located.\textsuperscript{723}

Undoubtedly, there may be a paradox in trying to protect a learner’s interests and the school’s/community’s interests at the same time. This raises a concern over what measures a school is expected to take when an individual child’s interests conflict with their school/community interests in cases involving a learner’s assertion of their religious freedom at school. For instance, a learner child, in asserting their individual freedom of religion, may deliberately disobey a school’s code of conduct which has been drawn up by the SGB (as the

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\textsuperscript{719} B v M 2006 (9) BCLR 1034 (W) at para 41.

\textsuperscript{720} Malherbe (n457) 285; It has been suggested that “the inclusion of a general standard (‘the best interests of the child’) for the protection of children’s rights can become a benchmark for review of all proceedings in which decisions are taken regarding children. And even if, as sceptics might aver, the best interest criteria is simply an opportunity to pay lip service to the interests of children, it still provides a minimum guarantee that the interests of children cannot be ignored.” See Sloth-Nielsen “The contribution of children’s rights to the reconstruction of society: Some implications of the constitutionalisation of children’s rights in South Africa” 1996 \textit{4 International Journal on Children’s Rights} 323-342.

\textsuperscript{721} Section 20(1) of the Schools Act is discussed in Chapter 5; Section 15 of the Constitution and reasonable accommodation are discussed in Chapter 6.

\textsuperscript{722} CCT 40/09; (2009) ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

\textsuperscript{723} Para 99.
elected representatives of the school communities) in consultation with parents; educators and learners in the best interests of the school.\textsuperscript{724}

In the case of \textit{Pillay}, the Constitutional Court found that reasonable accommodation of the individual learner’s religious practice (the wearing of a nose stud) was the correct approach in that particular case.\textsuperscript{725} Both the courts in \textit{Pillay} and \textit{Antonie v Governing Body, Settlers High School} (“\textit{Antonie}”),\textsuperscript{726} ruled in favour of the learners’ individual rights and did not support school decisions to enforce its code of conduct, which indirectly discriminated against them.\textsuperscript{727} However, accommodation may not be the best approach in other cases. For example, it is still permissible in terms of section 20(1) of the Schools Act for a school to have policies in place which set rules for all learners from the majority religious perspective if that is in the best interests of a particular school (which may include a religious ethos).\textsuperscript{728} For example, a public school with a significant Christian majority can have a Christian religious ethos. This is permitted in order to acknowledge the religious majority and is not considered to be unfair.

The following fictional scenario illustrates the point: In a predominantly Christian, South African public school, a Muslim female learner, insists on wearing a full \textit{burka} to school in assertion her individual religious/cultural rights. The school has a Christian ethos to cater to its religious composition. The school’s code of conduct has been drawn up by the SGB (as the elected representatives of the school communities) in consultation with parents, educators and learners, in what they believed were the best interests of that particular school/community.\textsuperscript{729} The wearing of a \textit{burka} is found to be in contravention of the school’s code of conduct. The decision is based on the fact that the wearing of full religious garb completely undermines the need for a school uniform; it makes pupils difficult to identify (which is a security issue) and is regarded as an act of proselytism\textsuperscript{730} by the majority of the school and therefore “threatening” to their freedom of religion. The school had in the past made exceptions for a

\textsuperscript{724} In terms of section 8(1) of the Schools Act; Joubert “Education, law and leadership that promotes the best interests of students in South Africa” 2009 14(2) \textit{International Journal of Law & Education} 10.
\textsuperscript{725} Para 79.
\textsuperscript{726} 2002 (4) SA 738 (C) (“\textit{Antonie}”). In this case, the Cape High Court adjudicated upon the issue of a learner wearing Rastafarian dreadlocks and a cap (that matched the prescribed school colours) to school, allegedly in contravention of the school’s Code of Conduct. The court ruled in favour of the learners religious freedom. The Code depicted a number of forbidden hair styles, but did not say anything about dreadlocks and yet the SGB expelled the learner after finding her guilty of serious misconduct.
\textsuperscript{727} Para 15.
\textsuperscript{728} See also section 15(2) of the Constitution discussed in Chapter 6.
\textsuperscript{729} Joubert (n724)10.
\textsuperscript{730} Meaning an attempt to “to induce someone to convert to one’s faith”. See definition at http://www.merriam-webster.com/dictionary/proselytize (Date accessed: 9 December 2012).
simple scarf to be worn over the head by Muslim learners, along with the school uniform. This was considered to be reasonable accommodation of the religious practice by the school. However, in this case, the learner’s application for an exemption from the code of conduct is denied on the basis that permitting a full *burka* would undermine the legitimate purpose of a school uniform and would take accommodation too far when considering the best interests of the school and community.

Importantly, the case of *Pillay*, the Constitutional Court case which dealt with accommodation of religious and cultural dress, did not abolish school uniforms and did permit schools to prohibit religious and cultural practices which place an unreasonable burden on the school. In the above scenario the school’s/community’s interests and the individual learner’s interests, conflict. In this case, the conflict would be in order. The school would be correct in prohibiting the wearing of the full *burka* as it takes reasonable accommodation too far within that particular school (with a significant Christian majority). On the other hand, if the school prohibited all head coverings with no exceptions, this may be considered to be unreasonable. The degree of accommodation expected for a child’s individual rights depends on the nature of the religious practice and the nature of the environment concerned.

The above scenario indicates that there may be circumstances in which upholding a child’s individual rights would undermine the order of the educational process of a school or undermine the rights of other learners. In this case the rights of the child may have to be limited. For example, a school may wish to do random drug searches in order to protect the safety of all learners. This would be considered a justifiable limitation of the child’s right to privacy in terms of the *Regulations for Safety Measures at Public Schools* (“the Regulations”).

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731 *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School ("Begum")* House of Lords [2006] UKHL 15, 2 All ER 487.

732 Lenta states: “the school uniform is an apparently neutral institutional practice that is not directed at any religious group, but nevertheless has a disproportionately burdensome impact on Muslim women….To the extent that such individuals are deprived of schooling because their beliefs bring them into conflict with the uniform regulations, this would seem to constitute a denial of an equal educational opportunity. The accommodation [of headscarves] is reasonable and should be granted and exclusion of Muslim pupils is an unfair denial of an educational opportunity.” See Lenta “Muslim headscarves in the workplace and in schools” 2007 124(2) *SALJ* 296 312-313.

733 Malherbe (n457) 269; See discussion in Terblanche & Davel “Safety measures and the rights of learners” 2004 1 *De Jure* 85.

734 GN 1040 GG 22754 of 12 October 2001. Notice in terms of section 61 of the South African Schools Act 84 of 1996. In terms of section 4(1), schools are drug free zones. Section 4(3) allows schools to conduct drug
A similar clash of rights could arise from the practice of dangerous religious observances in the school environment. For example, a child may wish to perform animal sacrifice or carry a dangerous object such as a ceremonial knife to school for religious reasons (as was the case in Multani v. Commission Scolaire Marguerite_Bourgeoys and Attorney General of Quebec). If, for example, a South African, Zulu, learner applies for a religious and/or cultural exemption to carry a traditional weapon (such as a spear) to school, the individual rights of that learner would have to be weighed up against the school’s duty to protect the physical safety of all learners in the school. The Regulations proclaim all schools to be “dangerous object free zones” in the interests of protecting the safety of all learners. If religious practices such as these undermine the objectives of the Regulations, permitting them would take accommodation too far. Contrary to the Multani judgement mentioned above, in the South African context, it is submitted that objectively harmful religious practices that compromise the safety of the learners should not be permitted in schools. This is in

735 searches without a warrant. This is also a limitation on the right to privacy as contained in section 14 of the Constitution.

736 In the case of Church of Lukumi Babalu Aye, Inc v City of Hialeah 508 US 520 (1993), the US Supreme Court invalidated municipal laws which prohibited animal sacrifice practised by the Santeria religion. Since these were not neutral laws of general applicability, but deliberately targeted one religious group, the Supreme Court determined that they were invalid unless they served a compelling state interest. It is submitted that in the school context, such a practice may be considered to be too dangerous.

737 The case of Multani v. Commission Scolaire Marguerite_Bourgeoys and Attorney General of Quebec, (“Multani”) 2006 SCC 6, involved a Sikh boy’s right to wear a kirpan (or ceremonial knife) to school. The court ruled that the schools absolute prohibition against wearing a kirpan infringes on the learners freedom of religion and such an infringement is not justifiable (para 15). This decision shows that the Canadian courts are attempting to reduce the unnecessary hardship endured by minorities by placing a duty on the school to make reasonable accommodation for minorities. Similarly to the judgement in Pillay; the court stated that a total prohibition devalues religious symbols and sends a message to students that certain religions are less important than others (at para 50). The school needed to protect freedom of religion by showing respect to minorities and therefore needed to explore a reasonable compromise.

738 Section 4(1); Section 1(c) defines dangerous object as “any article, object or instrument which may be employed to cause bodily harm to a person.” Thomas mentions a case in which the controversy was resolved by allowing a child to carry a smaller version of kirpin that was “securely fastened into a cloth pouch” to be worn under the clothing, so as not to be visible. However, this solution distressed other parents, one who commented: “As a parent, is the life and safety of a child more important than religious freedom? I think so.” See Thomas (n51) 207-208. In the case of S v RB; S v DK 2010 (1) SACR 447 (NCK), the court concluded that the best interests of a child may be limited to protect the safety of other children; Lenta comments as follows: “Thus, while the refusal to permit the Sikh schoolboy to carry a kirpan represents a denial of an educational opportunity and an abridgment of his freedom of religion, the school has a clear interest in enforcing a ‘zero tolerance’ policy that rules out some students carrying dangerous weapons.” See See Lenta (n732) 316: In a recent case in European Court of Human Rights, a claimant, Mrs Chaplin was switched to a desk job after she refused to take off a crucifix which hung round her neck. The claim was rejected on the grounds that the removal of the necklace was necessary to protect the health and safety of nurses and patients. See Grierson “European Court of Human Rights rejects Christians’ cases that their religious rights were violated by employers” at http://www.independent.co.uk/news/uk/home-news/european-court-of-human-rights-rejects-christians-cases-that-their-religious-rights-were-violated-by-employers 8634687.html (Date accessed: 1 June 2013).
accordance with the Regulations, section 24 of the Constitution and the schools duty of care in terms of section 28(1)(b) of the Constitution.

From the above, it is clear that in the case of conflicting interests, the courts will have to strike a balance between the interests of the school/community and interest of the learners in each particular case. The courts will have to consider the nature of the right that the child wishes to assert, its impact on the particular school environment and its impact on the rights of other learners within the environment.

3.4 THE “VOICE” OF THE CHILD

This section focusses on the importance of the “voice” of the child as an aspect of the best interests of the child. Based on this discussion, Chapter 7 illustrates the practical importance of children being allowed to express their own views in relation to matters such as the sincerity of their beliefs when applying for religious/cultural exemption in schools.

Importantly, section 7(g) of the Children’s Act includes the child’s maturity and developmental stage as a factor in determining the best interests of the child. In addition, section 10 of the Children’s Act provides every child “of such an age, maturity and stage of development” with a separate, self-standing right to participate in any proceedings regarding that child. In this regard, the Children’s Act recognises that children are human beings and individuals and as such have a right to express their views in matters that affect them. This would include having regard for the views of the child on matters pertaining to religion in schools or the contents of a school’s code of conduct. As Alderson states:

739 See Centre for Child Law “The Best Interest of the Child” at http://www.roylaw.co.za/home/article/the-best-interest-of-the-child/pageid/children (Date accessed: 1 October 2012); Jamieson states that in accordance with international and regional law, the South African Constitution and South African legislation: “Children are entitled to participate in decisions and dialogues that affect them as individuals, and as a group...This includes everything from dialogue with professionals about children’s own care, treatment or education, to discussions about policy development and budget allocation.” See Jamieson “Children’s rights to participate in social dialogue” 2010/ 2011 South African Child Gauge 22 22.

740 Songca (n686) 344; van Vollenhoven et al “Freedom of expression and the survival of democracy: has the death knell sounded for democracy in South African Schools?” 2006 40 Journal of Education 120 120; The precursor to the inclusion of section 10 in the Children’s Act, was Van Reenen J’s views expressed in Fitschen v Fitschen 1997 JOL 1612 (C). Van Reenen J recognised that in addition to the factors listed in the McCall, South African courts would in the future be compelled to give more weight to the recognition of the views of the children who are old enough to form informed opinions.
“To consult children, respects them, and thereby sets examples which help them respect themselves and other people, as part of the duty of care which adults and children have towards others….Adults can give more effective care when they use information from children.”

As mentioned above, in McCall v McCall, the courts criteria for upholding the best interests of the child include “the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration.” One way of implementing the best interests of the child principle is by reference to what the child would choose for him or herself in a specified hypothetical situation. Schäfer, however, asserts that a decision-maker cannot merely defer to the child’s wishes. The best interests of the child may require something other than what the child wants. However, section 10 of the Children’s Act ensures that a decision-maker cannot disregard the child’s wishes or presume to know what they are: the child’s views must be “ascertained” and “considered” as part of the assessment of what is in the best interests of the child.

In addition, section 31(1) of the Children’s Act mentions giving “due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development” in certain matters affecting children. This principle is also articulated in Article 12 of the CRC and Article 4(2) ACRWC, as discussed in Chapter 3. In fact, child participation under the CRC is considered to be one of the four pillars of the CRC and is regarded as giving the CRC its “soul”.

Importantly, case law indicates that South African courts are inclined to take into account the maturity rather than the age of the child when determining the weight that should be given to the views of the child. For example, in the case of Meyer v Gerber, the court found that the 15 year old boy in question was emotionally and intellectually mature enough to make an

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741 Alderson (n631) 141.
742 1994 3 SA 201 (C).
743 Paras 204 I/1- 205G.
745 Schäfer (n658) 166; Jamieson writes: “In short, everyone who works with children has a responsibility to respect children’s right to participate, and anyone – including parents – making decisions or taking actions that affect children has a duty to listen to their views and consider these seriously.” See Jamieson (n739) 29.
746 Sloth-Nielsen (n367) 401.
748 1999 3 SA 550 (O).
intelligent decision and that due weight should be given to his opinion. In *De Groot v De Groot*,\(^749\) the court was unwilling to give considerable weight to the views of young teenagers on the basis that they were immaturity formed.\(^750\)

In the case of *Pillay*, the school\(^751\) contended that since the learner did not testify on her own behalf it was impossible to determine if discrimination had in fact occurred and, even if it was found that there was discrimination, such discrimination could not be said to be unfair.\(^752\) The court held that:

> “It is always desirable, and may sometimes be vital, to hear from the person whose religion or culture is at issue. That is often no less true when the belief in question is that of a child. Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf.”\(^753\)

This case indicated that the expression of the child’s own viewpoint, although not decisive, was indeed desirable. However, the court found that the failure of the learner to testify was not fatal to her case, since the truthfulness of her parent’s testimony was not in question in this case.\(^754\)

Furthermore, in *Christian Education*, a separate, but important issue raised by Sachs J at the end of the judgment, was the absence of the “voice” of the learners concerned.\(^755\) He stated that:

> “actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual experiential foundations for the balancing exercise in this difficult matter would have been more secure.”\(^756\)

According to Sachs J, the learners concerned were placed in a position of conflict. On the one hand, they themselves may be adherents to the faith and participants within their religious communities and therefore wished to enjoy religious freedom in that regard (with corporal punishment being a part of that). On the other hand, they are the recipients of corporal

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\(^{749}\) Unreported 3690/09 (2010, ECP).

\(^{750}\) Para 15.

\(^{751}\) Referring to Durban Girls High School.

\(^{752}\) *Pillay* at para 55.

\(^{753}\) Para 56.

\(^{754}\) Para 57.

\(^{755}\) *Christian Education* at para 53.

\(^{756}\) Para 53.
punishment, which may be humiliating to them when administered in an institutional setting, and therefore they may want protection from corporal punishment in terms sections 10, 12 and 28 of the Constitution.\textsuperscript{757} He found it unfortunate that a \textit{curator ad litem} had not been appointed to represent the interests of children in this case.\textsuperscript{758}

Importantly, section 28 of the Constitution ensures that children have the right to legal representation in civil proceedings affecting them, “if substantial injustice” would otherwise result.\textsuperscript{759} In this regard, the Children’s Act provides children with the right to access to court, which entails the right to bring and be assisted in bringing matters to court in order to enforce their rights.\textsuperscript{760} This allows for the child’s voice to be expressed through a legal representative. This was illustrated in the case of \textit{Rosen v Havenga},\textsuperscript{761} wherein the High Court raised the question as to whether a child whose parents were divorcing should not be afforded separate legal representation. In this regard, the court referred directly to Article 12 of the CRC, which provides for giving due weight to the views of a child in accordance with the age and maturity of the child.\textsuperscript{762} As a result, a legal representative was appointed. This case exemplifies that the child’s voice and interests are directly protected in legal proceedings related to a child.\textsuperscript{763} Also, in \textit{Soller NO v G and Another},\textsuperscript{764} the court found that where a substantial injustice would otherwise result, a child may be given a voice and “such voice is exercised through the legal practitioner”.\textsuperscript{765} The judge also relayed that in the course of advocating the client’s

\begin{footnotesize}
\begin{enumerate}
\item Para 15.
\item See discussion in du Plessis “Religious Freedom and Equality as celebration of difference: a significant development in recent South African Constitutional case-law” 2009 12(4) PER 10 29; See Slotz-Nielsen & Mezmur “Exploring the domestication of the CRC in South African jurisprudence” (2002-2006), du Plessis states that “this judicial afterthought [by Sachs J] modestly challenged a deep-seated belief (and prejudice), namely that (even) in weighty matters concerning their upbringing and education, children should be seen and not heard.” See 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) \textit{African Human Rights Law Journal} 376 406.
\item Section 28(1)(h); Discussed in Slotz-Nielsen (n759) 495.
\item Section 14; See section 34 of the Constitution: Access to Courts.
\item 2006 4 All SA 199 (C).
\item The CRC Committee has observed that national age limits for hearing children is not in accordance with the CRC, when they exclude children below a certain age from the formal right to be heard. The right cannot be dependent on age alone. See discussion in Kronborg & Svendsen “Children’s Right to be Heard: the Interplay between Human Rights and National Law” in Lodrup & Modvar (eds) \textit{Family Life and Human Rights} (2002) 411.
\item Skelton “A special assignment: interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa”, Paper presented at the Miller Du Toit/University of the Western Cape Family Law Conference, Cape Town (1-2 April 2004).
\item 2003 (5) SA 430 (WLD).
\item Paras 437J – 438A.
\end{enumerate}
\end{footnotesize}
views, the legal representative should provide “adult insight into those wishes” and “apply legal knowledge and expertise to the child’s perspective.”

In other cases, the courts have mentioned the principal method in which children’s interests can be represented outside of direct legal representation, namely through the appointment of curators ad litem. For example, in *Centre for Child Law and Another v Minister of Home Affairs and others,* an advocate appointed by the court to represent unaccompanied migrant children, investigated the children’s situation, reported on the admission of children to the repatriation centre and applied for the appointment of legal representatives for the children to “present and argue the wishes and desires of the child.”

Some authors suggest that it would be an infringement of children’s rights to view the child as having no iudicium (judgement) and therefore withholding their right to freedom of expression. It is submitted that learners should be seen as human beings with dignity, and therefore their opinions should be considered in matters that concern them. For example, learners’ opinions on matters such as the code of conduct, including rules on religious and cultural dress and other forms of expression, could be useful to schools. As mentioned in Chapter 3, the CRC Committee is in favour of involving children in the decision making in cases relating to religious/cultural dress at schools.

4 A CHILD’S RIGHT TO DIGNITY AND EQUALITY

4.1 DIGNITY

In countries with a “lamentable history” of discrimination and injustice, the right to human dignity is of the utmost importance; especially with regards to children, who are

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766 At 438E-F; Other cases on child participation and representation include: *Christian Lawyers South Africa v Minister of Health* 2004 (10) BCLR 1086 (T); *Ford v Ford* 2004 (2) All SA 396 (W); *Reardon v Mauvis* Case No 5493/02 and *Fitschen v Fitschen* 1997 JOL 1612 (C).
767 2005 (6) SA 50 (T).
768 Para 23.
769 In terms of section 28(1)(h).
770 See van Vollenhoven et al (n740) 120-121.
771 121.
773 Aside from dignity and equality, children are entitled to other rights which are more relevant to the discussions in Chapters 5 and 6.
particularly vulnerable to human rights violations. Aside from being reflected as one of the founding values of values of the Constitution, section 10 of the Constitution states that everyone has the right to have his or her dignity respected and protected. The right requires that all people must be treated in a manner befitting human beings that is, not a humiliating or degrading manner. Correspondingly, the Children’s Act, states that in all actions and decisions affecting the child, the inherent dignity of the child, must be respected.

The Constitutional Court has confirmed that human dignity is a core constitutional right and the foundation of many other rights entrenched in the Bill of Rights. The place of dignity in the hierarchy of rights was recognised in *S v Makwanyane*, wherein Chaskalson P stated:

“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”

Importantly, respect for human dignity entails recognising that all persons are able to make individual choices. The right to dignity includes an individual’s “entitlement to respect for the unique set of ends that the individual pursues.” In the case of *Pillay*, the Constitutional Court affirmed that religious and cultural practices are considered to be included in these unique sets of ends. In the case of *Christian Education*, the court emphasised the integral link between religious beliefs and an individual’s sense of identity and dignity. According to the court, the right to believe or not to believe, to practice or not practice is inherent to one’s identity and therefore one’s dignity. The court stated:

“The right to believe or not to believe, and to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity….Religious belief has the capacity to awake

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774 Devenish (n64) 79.
775 Devenish (n52) 62.
776 Discussed in Chapter 1.
777 Devenish (n64) 84.
778 See discussion in Chapter 7.
779 Section 6(2)(b).
780 *S v Makwanyane* at para 328.
781 Para 144.
782 De Waal & Currie (n18) 231.
783 *Pillay* at para 64.
784 *Christian Education* at para 36.
concepts of self-worth and human dignity which form the cornerstone of human rights…” 785

The inevitable connection between dignity and religion was also emphasised in the case of *Prince v President of the Law Society, Cape of Good Hope and Others* (“Prince”),786 in which Sachs J stated that human dignity is one of the core constitutional values and is central in the limitations analysis.787 Ngcobo J stated in the minority judgement:

“There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.”788

The effect is that an adherent must make the impossible choice between his or her faith and the law,789 which in effect impairs the dignity of the adherent.

Contrastingly, as much as religion is inter-linked with dignity, in some instances, the right to dignity may conflict with religious beliefs. For example, the case of *Christian Education* emphasised the importance of considering dignity as an aspect of children’s rights. In the proportionality analysis, the court found that the purpose of the blanket ban on corporal punishment is to protect learners from physical and emotional abuse and in turn its symbolic effect would be to promote respect for the dignity and physical and emotional integrity of all children.

The state believed that disciplinary problems could be dealt with in a new, more progressive method that did not compromise the dignity of the child.790 Furthermore, the court found that it is the responsibility of the state to ensure that education in all schools is conducted in

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785 Para 36.
786 In this case the relevant legislation criminalised the use of *cannabis* by the Rastafari regardless of where, how and why it is used, with no distinction made between the *bona fide* Rastafari who use *cannabis* for religious purposes and any other drug user. As a result, Rastafari risk being arrested, prosecuted and convicted for possession or use of *cannabis* and Rastafarians are tantamount to criminals who are made to endure the stigma of this label.
787 Para 50.
788 Para 51.
789 Para 44.
790 *Christian Education* at para 50.
accordance with the constitutional values, with dignity being the paramount concern.\textsuperscript{791} In the end, the Constitutional Court in \textit{Christian Education} recognised that the dignity and well-being of children could not be compromised for the sake of the religious tenet in question and furthermore, that freedom of religion could not override the best interests of the child in this case.\textsuperscript{792}

The dignity argument could therefore work in two ways, one being that dignity and religion are intertwined and the other that a religious practice may conflict with the right to dignity. Nevertheless, it is clear that a child's right to dignity is an important consideration in matters pertaining religion in schools. The importance of a child’s right to dignity must be borne in mind throughout the discussion in Chapters 5 and 6. Furthermore, the practical manner in which a child’s dignity rights may be respected during religious exemption procedures at school, is illustrated in Chapter 7.

\subsection*{4.2 EQUALITY}

Integrally connected to the right to human dignity is the right to equality.\textsuperscript{793} Section 9 of the Constitution, also known as the “equality clause”, encompasses both the right to equality before the law and the protection against unfair discrimination. De Waal and Currie note that the equality clause is particularly useful for children since it presumes that discrimination on the basis of age is unfair. In other words, there must be good reason not to afford children the same rights and privileges as adults.\textsuperscript{794} Feinberg interprets the importance of the right to equality as follows:

\begin{flushleft}
\textsuperscript{791} Para 12.
\textsuperscript{792} Para 41; See also para 35 at which the court stated that: “The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land.”
\textsuperscript{793} See (n74) above.
\textsuperscript{794} De Waal & Currie (n18) 456.
\end{flushleft}
“Having rights enables us to ‘stand our ground as human beings’, look others in the eye, and feel that we are fundamentally equal to everybody else.”

Importantly, section 9 of the Constitution states that: “everyone is equal before the law and has the right to equal protection and benefit of the law.” It guarantees the full and equal enjoyment of all other rights. This implies that in principle, all learners can claim equal rights and equal opportunities before the law, including education laws and policies.

On this note, a distinction must be made between formal equality and substantive equality. Whereas formal equality requires sameness of treatment, substantive equality does not require that all persons be treated identically at all times. Equality, in the substantive sense, may require that in certain circumstances people be treated differently, taking into account their social and economic conditions. In certain circumstances, distinctions may need to be drawn between individuals or groups to accommodate their special needs such as their age, religion or culture. For example, formal equality would require that all children be educated according to the same curriculum. Substantive equality requires that children with disabilities (for example, sight impairment), be educated in a manner which caters for their specific needs. It is clear that equality is not simply a matter of likeness, but a “matter of difference.” For this reason, section 9 of the Constitution must be read as being grounded on a substantive concept of equality.

Significantly, section 9 prohibits unfair discrimination by the state and any person, whether directly or indirectly, on numerous grounds, including age, religion and culture.

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796 Section 9(1).
797 Section 9(2).
798 Eberlein (n601) 13; The value of equality is emphasised in the Manifesto on Values, Education and Democracy (2001), a document which aims flesh out certain South African ideals in the educational arena.
799 In the case of National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others 1998 (12) BCLR 1517 (CC) at para 61, the court stated: “treating people identically can sometimes result in inequality.” See also Lee Equality, Dignity and Same-sex marriage: A Rights Disagreement in Democratic Society (2010) 82.
800 This is discussed further in Chapter 6 with reference to the Pillay case.
802 De Waal & Currie (n18) 200-201.
803 Section 9(3).
804 Section 9(4).
805 Direct discrimination occurs when a person is treated less favourably simply on the ground of his or her race, sex, or other distinguishing feature, or on the basis of characteristics particular to that group, for
The purpose of the prohibition is to ensure that individuals are not disadvantaged on the basis of certain characteristics that make them different from other individuals.\(^{807}\) The protection of children from discrimination is also included as a general principle in section 6 of the Children’s Act.\(^{808}\)

In order to understand the purpose and effect of the equality clause, it is necessary to make a distinction between the concepts of differentiation, discrimination and unfair discrimination. Discrimination is a form of differentiation; but unlike “mere differentiation”,\(^{809}\) discrimination is differentiation on illegitimate grounds.\(^{810}\) The reference to unfair discrimination in section 9 denotes that there may be circumstances in which discrimination is fair. This means that people may be treated differently based on legitimate reasons. This would be the case, for example where the discrimination has a “worthy and important societal goal”\(^{811}\) such as legitimate affirmative action\(^{812}\) or the establishment of private schools which cater to specific religious or cultural needs.\(^{813}\) In this case, the impact of the discrimination on the complaint (and others in the same situation) may not be considered to be unfair.

In *President of the Republic of South Africa v Hugo*,\(^{814}\) the Constitutional Court stated:

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\(^{806}\) See section 9(3) states 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”. Section 9(4) states that: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.” Importantly, the case of *S v Lawrence* 1997 4 SA 1176 (CC), dealt with the issue of religious favouritism by the state and expounded on the meaning of discrimination on the basis of religion. Furthermore, the landmark case of *Pillay* raised vital questions about the nature of discrimination as well as the protection afforded to the cultural rights and religious freedom of schoolchildren in the public school setting. The discussion of these cases in Chapter 6 illustrates the practical difficulties in treating all religions equally in a public setting.

\(^{807}\) De Waal & Currie (n18) 456.

\(^{808}\) See *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257 (CC).

\(^{809}\) Devenish (n640) 45; See section 9(2) of the Constitution and section 2 of the Employment Equity Act 55 of 1998.

\(^{810}\) See section 29(3) of the Constitution. This right enhances the rights of religious and cultural communities. See discussion in Chapter 5.

\(^{811}\) See *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257 (CC).

\(^{812}\) Devenish (n640) 45; See section 9(2) of the Constitution and section 2 of the Employment Equity Act 55 of 1998.

\(^{813}\) See discussion in Chapter 5.

\(^{814}\) See *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257 (CC).
“We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

Unfair discrimination, on the other hand, has an unfair impact on its victims. Unfair discrimination means “treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.” In this regard, Cornell notes that the key to equality is that people must be treated as of equal worth rather than treated equally in the simplistic sense. Essentially, dignity lies at the heart of what distinguishes unfair discrimination from differentiation.

The Children’s Act supplements section 9(3) of the Constitution, by stating that in all actions and decisions relating to a child, the child must be protected from unfair discrimination on any ground. It is important to note that the grounds listed in section 9(3) are by no means inclusive of all forms of discrimination. Differentiation based on grounds analogous to those expressly listed in section 9(3), will also constitute discrimination. However, whereas differentiation on one of the listed grounds is presumed to be unfair, there is no such presumption with respect to analogous grounds. In the case of analogous grounds, the applicant must show that the law or conduct in question is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.” Importantly, the stages of enquiry to establish unfair discrimination in terms of section 9 were explained

815 Para 41.
816 De Waal & Currie (n18) 456.
817 *Prinslo v Van der Linde* 1997 (3) SA 1012 (CC) para 31; See the stages for enquiry into violation of the equality clause in *Harksen v Lane NO* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) para 53.
819 Section 6(2)(d).
820 *Prinslo v Van der Linde* at paras 27 & 28; *Harksen v Lane NO* at para 47.
821 De Waal & Currie (n18) 210.
822 Section 9(5) of the Constitution states: “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”
823 *Harksen v Lane NO* at para 46.
fully in *Harksen v Lane NO.* A discussion on unfair discrimination on the basis of religion specifically, is contained in Chapter 6.

Aside from section 9, the right to equality is given further content by the the Equality Act. In fact, the Equality Act restates and expands on the contents of section 9 of the Constitution. Importantly, the Equality Act recognises the existence of systemic discrimination and inequality brought about by colonialism and *apartheid* and the need to eliminate such discrimination.

Section 1 of the Equality Act defines “discrimination” as:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
(a) imposes burdens, obligations or disadvantage on; or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”

According to section 1, the discrimination may be direct or indirect. An example of direct discrimination on the basis of religion would be a public school with a Christian ethos refusing to admit Muslim learners. An example of indirect discrimination on the basis of religion would be the same public school prohibiting all head-coverings as part of the school dress code, with no option for religious exemptions based on sincere beliefs. This indirectly

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824 Para 53. The reference to section 8 of the interim Constitution is the equivalent of section 9 of the Constitution. The court held as follows:

“(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis: (b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. (b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2). (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.”

825 Section 6.

826 Section 4(2)(a) and (b).

827 Section 1.

828 Section 1 of the Equality Act; Take note of the distinction between direct and indirect discrimination made in n805 above. This matter is discussed in Chapter 6.
impacts upon Muslim female learners who are required to wear headscarves as part of their religion.

The prohibited grounds provided in the definitions section are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” 829 This is not a closed list and the section includes additional criteria for identifying further grounds. 830

Most importantly, the Equality Act prohibits the state or any person 831 from unfairly discriminating against another person on the basis of religion. Also, the Act places the duty of promoting equality on the state and private persons. 832 Since public schools fall within the definition of “state”, 833 public schools are required to admit learners and serve their educational requirements without unfairly discriminating against them in any way. 834 The situation with private schools is more complicated and is addressed separately. 835

Significantly, section 13(2)(a) 836 of the Equality Act goes further than section 9(5) 837 of the Constitution by presuming discrimination on listed or other grounds 838 to be unfair. In other words, the respondent will always bear the burden of proving unfairness. 839 In this regard, section 14 of the Equality Act sets out the factors that need to be taken into account in the determination of unfairness. 840 Consequently, any burden imposed on or right unfairly

829 Section 1; In the labour law context, unfair discrimination is dealt with in section 6(1) of the Employment Equity Act.
830 Subsection 1(1)(xxii)(b).
831 Section 5 states that the Act binds the State and all persons.
832 Section 24.
833 Section 1.
834 Section 5(1) of the Schools Act.
835 See discussion in Chapter 5.
836 Section 13(2)(a) reads: “If the discrimination did take place—
(a) on a ground in paragraph (a) of the definition of ‘prohibited grounds’, then it is unfair, unless the respondent proves that the discrimination is fair.”
837 Section 9(5) reads: “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”
838 Section 1 (xxii) defines “prohibited grounds” as “(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground— (i) causes or perpetuates systemic disadvantage, (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”
839 De Waal & Currie (n18) 227.
840 Section 14 of the Equality Act reads as follows:
withheld from a learner based on religion (whether directly or indirectly), that causes harm to such learner, constitutes discrimination in terms of the Act, may be submitted to the scrutiny of the Equality Court.  

An integral principle utilised in cases involving religious practices is that of “reasonable accommodation”.  

Section 14(3)(i)(ii) of the Equality Act states that in determining the fairness of the discrimination in question, whether an institution has taken reasonable steps to accommodate diversity or not, is an issue that needs to be considered.  

What this means in relation to the topic at hand is that schools are required to take positive measures and perhaps even incur added hardship or expense in order to allow all learners within its sphere to participate and enjoy all their rights equally. This ensures that learners are not marginalised for not conforming to the norm/majoritarian belief or practice.

“(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.  
(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:  
(a) the context;  
(b) the factors referred to in subsection (3);  
(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.  
(3) The factors referred to in subsection (2)(b) include the following:  
(a) Whether the discrimination impairs or is likely to impair human dignity;  
(b) the impact or likely impact of the discrimination on the complainant;  
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;  
(d) the nature and extent of the discrimination;  
(e) whether the discrimination is systemic in nature;  
(f) whether the discrimination has a legitimate purpose;  
(g) whether and to what extent the discrimination achieves its purpose;  
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;  
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—  
(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or  
(ii) accommodate diversity.”

The fairness test under the Equality Act involves an even wider range of factors than are relevant to the test of fairness than section 9 of the Constitution.

841 Benson “Taking Pluralism and Liberalism Seriously: The Need to Re-understand Faith, Beliefs, Religion and Diversity in the Public Sphere” 25 at: http://ssrn.com/abstract=2014147 (Date accessed: 24 June 2012); Lenta “Cultural and religious accommodations to school uniform regulations: case comments” 2008 1 Constitutional Court Review 259; This principle of reasonable accommodation was also alluded to in Christian Education, where the court held that while believers could not claim an automatic right to be exempted from the laws of the land based on religious beliefs, the state should, where reasonably possible, avoid putting believers in the painful position of either being true to their faith or respectful of the law.

843 Mentioned in Pillay at para 72.

844 This thesis argues that this includes private schools. See Chapter 7.

845 Pillay at para 72.
The concept of reasonable accommodation is also mentioned in the Equality Act which states that the denial of access to opportunities or “failing to take steps to reasonably accommodate the needs” of people on the basis of race, gender or disability, will amount to unfair discrimination. According to the Equality Act, the state has a duty to “develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation.” To rephrase, the Act allows the court to order that a group or class of persons be reasonably accommodated. Essentially, the principle of reasonable accommodation is appropriate in cases that involve a rule that is neutral on the face of it and is intended to serve a legitimate purpose, but still has a marginalising effect on certain people.

In light of South Africa’s history of religious discrimination in schools, the importance of a child’s right to equality in the context of education and matters pertaining to religion; cannot be overemphasised. This discussion on equality must be borne in mind throughout the remainder of the thesis.

5 CONCLUSION

Chapter 2 illustrated that most of the historical development of religion in schools, took place without consideration for children’s rights. In contrast, the discussion in this Chapter indicates that the rights of children, particularly in the context of education, have improved significantly. The Constitution affords special protection to children in the form of children’s rights in section 28. By including a section specifically dedicated to children’s rights in the Bill of Rights, the state has recognised that children are particularly vulnerable to human rights violations and require special protection and care.

Aside from the specific children’s rights, children also receive protection in terms of freedom and security of the person; the right to bodily and psychological integrity; the right to

846 Section 7(e).
847 Section 8(h).
848 Section 9(c).
849 Pillay at para 72; In Police and Prison Rights Union (POPCRU) and Others v Department of Correctional Services and Another, Case 544/2007 (“POPCRU”) at para 186, the applicants raised the “reasonable accommodation” principle, namely that failing to take steps to reasonably accommodate them on the basis of religion or culture, would amount to unfair discrimination.
850 Section 25(1)(c)(iii).
851 Section 28(1)(b); Section 28(1)(d).
852 Section 12(1).
dignity and the right to an environment that is not detrimental to their health or well-being. These rights place a duty on the state and private persons (more particularly, schools) to protect the safety and well-being of all children. This Chapter revealed that schools and educators have a duty of care towards all learners since they assume the position of a responsible parent over their learners. This would include safeguarding the learners’ health, well-being and development and protecting them from all forms of developmental harm; including psychological harm caused by, for example, the insensitive handling of religious exemption procedures. This thesis illustrates how this can be achieved on a practical level in the school environment.

Importantly, section 28(2) of the Constitution emphasises that the best interests of the child are of paramount importance in all matters concerning children. Since the constitutionalisation of the principle, its application has been extended to all areas of the law, including cases involving education rights and the religious upbringing of children. Despite its indeterminate nature and complications in its application, its mere existence in the Constitution puts children’s rights on at least an equal standing with other rights and considerations, in matters where they might otherwise have be neglected. All in all, it promotes a child-centred approach in all matters concerning children.

The Constitution recognises that children have a relationship of dependence with their parents. Parents are responsible for making decisions on behalf of children until such time as they reach a certain age or sufficient maturity level to do so themselves. As a result, the state does generally defer to the choices made by parents with respect to their children. However, this Chapter emphasised that the ultimate responsibility for the protection and well-

853 Section 12(2) of the Constitution.
854 Section 10.
855 Section 24.
856 Smith (n 601) 34; Govender (n624) 16; Law and Parents (n624).
857 See Chapter 7.
858 Cantwell “The impact of the CRC on the concept of ‘best interests of the child’”, Workshop on the best interests of the child, Vrije Universiteit, Amsterdam, 8 September 2004; Bekink & Bekink refer to the best interest of the child principle as the “golden thread that runs through the whole fabric of the South African law relating to children.” See Bekink & Bekink (n670) 21.
859 Illustrated in Chapter 7.
860 Robinson (n237) 11; De Waal & Currie (n18) 26.
861 Article 5 of the CRC recognises the right of parents to provide appropriate direction and guidance in the exercise by the child of the rights, in a manner consistent with the evolving capacities of the child. See Chapter 3.
862 Article 5 of the CRC requires that States Parties respect the rights, duties of responsibilities of parents to provide guidance and direction to their children.
being of children rests with the state. It is the duty of the state to restrain parental rights (including those relating to the education or the religious upbringing of children) where these rights are seen to undermine a legitimate interest of the state or the best interests of the child.\textsuperscript{863} This point is of particular relevance to the forthcoming discussion on the freedom of religion of children in private schools.\textsuperscript{864}

Despite their dependence on adults, children acquire a degree of personal autonomy (dependant on age/maturity) through other rights such as freedom of religion. This Chapter recognised that the older the child becomes, the more difficult it is to restrain the child’s personal autonomy.\textsuperscript{865} In other words, once a child a capable of making a decision about his or her religious beliefs, that child may wish to assert their own religious freedom.\textsuperscript{866} In this regard, the law reflects that the (sufficiently mature) child’s viewpoint in matters that relate to him or her is an important consideration in determining their best interests.\textsuperscript{867} This means that the parental authority over a child’s religious upbringing may conflict with a sufficiently mature child’s individual religious freedom.\textsuperscript{868} Also, this Chapter illustrated that a child’s individual religious freedom may conflict with the best interests of the school/community of which the child is a part. In these circumstances a balance would need to be struck between the interests of the child; the interests of other learners and the interests of the state\textsuperscript{869} and in the case of very young children- the interests of the parents.

Significantly, section 9 of the Constitution guarantees everyone the right to equal protection and benefit of the law.\textsuperscript{870} This means that, in principle, learners are entitled to equal rights and equal opportunities in terms of education laws and policies. Furthermore, the Constitution and the Equality Act prohibit the state or any person (including a private school) from unfairly discriminating against another person on the basis of religion. Importantly, the Equality Act states that in determining the fairness of the discrimination in question, it needs to be considered whether an institution (school) has taken reasonable steps to accommodate

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{863} Moyo (n646) 70.
\item \textsuperscript{864} See Chapter 7.
\item \textsuperscript{865} Bekink (n627) 185.
\item \textsuperscript{866} Schäfer (n658) 161.
\item \textsuperscript{867} \textit{McCall v McCall} at paras 204 1/J- 205G; Article 10 of the Children’s Act and Article 12 of the CRC.
\item \textsuperscript{868} This point is pertinent to the discussion on freedom of religion of children in private schools contained in Chapter 7.
\item \textsuperscript{869} The interests of the state in matters pertaining to religion is particulary relevant to the issue of teaching religion in public schools- dealt with in Chapter 7.
\item \textsuperscript{870} Section 9(1).
\end{itemize}
\end{flushleft}
diversity or not.\footnote{Section 14(3)(i)(ii); Mentioned in Pillay at para 72.} This practical application of this principle in the school environment is discussed in Chapter 6.
CHAPTER 5
EDUCATION RIGHTS

“Education is the most powerful weapon which you can use to change the world.”

1 INTRODUCTION

The aim of this Chapter is to discuss the impact of education rights on issues pertaining to religion in schools. The Chapter focusses on section 29 of the Constitution; as well as the inter-related constitutional right of freedom of association. Also, this Chapter discusses the education legislation which gives effect to these constitutional provisions, namely the Schools Act.

In addition to the abovementioned legislation, this Chapter also contains a discussion on the National Policy on Religion and Education, a policy which provides the framework within which schools must operate with regards to religion. Furthermore, this Chapter outlines the contents of the Bill of Responsibilities for the Youth of South Africa, a document which aims to transform constitutional human rights into a practical set of personal responsibilities for South African youth but which impacts upon their freedom of religion at school.

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872 Taken from a speech delivered by Mr Nelson Mandela at the University of the Witwatersrand, Johannesburg, South Africa on 16 July 2003.

873 Venter recognises the link between education and religion. He states: “There is a direct link between the propagation of religions and education. Despite the fact that faith is a matter of intensely personal conviction, religious practices inevitably have communal and public dimensions, whereby society is directly involved.” See Venter “Religion in the classroom: Comparative Observations” 2012 27(2) SAPL 433-433.

874 Discussed in detail in van der Vyver “Constitutional Protection of the Right to Education” 2012 27(2) SAPRI/PL 326 331-338.

875 National Policy on Religion and Education, as approved by the Council of Education Ministers on 4th August 2003.
2 CONSTITUTIONAL PROVISIONS ON EDUCATION

2.1 THE RIGHT TO EDUCATION

Education is undoubtedly the primary tool to ensure the “safeguarding, protection and transference of a society’s constitutional values.”876 Devenish sums up the importance of education in human rights culture, as follows:

“Education is essential as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear. It gives to them dignity and self-confidence and is a basic human right, on which the realisation of many other rights depend. It is for this reason that the right to education is extensively recognised in both international law and in national constitutions.”877

The South African Constitution guarantees everyone the right to “basic education” in section 29(1)(a).878 The right of a parent or guardian in respect of the education of his or her child is not expressly mentioned.879 According to the The White Paper on Education and Training, the term “basic education” is a flexible concept which must be defined so as to meet the “learning needs appropriate to the age and experience of the learner, whether child, youth or adult.”880 In other words it is not a static concept and must evolve with the improving

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877 Devenish A Commentary on the South African Constitution (1998) 153; the Committee on Economic, Social and Cultural Rights, General Comment no 13 para 1 states: “Education is both a human right in itself and an indispensable means of realizing other human rights”; Van der Merwe also recognises the link between education and a sense of self-worth. She states: “In the South African context, basic education could refer to a standard of education that empowers people to break out of the poverty cycle and compete effectively in the labour market; enables people to understand and enjoy their new-found democratic values, rights and freedoms; encourages people to participate in and protect the fledgling democratic system, and enhances their feeling of self-worth as human beings.” See Van der Merwe “How ‘basic’ is basic education as enshrined in section 29 of the Constitution of South Africa?” 2012 27(2) S Afr Pl 365-378.
879 Section 4(a) of the National Education Policy Act 27 of 1996 requires national polices on education to respect “the right of a parent or guardian in respect of the education of his or her child.”
880 Ch. 7 para 4.
educational standards and capacities in the country. Importantly, the right to equal access to education is implicit in section 9 of the Constitution (the equality clause), which applies to all educational institutions. Equal access to education does not entail total equality, but rather equal opportunity in accordance with each person’s ability and potential.

In addition, the right to “further education” is provided for in section 29(1)(b). However, it is qualified by internal modifiers which stipulate that: “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right. It must be noted that unlike the textual formulation of section 29(1)(b), section 29(1)(a) is not subject to any qualification. This alludes to the right to basic education as being a positive right requiring “direct realisation”; whereas the right to further education is largely dependent on the availability of financial and other state resources.

As mentioned in Chapter 3, in the case of *Grootboom*, the Constitutional Court rejected the notion of minimum core obligations with regard to socio-economic rights such as the right to education. The court held that such rights can only be “negatively protected from improper invasion.” However, the Constitutional Court has since confirmed that the right to basic education is “immediately realisable” and not subject to progressive realisation in the case of

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881 Cheadle (n 315) 296.
882 Boezaart states: “The right to equality goes far beyond equal treatment before the law and non-discrimination. It includes equal access, equal resources and equal opportunities.” See Boezaart “A constitutional perspective on the rights of children with disabilities in an educational context” 2012 27 *SAPR/PL* 454 459. This is particularly relevant to the discussion on freedom of religion of children in private schools in Chapter 7.
883 Devenish (n877) 153; Section 8 of the Constitution provides that: “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” This means that the Constitution applies not only to legislation, but also to rules and conduct carried out by the state or private institutions.
884 Malherbe (n457) 272.
887 Malherbe (n457) 275-276.
888 Grootboom at para 98; See also *Minister of Health v Treatment Action Campaign (No.2)* 2002 (5) SA 721 (CC) and *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); Discussed in Mbazira (n450) 7; Discussed in Taiwo *The Implementation of the Right to Education in South Africa and Nigeria* (2011) 12-13.
889 Grootboom at para 23.
The court held that:

“It is important… to understand the nature of the right to ‘a basic education’ under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education ‘progressively available and accessible.’”

Also, in the case of Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 (“Gauteng Education”), the court held that:

“[The right to basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.”

According to the court, the state is obligated to do more than not impair access to the enjoyment of the right; it has a constitutional duty to take positive steps to ensure that basic education is provided.

In the recent High Court case of Freedom Stationery the court acknowledged that “[t]he protection of access to education is of prime importance with regard to the public interest.”

In this case, the court admonished the Department of Education for the lack of stationery, transport and food in many Eastern Cape schools and thereby implied that the state’s obligations towards education encompass more than just providing the physical infrastructure.
for schools and qualified teachers. The court recognised that the state’s obligations may also include providing stationery to school children in need in order to facilitate their access to education. Although this case did not expand on the nature and scope of the right, it did contribute “towards crystallising the legal content of the right to basic education provided for in section 29(1)(a).”

Most recently, in the case of *Rivonia*, the Constitutional Court made an express link between state’s obligation to protect and fulfil the right to a basic education and the best interests of the child. In this regard, the court stated:

“[i]n disputes between school governing bodies and national or provincial government, cooperation is the required general norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised.”

Nevertheless, the Constitutional Court is yet to pronounce on the nature and scope of the right to basic education.

As mentioned in Chapter 1, some may argue that basic education should include religious instruction. However, others believe that the right of a parent to have their child’s education conform to their religious beliefs should include the right not to have the child exposed to other religions at school. Although the duty of the state to provide religious education is not expressly mentioned in the Constitution, the provision of religious education by the state is neither promoted nor forbidden. The provisions on religion in the Schools Act and the

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897 Couzens (n643) 398.
898 398.
899 See *Rivonia* at para 83 which states: “The school in question is a public school which falls under the administration of the applicants who are all organs of state. These applicants have a constitutional obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’ But this duty is also imposed on the school concerned and its governing body because they too are organs of state. One of the rights they are all obliged to protect and fulfil is the little girl’s right to a basic education which she wanted to realise.”
900 *Rivonia* at para 69.
901 Daniel & Greytak (n236) 350.
902 Religious instruction, meaning instruction in a particular faith that is devotional in nature. The distinction between religious instruction and religion education is made in Chapter 1 and in the discussion of the National Policy on Religion and Education below.
903 See Article 14(2) of the CRC and Article 5 of the Declaration; See the Wittmann case; In a first White Paper on Education (Department of Education, 1995), a parent’s right to choose the religious basis of their children’s education was recognised.
904 See Van der Schyff (n34).
National Policy on Religion and Education, represents the state’s attempt at addressing this issue.

2.2 THE RIGHT TO INSTRUCTION IN THE OFFICIAL LANGUAGE OF CHOICE

Section 29(2) of the Constitution provides that:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.”

The issue of the determination of school language policies in South Africa is particularly sensitive, because it may lead to schools being polarised along a racial lines. In recent years, the courts have had numerous opportunities to interpret section 29(2). Although these cases relate to language issues and not religion, they are nevertheless relevant to the topic at hand, in that they contain important principles regarding equality rights and best interests of children in the school setting. They illustrate how the best interests of the child principle can and should be applied in matters of education, particularly with regard to religion in schools. In addition, language rights are inevitably intertwined with culture since one’s mother tongue is the principal means through which culture is attained.

In the case of Mikro, the Supreme Court of Appeal interpreted section 29(2) to mean that everyone has the right to be educated in an official language of his or her choice at a public school provided by the state, if reasonably practicable, but not the right to be so instructed at

905 The link between language issues and religion is explained in Chapter 2.
906 This section is restated in section V(c) (2) of the Norms and Standards Regarding Language Policy, GN 1701 in GG 18546 of 1997-12-19, Promulgated by the Minister of Education in terms of s 6(1) of the South African Schools Act 84 of 1996. Section 5 A(3) of South African Schools Act the directs SGB’s to have regard to the Norms and Standards when determining a language policy.
907 See Chapter 2.
908 The link between religion and culture is explained in Chapter 1 and elaborated on in Chapter 6.
909 See Van Wyk (n876) 581.
each and every public educational institution.\textsuperscript{910} This means that the right is subject to the qualification of what is “reasonably practicable” for the state to provide. The learners at Mikro Primary School did not have a constitutional right to demand instruction in English at that particular Afrikaans-medium school.\textsuperscript{911} Therefore, the court ordered the placement of learners into another suitable school, taking into account the best interests of the children.\textsuperscript{912}

Furthermore, the Constitutional Court was faced with the task of interpreting section 29(2) in light of the tussle over a language policy in the case of Hoerskool Ermelo in 2009.\textsuperscript{913} In this case, the dispute arose from the school’s language policy, which stipulated Afrikaans as the only medium of instruction.\textsuperscript{914} In 2006, the Department of Education, Mpumalanga, approached the school requesting that it admit 27 grade 8 learners who could not be accommodated at any of the English medium schools in Ermelo because they were already full to capacity. Initially the school refused to admit the learners.\textsuperscript{915} In 2007, the SGB instructed the principal to admit learners provided that they submit to tuition in Afrikaans.\textsuperscript{916}

It was the Department’s view that the school had surplus classroom capacity to accommodate the learners and had acted unreasonably in refusing to alter its language policy to admit the stranded learners.\textsuperscript{917} The Head of Department (HoD) proceeded to withdraw the function of the SGB to determine the school’s language policy with immediate effect and to appoint an interim committee to establish a new, parallel (dual) medium language policy for the school.\textsuperscript{918} The Constitutional Court was called upon to answer the question of whether the HoD may lawfully revoke the function of the governing body of a public school to determine its language policy and confer the function on an interim committee appointed by him. And, if so, whether the interim committee so appointed, in turn, lawfully determined a new language policy for the school.\textsuperscript{919} The court ordered that the learners who were enrolled at the school since 25 January 2007 in terms of a parallel medium language policy were to continue to be

\textsuperscript{910} Mikro at para 31; Msaule “The Right to Receive Education in One’s Language of Choice: A Fundamental but Contentious Right” 2010 2 STELL LR 239 248.
\textsuperscript{911} Bray “Macro issues of Mikro Primary School” 2007 10(1) PER 7 9; Smit (n11) 229-230.
\textsuperscript{912} Mikro at para 48.
\textsuperscript{913} Statistically, there were approximately 15 classrooms available to accommodate new grade 8 learners even if they did not agree to be taught in Afrikaans (para 17).
\textsuperscript{914} Hoerskool Ermelo at para 1.
\textsuperscript{915} Para 12.
\textsuperscript{916} Para 17.
\textsuperscript{917} Para 20.
\textsuperscript{918} Para 2.
\textsuperscript{919} Para 1.
taught and allowed to write examinations in English until the completion of their school careers. Significantly, the court found that while the power to determine an admission policy vests in the first instance in SGB’s, that power must “be understood within the broader constitutional scheme to make education progressively available and accessible to everyone.”

In this case the court stressed the importance of considering the historical context of the language issue by stating:

“[t]he case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners per class ratios in Ermelo reveal startling disparities which point to a vast difference of resources and of the quality of education. It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socioeconomic disadvantage.”

The key issue was the scarcity of classroom places for English speaking learners in Ermelo that was likely to endure. As a result, the SGB was directed to reconsider the school language policy with due regard not only for the best interests of its learners and the school but also the interests of the community in which the school is located.

The judgement in *Hoerskool Ermelo* reaffirmed the right to receive education in the official language of one’s choice in a public educational institution where it is reasonably practical, taking into consideration all reasonable educational alternatives, including single medium institutions but also taking into account what is equitable, practicable and addresses South Africa’s past racially discriminatory laws and practices and, importantly, taking into account the best interests of the children and the community concerned. The right of single medium schools is still recognised but must be exercised “with regard to the rights of learners who might be deprived of the right to education due to a single medium policy when the

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920 Para 95.
921 Para 61. See *Rivonia* case discussed in Chapter 4.
922 Para 2.
923 Para 100.
924 Para 99.
925 Para 42.
926 See discussion in Chapter 4.
language policy is determined." The right of children to equal access to education (regardless of their language) was the primary concern.

On a similar note, the court in *Seodin Primary School and Others v MEC of Education, Northern Cape and Others*, held as follows:

"[i]t would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilized schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools."

Importantly, the case highlighted the right of SGB’s to determine the language policies of their schools provided that there is no discrimination in admission policy on account of language. This case recognised that the equality rights of the leaners superseded the language rights of the school.

Overall, South African case law indicates that the right to equality and children’s rights, more specifically, the best interest of the child principle, are vital considerations in the interpretation of learners’ educational rights.

2.3 THE RIGHT TO ESTABLISH PRIVATE SCHOOLS

Section 29(3) of the Constitution allows for the establishment of private schools that cater for the particular needs of cultural, linguistic or religious groups. Practically speaking, private schools are necessary, given that the state cannot bear the responsibility for the education of all children in the country. Therefore, it must be emphasised that the existence of private schools contributes to the realisation of the right to education in South Africa. Section 29(3) provides that:

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927 Msaule (n910) 248.
928 In *Seodin Primary School and Others v MEC of Education, Northern Cape and Others* 2006 (4) BCLR 542 (N).
929 Para 56 D-F.
930 De Waal & Currie (n18) 484-485.
931 Adhar & Leigh (n26) 258.
932 Taiwo (n888) 299; See more positive aspects of private schools in Henning *The Case for Private Schools* (1993) 12-13; Despite this, private schools are often criticised for being elitist and privileged schools that perpetuate discrimination. Zungu, for example, refers to private schools as “elite-producing factories.” Ashley observes further that: “[p]rivate schools still have a white ethos, and our children, if unguided are
“Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.”

The Constitution’s inclusion of the right to establish private schools is in accordance with international law\(^{933}\) as well as Constitutions\(^{934}\) and prominent case law\(^{935}\) from other jurisdictions.

Importantly, section 29(3) of the Constitution enhances the rights of cultural and linguistic communities envisaged in sections 30\(^{936}\) and 31 of the Constitution. Section 31 guarantees persons belonging to a cultural, religious or linguistic community, the right “to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”\(^{937}\) In this regard, De Waal and Currie assert that the cultural rights envisaged in sections 30 and 31 of the Constitution would not be possible without the right to learn about and teach about those cultures.\(^{938}\) Section 29(3) allows religious/cultural/linguistic groups to transmit their

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933 Article 26(3) of the UDHR and Article 13 of the ICESCR discussed in Chapter 3; Article 2 of the First Protocol to the European Convention of Human Rights.
934 Article 20 (1) of the Constitution of Cyprus (1960); Section 76 of the Danish Constitution (1953); Article 7(4) of the Basic Law of the Federal Republic of Germany; Article 16 (8) of the Greek Constitution (1975).
935 In the watershed United States Supreme Court case of Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925), the court upheld the rights of parents to have their children privately educated; Wisconsin v Yoder 406 US 205 (1972), 214 confirmed the Pierce decision by stating: “Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in Pierce, made to yield to the right of parents to provide an equivalent education in a privately operated system… As that case suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”
936 Section 30 states: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”
937 A United Nations Development Report stated: “Cultural liberty is a vital part of human development because being able to choose one’s identity- who one is- without losing the respect of others or being excluded from other choices is important in leading a full life. People want freedom to practice their religion openly, to speak their language, to celebrate their ethnicity or religious heritage without fear or ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings.” See Human Development Report 2004, “Cultural Liberty in Today’s Diverse World”, published for the United Nations Development Programme.
938 De Waal & Currie (n18) 484-485; In the Minority Schools in Albania Case 1935 PCIJ (Ser A/B) No 64, 20, the court found that minorities wish to preserve their “racial peculiarities, their traditions and their national characteristics” and they are entitled to establish their own schools to be able to do so.
religion/culture/language from generation to generation,\(^{939}\) through the school system.\(^{940}\) In this regard, Henning expresses that private schools:

“often reflect the desire of individuals or groups to express freedom and are the intangible expression in bricks and mortar of intangible values, beliefs and attitudes that groups hold in common.”\(^{941}\)

These are powerful reasons in favour of private schools enjoying constitutional protection.

It is important to note that section 29(3)(a) is very careful to prohibit admission criteria for schools that are based solely on race.\(^{942}\) Practically speaking, this means that an African learner wishing to attend a school teaching in German cannot be denied access to the school on the basis that she is an African. However, he or she must be willing to be instructed in the school’s medium of instruction (German). This provision ensures that private schools are not utilised to continue racial segregation. However, this specific exclusion of discrimination on the basis of race envisages that private schools may discriminate on the basis of language, religion\(^{943}\) and culture (amongst others).\(^{944}\) In this regard, De Waal and Currie note that the specific prohibition against racial discrimination in section 29(3)(a), rests on the assumption that a degree of discrimination on other grounds may be necessary in order to exercise the right. For example, a school may wish to admit only members of a particular gender or only pupils of a certain religious group and the discrimination may, in these circumstances, not be deemed unfair\(^{945}\) or unreasonable.\(^{946}\)

Nevertheless, as a secondary issue, Witbooi asserts that the existence of private schools indirectly contributes to class and racial inequality despite the prohibition on discrimination against racial discrimination in section 29(3)(a). He comments as follows:

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\(^{939}\) See positive aspects of private schools in Minority Schools in Albania Case 1935 PCIJ (Ser A/B) No 64, 20.

\(^{940}\) Van Wyk (n876) 581.

\(^{941}\) Henning (n932) 21.

\(^{942}\) The rationale behind this, is that apartheid resulted in the denial of equal treatment to black people on the basis of race. In Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) at paras 5 and 7, the Constitutional Court has stated that: “[f]rom the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced.” The court stated that: “[r]ace was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.”

\(^{943}\) There is a belief that many private religious schools are continuing the legacy of religious education started by European settlers (as discussed in Chapter 2). See Adhar & Leigh (n26) 257.

\(^{944}\) Devenish states that independent schools are not obliged to treat religions equally. See Devenish (n52) 92.

\(^{945}\) Unfair discrimination is dealt in the discussion on the right to equality in Chapter 4.

\(^{946}\) De Waal & Currie (n18) 486; Devenish (n52) 154.
“[O]nly a few blacks can afford to send their children to private schools. Private schools in South Africa are a symbol of elitism, supported by the rich parents and those companies who benefit from the skills of those who have received the education which may benefit them.”

This raises the point that was reflected in Chapter 2, that there is an inevitable link between race, religion, language and culture. This means that the establishment of schools based on religious/cultural/linguistic criteria may indirectly discriminate on the basis of race.

This point was recognised in the case of Gauteng Education, where the petitioners were Afrikaners who wanted their children to be educated exclusively in Afrikaans and in accordance with a Christian value system that required religious classes as part of the curriculum. They contended that the relevant Bill violated their constitutional rights by abolishing language competency tests in school admissions procedures, limiting a school’s ability to establish its own religious policy, and severing government funding of religious schools. They argued that section 32(c) of the interim Constitution (equivalent of section

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947 Ashley (n932) 54; Akoojee notes that although class differentiation has in many respects replaced racial discrimination, it is still racially defined. See Akoojee Private Further Education and Training In South Africa: The Changing Landscape (2005) 4.
948 See Hoërskool Ermelo.
949 The Bill was passed and duly enacted as the School Education Act of 1995.
950 Section 19 of the Bill provided as follows: “Language and discrimination
19 (1) Language competence testing shall not be used as an admission requirement to a public school.
(2) Learners at public schools shall be encouraged to make use of the range of official languages.
(3) No learner at a public school or a private school which receives a subsidy in terms of section 69 shall be punished for expressing himself or herself in a language which is not a language of learning of the school concerned.”
951 Section 21 and section 22 of the Bill read as follows:
“21 (1) The religious policy of a public school shall be made by the governing body of the school concerned after consultation with the department, and subject to the approval of the Member of the Executive Council.
(2) The religious policy of a public school shall be developed within the framework of the following principles:
(a) The education process should aim at the development of a national, democratic culture of respect for our country’s diverse cultural and religious traditions.
(b) Freedom of conscience and of religion shall be respected at all public schools.
(3) If, at any time, the Member of the Executive Council has reason to believe that the religious policy of a public school does not comply with the principles set out in subsection (2) or the requirements of the Constitution, the Member of the Executive Council may, after consultation with the governing body of the school concerned, direct that the religious policy of the school shall be reformulated in accordance with subsections (1) and (2).
(4) The provisions of section 18(4) to (8) shall apply mutatis mutandis to a directive issued by the Member of the Executive Council under subsection (3) and in such application any reference to language policy shall be construed as a reference to religious policy.”
29(3) of the Constitution) created a positive obligation on the state to establish educational institutions based on a common culture, language, or religion provided there was no discrimination on the basis of race. This argument did not take into account the link between language and race and the fact that the use of language competency tests could amount to indirect discrimination on the basis of race.\textsuperscript{953} Indirect discrimination amounts to using seemingly neutral criteria to disguise the perpetuation of discriminatory practices.\textsuperscript{954}

The Constitutional Court held that the right to establish independent schools is a defensive right, requiring the state not to interfere with the establishment of such schools. Importantly, the court held that the state cannot be required to provide schools which cater to particular linguistic, cultural, or religious needs. In other words, the state is required to tolerate the establishment of private/religious educational institutions without actively participating in the said establishment.\textsuperscript{955} Ultimately, the court decided held that the state cannot be expected to pay the costs of a school that admits students based upon competency in Afrikaans and that requires Christian education as part of its curriculum.\textsuperscript{956}

\begin{quote}
\textsuperscript{952}Section 32(c) reads: “Every person shall have the right... to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.”

\textsuperscript{953}In relation to section 29(3)(a) of the Constitution, Van der Vyver states: “Application of the Non-Discrimination Clause could be complicated. Putative egalitarianism may develop under the guise of all kinds of ostensibly race-neutral admission tests and cunning entry requirements. There are, in a word, more ways than one to kill the cat.” See van der Vyver (n874) 327.

\textsuperscript{954}Discussed in Chapter 4; See more on indirect discrimination in Chapter 6.

\textsuperscript{955}\textit{Gauteng Education} at paras 7-9; See du Plessis (n52) 439.

\textsuperscript{956}See Blake & Litchfield (n273) 515.
\end{quote}
Significantly, the right in section 29(3) entails that a private school may choose its own religious ethos. Moreover, the right has been interpreted to include the right to require religious conformity from (or otherwise exclude) non-adherent learners. This issue was dealt with in the case of Wittmann. In this case, the applicant, a parent of a minor child who had been admitted as a pupil in a German-medium private school, sought an order declaring the compulsory attendance of religious instruction classes and school assembly/prayers to be unconstitutional, on the basis that it infringed upon freedom of religion.\(^{957}\) In addition, the applicant sought an order granting her the right to have the minor child excused from attendance of the religious instruction classes and the school assembly/prayers.

The court held that there had been no violation of freedom of religion as the school was not a state-aided institution\(^ {958}\) and therefore not bound to the Bill of Rights in the interim Constitution.\(^ {959}\) Importantly, the court held that the learner’s right to freedom of religion had been waived by the applicant when she agreed to submit to the school’s constitution and rules upon admission. This decision indicated that the waiver of the freedom of religion (for the limited duration of one’s membership at an institution and within the limits of the institution’s rules), was not contrary to the provisions of the Constitution in the case of private schools. The court held that even if the German school was a state-aided institution, the right of non-attendance in section 14(2) of the interim Constitution could validly be waived and that is what the applicant had done when she voluntarily submitted to the school’s constitution and rules.

\(^{957}\) This case was decided under section 14 of the interim Constitution which states:

“(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

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

(3) Nothing in this Chapter shall preclude legislation recognising

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures.”

\(^{958}\) In Wittmann at paras 78-79, the court held that in section 14(2) of the interim Constitution, state-aided institutions must in the context of education be read as referring to a state-aided school, a phrase which has a special meaning, namely, what was colloquially known as the model C school. The German school certainly was not such, as it was a private school. The court therefore held that the conditions in section 14(2) of the transitional Constitution, the similarly worded precursor to section 15(2), do not apply to a private school subsidised by the state to the extent of R1.5 million per year, since such a school is not a state-aided institution.

\(^{959}\) The interim Constitution was held to have vertical effect only (except for the diffusive effect of its principles); See Du Plessis and Another v De Klerk 1996 (3) SA 850 (CC) n1; The Constitution now provides in section 8(2) that it also has horizontal effect.
This case denotes that the right to maintain private institutions based on religion, culture or language, includes the right to require conformity or to exclude non-adherents from those institutions. The freedom of religion of the “outsider” is limited to their right not to join. In other words, “outsiders” cannot join on their own terms and once they have joined cannot impose their own terms. In effect, this means that private schools may exclude legitimately non-adherents who refuse to conform to the religious character of the school and need not treat all religions equitably. The conflict lies in the fact that permitting the establishment of private school with a particular religious ethos, defends the right of that community (or religious group) to continue to perpetuate its way of life (which is a positive for that community); however, it does not provide for equal opportunity for those who are not part of that community (religion).

In this regard, Devenish comments that although provision is made for the horizontal application of the Bill of Rights, it is uncertain to which extent certain rights apply between private persons inter se and legal entities. He raises the question of whether it should be permissible for a completely private religious school to refuse admission to persons of other faiths or atheists or agnostics. He concludes that, ultimately, this is a question for the Constitutional Court to decide.

In any event, in practice, the problem with the current position is that non-adherent children can be compelled to attend religious instruction and religious observances contrary to their faith and can be restricted from manifesting their own beliefs, with no possibility of accommodation by the school. This situation impacts upon, not only the freedom of religion of the children concerned; but also their equality rights, children’s rights, dignity and best interests. Also, it must be questioned whether this interpretation is in accordance with constitutional values. As a result, the core issue to be determined is the constitutionality of the waiver of the freedom of religion of a child in order to attend a private school.

960 See discussion in Chapter 7.
961 Wittmann at para 91.
962 De Waal & Currie (n18) 308.
963 Adhar & Leigh (n26) 257.
964 Such as section 15 and the right to freedom of expression in section 16 of the Constitution.
965 Devenish (n52) 95: On 30 July 2012, the Alberton Magistrates’ Court, sitting as an Equality Court, upheld the rights of a lesbian couple who had lodged a complaint that they were not allowed to publicly celebrate their civil union at Sha-Mani, a privately-owned functions venue and conference centre in Alberton. The outcome of this case emphasised that the Constitution prohibits unfair discrimination not only by the state, but also by private organisations, such as Sha-Mani. See University of Pretoria, Faculty of law “Equality Court affirms lesbian couple’s rights” (Press Release) 31 July 2012.
Importantly, section 31(2) contains an express qualification, stating that cultural and linguistic rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. In this regard, De Waal and Currie note that the Constitution must be interpreted as respecting cultural associations (in this case schools) and practices for as long as they are in accordance with the Constitution’s individual fundamental rights. The court in *Christian Education* commented on this qualification as follows:

“Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to ‘privatise’ constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.”966

Significantly, section 31(2) ensures that the rights of members of religious and cultural communities cannot be used to shield practices which are contrary to the Bill of Rights, more particularly the best interests of the child and the right to equality. Precisely the same argument could be made with respect to the right contained in section 29(3). While the Constitution supports group rights, it places them in the context of other rights which guarantee individuals rights and freedoms.967 This thesis argues that the state cannot simply preserve all the rights of private schools without considering the impact of this right on the other fundamental rights of the children concerned.968

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966 Para 26.
967 De Waal & Currie (n18) 481- 483.
968 See Chapter 7.
2.4 FREEDOM OF ASSOCIATION

Closely connected to education rights, freedom of religion and cultural and linguistic rights is the right to freedom of association. The right to freedom of association is one of the cornerstones of a democratic society in that there is:

“the need to associate in order to realise fully one’s humanity- to interact-, … make common purpose and enjoy life with other persons sharing one’s culture, personal, political or economic interests [and] the necessity to a functioning democracy of such a freedom, for a proper and coherent expression and interplay of collective interests.”

Freedom of association includes establishing, joining, dissolving, leaving or participating in the activities of an association, including a religious association, as well as the right not to join an association. It has been contended that freedom of association is an extension of individual freedom and for that reason the right to associate or not associate, should be equally revered and protected as individual freedom. This right is supplemented by the right to form, join and maintain cultural, religious and linguistic associations. The importance of freedom of association is that it enables individuals to “create and maintain intimate relationships of love and friendship” and is “increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life [and] religious practice.”

Nevertheless, associational rights raise concerns in the law, in particular that they may conflict with the right to equality (as alluded to in the discussion on private schools above). For instance, religious associations may adopt rules for association that result in unfair

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969 Section 18; du Plessis (n334) 166.
970 Cheadle (n315) 247.
971 Taylor v Kurtsaag NO 2005 (7) BCLR 706 (W); 2005 (1) SA 362 (W); According to du Plessis: Freedom of association includes anti- and non-religious groups that will qualify in a similar way for protection. See du Plessis “Grondwetlike Beskerming vir Godsdiensregte as Groepregte in Suid-Afrika” 2002 43 NGTT 216.
972 De Waal “Association” in Van Wyk (n876) 258.
974 Section 31(1)(b) of the Constitution. Discussed in Chapter 6.
discrimination against individuals on one of the prohibited grounds. Then it becomes a question of whose freedom should take precedence, the individual’s or the association’s.976

For example, in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* ("Strydom"),977 Mr Strydom was appointed by a Church to teach music to the learners as an independent contractor. Thereafter it was discovered by the Church that he was involved in a same-sex relationship, of which the Church vehemently disapproved. He was, as a result, dismissed from his employment. He then proceeded to take the case to the Equality Court, which concluded that the dismissal amounted to unfair discrimination on grounds of sexual orientation. In this decision, Basson J quoted the Constitutional judgment of *Minister of Education v Syfrets Trust Ltd*,978 which held that equality is “not merely a fundamental right; it is a core value of the Constitution” that “goes to the bedrock of our Constitutional architecture.”979

The decision in *Strydom* indicates that the equality clause in the Constitution and the Equality Act may restrict the autonomy of a religious association to regulate its internal matters if it engages in unfair discrimination on one of the prohibited grounds.

In response to the finding in *Strydom*, Lenta argues that religious associations are also protected by freedom of religion and therefore the state cannot require that they conduct themselves in a manner that is inconsistent with their “settled religious convictions and practices.”980 He contends further that: “[t]o disallow a church from discriminating impairs the ability of the religious community of which it forms a key part to transmit its core beliefs…and may also impair the ability of a church to maintain the religious ethos of its academy, which includes the exemplification of these beliefs in its practice.”981

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976 Bilchitz (n807) 15
977 2009 (4) SA 510 (T) ("Strydom").
978 2006 (4) SA 25 (CC).
979 *Strydom* at paras 8 and 10.
980 Lenta (n975) 833.
981 853; See also Lenta argues that: “the balancing of the important interests of religious believers and victims of discrimination respectively should, if carried out correctly, result in religious associations sometimes being permitted to engage in employment discrimination on grounds such as sexual orientation – that is, in respect of positions sufficiently close to the doctrinal core of the religion concerned.” See Lenta “In defence of the right of religious associations to discriminate: a reply to Bilchitz and De Freitas” 2013 29(2) SAJHR 429 430; Woolman concurs with this opinion by referring to case law, namely *Taylor v Kurstag*, and *Wittmann*, both of which recognised the right of a religious institutions “to have one’s life shaped in a manner that does not readily permit the alteration of either belief or act and that to be a member of a liberal society is to live in a state committed to not so readily dictating the ends of its citizens.” See Woolman
Contrastingly, Bilchitz argues in favour of equality and against non-discrimination, over religious associational rights. He asserts that allowing the private religious domain to continue discriminatory practices under the guise of religion, will ultimately undermine the new order envisaged by the Constitution.\footnote{982} Rautenbach also asserts that when considering South Africa’s political history, it is doubtful that freedom of association can be relied on to sanction “private apartheid”.\footnote{983} Furthermore, a discussion paper prepared by the Human Rights Commission contends that there is a hierarchy of rights and:

> “According to this hierarchy, the rights to human dignity and equality are superior to others. Therefore, when these core rights collide with other rights such as the right to freedom of association, the right to dignity and equality must prevail.”\footnote{984}

Generally, the state’s interference into the internal affairs of an association will depend largely on the nature of the association, the impact it has on the public\footnote{985} and the nature of right being infringed. For example, religion-based private schools may require a greater degree of interference by the state that other religious institutions, since they carry out a public function of facilitating the right to education.\footnote{986}

A further issue to be considered is whether or not learners should be permitted to form religious associations within schools and, if so, if their associational activities should be permitted during school hours or only after hours.\footnote{987} At present, although religious instruction may not form part of the formal school programme any longer, schools are encouraged to

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\footnote{982}{Bilchitz “Should religious associations be allowed to discriminate?” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874683 (Date accessed: 2 July 2012); See Bilchitz and De Freitas “Introduction: The Right to Freedom of Religion in South Africa and Related Challenges” 2012 28(2) SAJHR 141-144; Bilchitz argues that the right of private associations to discriminate is repugnant when considering South Africa’s history and the values enshrined in the Constitution. See Bilchitz “Why courts should not Sanction Unfair Discrimination in the private sphere: a reply” 2012 28(2) SAJHR 296-297.}

\footnote{983}{Rautenbach et al “Culture (and Religion) in Constitutional Adjudication, Revised paper delivered at the 5th Colloquium on Constitution and Law, Johannesburg 16 November 2002; Devenish (n64) 61.}


\footnote{985}{van Coller “Religious Institutions and Fundamental Rights: Applicability, Interaction and Limitations” Second ICLARS Conference, Santiago de Chile (8 September 2011) 18.}

\footnote{986}{Discussed further in Chapter 7.}

\footnote{987}{Manifesto on Values, Education and Democracy (2001) states that: “According to the Constitution, schools may be made available for religious observance so long as it is outside of school hours.” See p 7.}
allow their facilities to be used for religious activities, provided it does not interrupt the core educational activities of the school. This could include permitting “voluntary gatherings and meetings of religious associations during break times.”\textsuperscript{988} It states furthermore that:

“In accordance with the Constitution, the South African Schools Act, and rules made by the appropriate authorities, the Governing Bodies of public schools may make their facilities available for religious observances, in the context of free and voluntary association, and provided that facilities are made available on an equitable basis.”

If learners assert their associational rights within schools, it raises numerous and complex concerns for schools. For one, the school will have to ensure that it treats all religious associations equally and does not privilege one above the other, regardless of popularity. For example, most schools would more readily accept the application by learners to form a Christian Bible club, as opposed to an association not as mainstream, such as a Wiccan\textsuperscript{989} club. Also, schools would have to provide equal opportunity for non-religious clubs\textsuperscript{990} which assert other rights, as it does for religious clubs. For example, if students wanted to establish a Gay-straight alliance club, it would have to be accepted as readily as religious clubs. However, if, for example, students wanted to establish a shooting club, – this would not give effect to a constitutional right and may undermine school safety and therefore need not be accepted by schools.

Furthermore, if religious associations carry out activities during school hours, the school would have to ensure that these associations operate within rules which respect the equality and freedom of religion of all learners a within the environment.\textsuperscript{991} Also, the core beliefs of different associations may be contradictory to each other and rules would have to be established for all associations to co-exist in a way that is respectful to all others. It is imperative that there be no room for members to pressurise non-members into joining the group. There is concern that religious associations, in promoting themselves at school, may

\textsuperscript{988} National Policy on Religion and Education at para 55.
\textsuperscript{989} Wicca is a belief system based on ancient Witchcraft traditions. See The Celtic Connection “What is Wicca, Witchcraft and Paganism?” at http://wicca.com/celtic/wicca/wicca.htm (Date accessed: 7 January 2012).
\textsuperscript{990} Section 15(1) of the Constitution protects freedom of religion and “beliefs” that are not religious. This is elaborated on in Chapter 6.
\textsuperscript{991} The Guidelines for the consideration of Governing Bodies in adopting a Code of Conduct for Learners, GN 776 GG 18900 of 15 May 1998, lists non-discrimination, equality, respect and dignity as learners’ rights. See para 4.2 and 4.3. The right to freedom of association is not specifically dealt with.
attempt to proselytise others, which may be seen as harassment or coercion to join. This may negatively impact on children’s rights and the educational activities of the school.

Closely linked to the right of association, is the right of assembly, demonstration picket and petition. This right is crucial to addressing the feelings of powerlessness and isolation endured by minority groups who feel that their demands are not being given adequate consideration by the state. During the apartheid era, the NP government passed several laws aimed at the restriction of assemblies and gatherings. These laws endowed the specified authorities with the power to prohibit assemblies and public gatherings on various grounds, most of which were political and ideological. The Sharpeville massacre of 1960 was an example of a gross violation of the right to assemble during the apartheid era. Therefore, it follows that sections 17 and 18 of the Constitution are of paramount importance in the new South African legal order.

However, as important as these rights are, the Guidelines for the consideration of Governing Bodies in adopting a Code of Conduct for Learners emphasises that that where any form of expression leads to “the material and substantive disruption in school operations, activities or the rights of others” the expression can be limited, as the disruption of school activities is unacceptable. The ability of a school to function without disruption is crucial to education; therefore a restriction on disruptive assemblies, demonstrations or other forms of expression would be permissible.

993 The Guidelines for the consideration of Governing Bodies in adopting a Code of Conduct for Learners lists the “absence of harassment” as a right within the school environment. See para 4.6.
994 Section 17 of the Constitution; Beatty v Gillbanks (1882) 9 QBD 308, a Ghanaian case the Salvation Army was stopped from marching because of fears that it would incite a disorderly, loosely organised ‘skeleton army’, to acts of violence against it. The court observed that the Salvation Army had gathered “for a purpose which cannot be said to be otherwise than lawful and laudable, or at all events cannot be called unlawful”, and noting that what disturbances there had been, or might be, were, or would be caused by, “a body of persons opposed to the religious views of … the Salvation Army.” The court held that to disallow the procession amounted to saying “that a man may be punished for acting lawfully if he knows that his so doing may induce another man to act unlawfully a proposition without any authority whatever to support it.”
996 Among such legislation were the Internal Security Act of 1982 (previously Suppression of Communism Act of 1950) and the other laws included the Criminal Law Amendment Act 8 of 1953, the Riotous Assemblies Act 17 of 1956, the emergency regulations issued under the Public Safety Act 3 of 1954 and the General Law Further Amendment Act 92 of 1970. See Article 19: The Global Campaign for Free Expression “Freedom of Association and Assembly Unions, NGOs and Political Freedom in Sub-Saharan Africa” (March 2001) 63.
997 Para 4.5.1.
by religious associations at school, are a reasonable and justifiable limitation of freedom of religion.998

3 EDUCATION LEGISLATION: THE SOUTH AFRICAN SCHOOLS ACT

Education in South Africa is a matter of concurrent national and provincial legislative competence. Although each of the nine provinces has passed laws dealing with public schooling, national legislation on education in schools and relevant constitutional provisions exist to ensure that a national standard is maintained.999 This makes it easier to determine what is expected from schools and to ensure that schools do not violate the right to freedom of religion.

The primary purpose of the Schools Act is to give effect to the constitutional right to education.1000 The Preamble of the Schools Act encapsulates the enormity of the challenges that the state has faced in redressing the inequality which existed in the South African school system in the past. It recognises that schools would for a long time be a hub of intense debate regarding issues such as religious diversity, language differences and racial integration. The Preamble recognises the need for a national system of schools which redresses the injustices

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998 Discussed further in Chapter 6. This principle was illustrated in the case of Pillay at para 107, in which the court acknowledged that the exercise of religious rights may clash with a school’s responsibility to maintain order and discipline. As a result, the court held that a school may limit religious practices that place an unreasonable burden on or disrupts school activities. See Lenta (n842) 290.

999 Dickinson & van Vollenhoven (n14) 12; Also see the National Education Policy Act 27 of 1996 (“NEPA”), which provides for the determination of National policies in education. It establishes a system whereby the Minister of Education, in conjunction with the provincial departments, sets the political agenda and the national norms and standards for education planning, provision, governance, monitoring and evaluation. The provincial departments are given the task of implementing education policy and programmes that are in line with the national goals. According to the NEPA, the said policy must advance and protect the fundamental rights of every person guaranteed in Chapter 3 of the Constitution (now Chapter 2), and in terms of international conventions ratified by Parliament, and in particular - according to Section 4(a): The right of every person to be protected against unfair discrimination within or by an educational institution on any ground whatsoever; The right of a parent or guardian in respect of the education of his or her child; The right of every child in respect of his or her education; The right of every student to be instructed in the language of his or her choice where this is reasonably practicable; The right of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race; The right of every person to use the language and participate in the cultural life of his or her choice within an educational institution. See Organisation for Economic Co-operation and Development “Reviews on National Policies for Education: South Africa” (2008).

1000 See Rivonia at para 35.
of the past; combats racism, unfair discrimination and intolerance and protects diverse cultures and languages. 1001

Importantly, section 3 of the Schools Act places an obligation on parents to assure their child’s attendance of school. 1002 Essentially, the governance of every public school rests in the hands of the SGB. 1003 The SGB is a democratically elected body comprising of all the stakeholders within the school, which include the principal, educators, parents, learners and other members of the staff. 1004 The Act recognises that parents and the community are the best position to determine the needs of each particular school. 1005 Section 18 of the Schools Act provides that SGBs must function in accordance with a written constitution which must comply with certain minimum requirements determined by provincial MECs for Education in the Provincial Gazettes.

In relation to religion, section 7 of the Schools Act states that religious observances may be conducted at a public school under rules issued by the SGB if such observances are conducted on an equitable basis and attendance by learners and members of staff remains free and voluntary. This reiterates the principles set out in section 15 of the Constitution.

In addition, the Schools Act makes provision for the adoption of codes of conduct by schools which would contain rules relating to religious observances and religious/cultural dress. Section 8(1) of the Act provides that:

“(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.
(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.”

1002 Section 3(1) states that: “every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade.”
1003 Section 16.
1004 Section 23.
1005 Department of Education 1997b Understanding the South African Schools Act, Pretoria: Department of Education.
This section illustrates the importance of the involvement of school-children and their parents in the establishment of school rules but with due regard for the educational goals of the school.

Furthermore, section 8(3) of the South African Schools Act authorises the Minister to enact guidelines for the “consideration” of schools. Some regulations are mandatory but most—including those relating to religion and culture—are merely suggestive, making use of the word “should”. The sections on religious and cultural diversity aim to “assist” schools in establishing a uniform policy. However, all that is required from an SGB is that it considers the guidelines when adopting a new code of conduct. Ultimately, the guidelines issued by the Minister are therefore non-binding.1006

A major concern with regards to the Schools Act is that section 20(1) provides that it is an SGB’s function to promote the “best interests of the school”. The Act, however, makes no express mention of the best interests of the learner child.1007 Section 8(5) mentions “safeguarding the interests of the learner and any other party involved in disciplinary proceedings.” This is a short-coming in the Act which overlooks the interests of children in proceedings other than disciplinary proceedings, such as religious/cultural exemption procedures, for example.1008

Furthermore, section 20(1) of the Schools Act states that one of the functions of a SGB of a public school is to develop the mission statement,1009 and a code of conduct for the school, which would include the rules regarding the role of religion within that school or specifying a religious ethos which best suits the school concerned. In theory, allowing a SGB to determine the rules should mean that the rules are made with due sensitivity to the religious composition of each school. However, in practice, the situation may be very different. In this regard, Kumar observes:

1006 Pillay at para 34. For example, see Guidelines for the consideration of Governing Bodies in adopting a Code of Conduct for Learners.
1007 Section 8(5) mentions “safeguarding the interests of the learner and any other party involved in disciplinary proceedings.”
1008 This is addressed in Chapter 7.
1009 Section 5(3) states that: “No learner may be refused admission to a public school on the grounds that his or her parent does not subscribe to the mission statement of the school.” This places the rights of the child to receive an education ahead of any lack of agreement between the parent and school.

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“While all of the education is mostly secular education, the claiming of a particular religious ethos for a school simply to ensure a particular religious education in that school can result in a situation where state law could get into a tricky situation regarding religion. In other words, constitutional provisions could be used for purposes of ensuring religious status for a school. Since all schools in South Africa receive some form of state subsidy, is it constitutionally right to create a school subsidised by the state and yet allow a particular religion to be its ethos?”

After all, many South African are still in the process of transitioning from separate race schools to multi-racial/multi-faith schools and the SGB, which holds the power and influence over a school’s stance on religion, may still consist mainly of members of the majority faith and their decisions may be biased and therefore infringe upon the rights of historically marginalised religious groups. As a result, it can be argued that section 20(1) defers too much power to SGB’s. However, it can be counter-argued that the objectives of the state in allowing public schools to choose a religious ethos which best suits each schools is to acknowledge and show due respect for the religious majority within a school- which is a legitimate objective on the part of the state. After all, the rights of the religious majority cannot be completely overlooked for the sake of protection of minority rights.

Important, the Schools Act also provides for the establishment of private schools provided that the education at these schools, are not inferior to public schools and their admission policies do not discriminate on the basis of race. This echoes the requirements in section 29(3) of the Constitution. Although private schools are generally maintained at the owner’s expense, in terms of the Schools Act, nothing precludes the state from subsidising a private educational institution. Significantly, section 48(2) of Schools Act states that a state subsidy may be granted to independent schools out of funds appropriated by the provincial legislature for that purpose. Inevitably, the use of public funding for private purposes is a controversial issue. Many believe that the state should only provide funding to secular public

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1010 Kumar (n52) 281.
1011 Pillay at para 174.
1012 Rousseau points out that: “if your school’s character is explicitly defined as Christian, you have no option to disassociate yourself on a formal level, except by leaving the school. If there are no other schools in your area, or that are suitable for whatever reason, then you are compelled to study at a school that is Christian in character, despite the fact that public schools are not permitted to take on or practice the character of any particular religion.” See Rousseau “Religious education in South African schools” at Synapses http://synapses.co.za/religious-education-south-african-schools/ (Date accessed: 9 July 2013).
1013 Section 46 (3).
1014 National Norms and Standards for School Funding, GN 2362, GG 19347 of 12 October 1998, provides uniform national norms on private schools subsidies.
schools that are open to all children.\textsuperscript{1015} It submitted that the state must ensure that allocation of subsidies do not give unfair preferential treatment to particular religious groups.\textsuperscript{1016} Failure to do so would infringe the equality clause of the Constitution.

By and large the Schools Act is the legislation dedicated to giving effect to the constitutional provisions pertaining to education rights. However, as is elaborated on in Chapter 7, there is room for improvement in the Act in the area of upholding children’s rights.

4 NATIONAL POLICY ON RELIGION AND EDUCATION

4.1 INTRODUCTION

In addition to the abovementioned legislation, South Africa has adopted a \textit{National Policy on Religion and Education} (the National Policy) which introduced compulsory “religion education”\textsuperscript{1017} in schools and follows the lead of the Constitution and the Schools Act by providing a broad framework within which schools will adopt their own approaches on religious observances/expression that best fits each school.\textsuperscript{1018} Furthermore, the National Policy does not prescribe rules but offers a structure within which schools can adopt policies on religious observances/expression while being well informed of their rights and responsibilities regarding religion in schools.\textsuperscript{1019}

The National Policy is applicable to all public schools. Importantly, it reconfirms the constitutional provision that citizens have the right to establish private schools, including religious schools that are independently funded, which avoid racial discrimination and maintain standards that are at least equal to that of public schools.\textsuperscript{1020}

4.2 BACKGROUND TO THE NATIONAL POLICY

The January 1999 report from the Ministerial Committee for Religious Education, delivered during Dr. Sibusiso Bengu’s term as Minister of Education, stated that SGBs could determine

\begin{itemize}
\item \textsuperscript{1015} Ashley (n932) 55.
\item \textsuperscript{1016} Adhar \& Leigh (n26) 257.
\item \textsuperscript{1017} Explained in Chapter 1 and in the discussion of the National Policy’s provisions below.
\item \textsuperscript{1018} Asmal “Minister’s Foreword” in the National Policy.
\item \textsuperscript{1019} Para 2.
\item \textsuperscript{1020} Para 16.
\end{itemize}
the type of religious education to be offered in their schools, provided that it was consistent with the Constitution. The Bengu policy therefore allowed for provision of religious education from one religious perspective if the SGB saw fit.\textsuperscript{1021}

A new position emerged in June 1999 when the then newly appointed Minister of Education, Kader Asmal, took issue with the fact that religious education was being offered from a Christian perspective only.\textsuperscript{1022} He aspired to create and implement a policy which required schools to “reflect a South African identity in their culture, ethos, sport and teaching philosophy and practice.”\textsuperscript{1023} He believed that religious education should involve a comparative study of all religions. In his opinion, this would assist towards creating a South African society that reflects “unity without uniformity and diversity without divisiveness.”\textsuperscript{1024}

In fact, the new National Policy was a result of years of research and consultation. As it went through the process, there was an emerging consensus between participants as to the place of religion in education. Minister Asmal consulted with numerous other Ministers and religious leaders of the different religions and obtained support from many of them for the new Policy. The results made it clear that imposing religious practices on learners was unconstitutional.\textsuperscript{1025}

The state considered four possible models of education when drawing up the National Policy:

- A \textit{theocratic} model where the state aligns itself with a particular religion and imposes that religion in public institutions. The state recognised that this would be inappropriate in a multi-faith country;
- A \textit{repressionist} model, which requires the state to suppress religion and eliminate it from public life. The state recognised that the majority of South Africans are religiously active and that showing hostility towards religion would result in tremendous outrage from the public.
- The \textit{seperationist} model recognises that a modern secular state could be established that is neither religious nor anti-religious, but instead is impartial to all religions and

\textsuperscript{1021} Dickinson & van Vollenhoven (n14) 15.
\textsuperscript{1022} 15.
\textsuperscript{1023} Pretorius “Asmal plans a lesson for the rainbow classroom” 9 January 2000 \textit{Sunday Times} 2.
\textsuperscript{1024} The National Policy.
\textsuperscript{1025} The National Policy paras 6, 7 and 12.
worldviews. In other words, the religious and secular spheres of society are kept completely separate, as in the United States of America and France. The state recognised that this model is difficult to implement and not desirable in South Africa, a country in which the state is committed to engaging religious institutions and recognises their value in improving the quality of life of South Africans; and

- A co-operative model which creates separate spheres for religion and the state but still leaves room for interaction between the two. It protects religious freedom, protects citizens from discrimination based on religion, protects citizens from religious coercion and encourages dialogue between religious institutions and the state.1026

Resultantly, the state proposed a co-operative model which encompasses both constitutional separation and mutual recognition, a model which it believed was best for both religion and education. In terms of this model, the state was required to be impartial about religion, to neither advance nor inhibit a particular religion, but to recognise the equal value of all religions and secular worldviews.1027 Most importantly, the new model emphasised that religious indoctrination had no place in schools.1028

Minister Asmal’s views on religion were also were reflected in the Manifesto on Values, Education and Democracy (“the Manifesto”), published in August 2001.1029 Importantly, this document asserts that the state is not responsible for the religious upbringing of a child, but rather for providing knowledge about religion, morality, values and the diversity of religions.1030

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1026 Para 3; Sachs expresses positivity about the co-operative model as being the best option in the South African context. See Sachs “Religion, Education and Constitutional Law” 1993, Institute for Comparative Religion in South Africa 171-172.


1029 On the issue of values, the Manifesto on Values, Education and Democracy (“the Manifesto”), highlights ten key constitutional values namely: nationhood: democracy, social justice and equity, equality, non-racism, non-sexism, Ubuntu (human dignity) and an open society, accountability/ responsibility, the rule of law, respect, and reconciliation; Furthermore, the Manifesto goes on to identify 16 strategies that are appropriate to embedding these values in education. The strategies include: 1) talking in the classroom about a culture of human rights; 2) making arts and culture part of the curriculum; 3) putting history back into the curriculum and introducing religion education into schools.

1030 Dickinson & van Vollenhoven (n14) 16.
4.3 PROVISIONS OF THE NATIONAL POLICY

From the outset, it is necessary to point out that the National Policy makes a distinction between “religion education” and “religious instruction”. Religion education has non-devotional, educational aims and objectives for teaching and learning about different religions. In other words, it aims for religion to be taught from a neutral or academic standpoint without giving preference to one religion. Religious instruction, on the other hand, provides instruction in a particular religion with a view to promoting adherence thereto. It is therefore devotional in its objective. According to the National Policy, whereas religion education has a place in schools, religious education does not. Importantly, the National Policy correctly emphasises that “[c]onfessional or sectarian forms of religious instruction in public schools are inappropriate” in a religiously diverse society.

According the National Policy, permitting religion education in schools caters to the reality of religious plurality in South Africa, while still respecting a religiously active South Africa. Evidently, the state believes that it is the responsibility of public schools to educate learners about religion. In terms of the National Policy, the public school is charged with the task of instilling in learners with “the knowledge about religion and morality and values and the diversity of religions.” In this way learners are made aware of the common values that all religions uphold, including service to others, tolerance, increasing understanding and reducing prejudice. In addition, they will learn to accept, interact and engage with others of different

1031 As mentioned in Chapter 1 and emphasised again in Chapter 6; See more on this distinction in Kruger “Models of Religious Education: Personal correspondence to the editor” in Challenge (May 1997) 5.
1032 National Policy para 17.
1033 See definition section of the National Policy. The Manifesto also makes a distinction between religious education and religion education (See para 44). According to the Manifesto, religious education delves into the spiritual aspects of one particular religion, a matter which is better dealt with in the home environment, and religion education involves a study of all forms of religion from an academic or historical standpoint, which has a place in the school curriculum.
1034 Para 23.
1035 Para 22.
1036 Para 7; In order to achieve this, the Department of Education is guided by the following principles: 1) The relationship between religion and education must be in line with the constitutional values of citizenship, human rights, equality, freedom from discrimination, and freedom of conscience, religion, thought, belief, and opinion; 2) Public institutions are responsible for teaching about religion and religions but not for religious education which should be provided at home and within the religious community; 3) Religion education should create an informed community unified in its diversity and 4) Religion education must be facilitated by trained professionals who make use of credible learning materials and utilising objective assessment criteria. See National Policy para 8.
1037 Para 16.
faiths, and have an informed understanding about the traditions of others, while at the same time adhering to their own faith and traditions.\textsuperscript{1038}

Religion education forms part of the compulsory school curriculum as part of the Life Orientation Learning Area, under the focus area: Social Development from Grade R to 9,\textsuperscript{1039} and under Learning Outcome 2: Citizenship Education from Grade 10 to 12.\textsuperscript{1040} In addition, a separate subject of Religious Studies is offered as an optional, specialised and examinable subject form Grade 10-12.\textsuperscript{1041} The objectives of the state in including religion in the school curriculum are indeed praiseworthy. The National Policy envisions a society in which young people grow up to be knowledgeable and respectful of each other’s religions.

Significantly, the National Policy recognises South Africa’s cultural and religious diversity as a national asset. It emphasises the need to celebrate diversity as a national resource as is encouraged by the South African coat or arms which states: \textit{!Ke E:/Xarra //ke} (Unity in Diversity). This is stated as one of the National Policy’s primary goals.\textsuperscript{1042} This provision reflects the belief of the state that religion education can contribute to promoting respect for diversity and creating progressive values for the future. This is particularly important in light of South Africa’s history of suppression of religious diversity and favouritism of one faith above others. The importance of celebrating diversity was also emphasised by the Constitutional Court in recent cases involving discrimination, namely Pillay\textsuperscript{1043} and Fourie.\textsuperscript{1044}

Moreover, the objective of celebrating diversity is also reflected in the inclusion of culture\textsuperscript{1045} in the public school curriculum and the promotion of multi-lingualism in the state’s policy on language in public schools.\textsuperscript{1046} The Arts and Culture learning area encompasses learning about various aspects of different cultures.\textsuperscript{1047} Similarly to the objectives of National Policy,
its inclusion in the curriculum “provides a way for the values of equality, non-racism, non-sexism, ubuntu, openness, reconciliation and respect to be instilled in young people.” Furthermore, the current language policy aims to promote multi-lingualism by compelling learners to learn at least one additional language that is not their mother-tongue. In fact, as early as next year the language policy may include the compulsory learning of an African language, owing to the “changing profile of learner population” and in order to “promote multilingualism” and foster “social cohesion”. For practical and social reasons, it is to the benefit of South African learners to be proficient in more than one language and to learn about and understand diverse cultures. The corresponding goals

See Department of Education, Republic of South Africa: *National Curriculum Statement Assessment Guidelines for General Education and Training (Intermediate and Senior Phases) Arts and Culture 4.* See the Manifesto (Executive Summary).


The Preamble of the Language Policy “recognises that our cultural diversity is a valuable national asset and hence is tasked, amongst other things, to promote multilingualism, the development of the official languages, and respect for all languages used in the country.”

Section 6 of the Language Policy states: “All learners shall offer at least one approved language as a subject in Grade 1 and Grade 2. From Grade 3 (Std 1) onwards, all learners shall offer their language of learning and teaching and at least one additional approved language as subjects. From Grade 10 to Grade 12 two languages must be passed, one on first language level, and the other on at least second language level. At least one of these languages must be an official language.” Wright states: “South Africa’s excellent LIEP is one of additive multilingualism...When they finish school, learners should be proficient in their home language and in a second language, as well as having a sound knowledge of an additional language.” Wright “Implications of the National Language Policy in the South African Classroom” (Research paper).

Jones states: “An African language - including Afrikaans - will be compulsory for all pupils until matric, according to a new policy which could be implemented at all schools from as early as next year.” See Jones “African languages to be compulsory for all pupils” at [http://www.iol.co.za/news/south-africa/african-languages-to-be-compulsory-for-all-pupils-1.11531279#.Udu77HYaLIU](http://www.iol.co.za/news/south-africa/african-languages-to-be-compulsory-for-all-pupils-1.11531279#.Udu77HYaLIU) (Date accessed: 9 July 2013); This is in line with Article 12 of the SADC Protocol on Culture, Information and Sport mentioned in n547 above Meersman states: “The fact is the vast majority of South Africans are not first-language English speakers. Not understanding an African language excludes oneself from most people.” “Language is the new apartheid, says Dowling. If you are only Xhosa-speaking you have this additional hurdle to get a job or promotion. Poverty and language are linked.” “But the real benefit is that you feel you can belong in places you never really did before.” See Meersman “Why learn an African language?” at [http://www.thoughtleader.co.za/brentmeersman/2013/05/24/why-learn-an-african-language/](http://www.thoughtleader.co.za/brentmeersman/2013/05/24/why-learn-an-african-language/) (Date accessed: 15 July 2013).

Levy states: “The key to the future lies in helping the next generation to respect and embrace diversity rather than fear and reject differences.” See Levy “Culture in the Classroom” 1997 *Early Childhood News* 28 33 or [http://www.earlychildhoodnews.com/earlychildhood/article_view.aspx?ArticleID=141](http://www.earlychildhoodnews.com/earlychildhood/article_view.aspx?ArticleID=141) (Date accessed: 15 July 2013); Browne states that the inclusion of the Arts and Culture learning area will “contribute towards the establishment of a shared national heritage and identity that will prepare them for life, living and lifelong learning.” Through Learning outcome 3 the “learner will develop sensitivity towards fellow learners, also to those from other cultures.” See Browne The Implementation of the Arts and Culture Learning Area in Previously Disadvantaged Primary Schools in the Nelson Mandela Bay Area: Teacher
of the curriculum on religion, culture and language reflects a holistic approach by the state to “celebrate diversity” in all aspects in the school environment.\textsuperscript{1055}

Aside from its provision on religion education, the National Policy recognises instances in the past where schools and other public institutions have discriminated on the grounds of religious belief. It expresses the sentiment that, most often, learners of minority faiths were subjected to religious observances of the majority-followed Christian faith. Therefore, the core provision of the National Policy is that South African schools can no longer impose religious practices on schoolchildren.\textsuperscript{1056} This is in accordance with section 15(2) of the Constitution and section 9(2) of the Constitution.

In this regard, the National Policy addresses the issue of the school assembly which has for a long time been viewed as an occasion for religious observance.\textsuperscript{1057} It emphasises that “where religious observance is organised as an official part of the school day, it must accommodate and reflect the multi-religious nature of the country”\textsuperscript{1058} in an appropriate manner.\textsuperscript{1059} This may include allowing learners to excuse themselves on grounds of religion or conscience and making equitable arrangements for them in this period.\textsuperscript{1060} The multi-religious nature of a school can be acknowledged, for example, by rotating opportunities for observances by all religions in a way that proportionately resembles all the religions in the schools; or by reading from religious texts from various faiths; or using a universal prayer or moment of silence.\textsuperscript{1061} The National Policy also emphasises that where learners are separated for the purposes of religious observances, the school must consider the impact of peer pressure on children and

\textit{Experiences} (2011) 24 24-25. Lutz and Kuhlman state that: “The ‘rest of the world’ is pluralistic and diverse with many ethnic, religious, and cultural traditions. It is that tapestry of diversity that we choose to value as we help students recognize and respect people who differ from themselves and/or appreciate their many similarities. Learning about other cultures and ethnicities is one way to combat prejudice. As children learn about new cultures and fit their experiences with their new learning, they can appreciate all people’s uniqueness and similarities and not rely on racial and ethnic generalizations.” Lutz & Kuhlman “Arts and Young Children: Learning About Culture through Dance in Kindergarten Classrooms” 2000 28(1) \textit{Early Childhood Education Journal} 35 35.

\textsuperscript{1055} This is an important point to bear in mind in relation to the discussion on teaching religion in public schools addressed in Chapter 7.

\textsuperscript{1056} National Policy para 12.


\textsuperscript{1058} National Policy para 61.

\textsuperscript{1059} Para 62 states that “appropriate means may include the following: 1) The separation of learners according to religion, where the observance takes place outside of the context of a school assembly, and with equitably supported opportunities for observance by all faiths, and appropriate use of the time for those holding secular or humanist beliefs; 2) Rotation of opportunities for observance, in proportion to the representation of different religions in the school; 3) Selected readings from various texts emanating from different religions; 4) The use of a universal prayer; or 5) A period of silence.”

\textsuperscript{1060} Para 63.

\textsuperscript{1061} Para 62.
the negative impact on those who are identified as “different”.\textsuperscript{1062} In addition, the National Policy encourages respect and accommodation for religious dress, religious holidays and religious dietary requirements by schools.\textsuperscript{1063}

In light of the above, it must be acknowledged that the National Policy is laudable in principle. Nevertheless, it is not without its problems.\textsuperscript{1064} Despite its worthy objectives, it must be questioned whether or not compulsory religion education is in accordance with the religious freedom of school-children and their parents. Furthermore, it is questionable whether religion (in any format) can be taught from a completely “neutral” perspective at all. It is important to note that neither SGB’s nor parents have any input in the curriculum content so as to ensure the “neutrality” of the information.\textsuperscript{1065} A further concern with this approach is that if education about different religions is permitted, there is still a danger of abuse of authority by teachers who may continue to indoctrinate learners with particular religious beliefs.\textsuperscript{1066} This key issue is discussed and analysed in Chapter 7.

5 THE BILL OF RESPONSIBILITIES FOR THE YOUTH OF SOUTH AFRICA

Also connected to the state’s aim of instilling values in school children is the introduction of the \textit{Bill of Responsibilities for the Youth of South Africa} (the Bill), launched by the Department of Education in March 2008. The Bill was drafted in collaboration with LeadSA\textsuperscript{1067} and the National Religious Leaders Forum (NRLF).\textsuperscript{1068} The contents of the Bill are purportedly based on the Bill of Rights\textsuperscript{1069} with the aim of transforming the constitutionally given human rights into a practical set of personal responsibilities for South

\begin{itemize}
\item \textsuperscript{1062} Para 62.
\item \textsuperscript{1063} Para 59 states that: “an observance which may be ongoing, and entail other dimensions such as dress, prayer times and diets, which must be respected and accommodated in a manner agreed upon by the school and the relevant faith authorities.”
\item \textsuperscript{1064} See Chapter 7.
\item \textsuperscript{1065} Prinsloo (n1057) 349-350.
\item \textsuperscript{1066} Adhar & Leigh (n26) 245.
\item \textsuperscript{1067} Lead SA is a Primedia Broadcasting and Independent Newspapers initiative that encourages South Africans to seek to “do the right thing” through various projects. It was launched in August 2010. See Lead SA “Lead SA Projects” at http://leadsa.co.za/?page_id=7281 (Date accessed: 7 January 2010).
\item \textsuperscript{1068} Goldberg “Chief Rabbi powers Bill of Responsibilities” 27 Jul- 3 Aug 2007 \textit{SA Jewish Report} 4.
\item \textsuperscript{1069} See Preamble.
\end{itemize}
African youth. The Bill is meant to be displayed on the classroom wall in every classroom in the country and its contents taught as part of the Life Orientation syllabus.\textsuperscript{1070}

The objective of the Bill is to generate a culture of responsibility that begins at school level and then filters into the rest of society.\textsuperscript{1071} The Bill states:

“South Africa is a diverse nation, and equality does not mean uniformity, or that we are all the same. Our country’s motto: !KE E: /XARRA //KE, meaning “Diverse people unite”, calls on all of us to build a common sense of belonging and national pride, celebrating the very diversity which makes us who we are. It also calls on us to extend our friendship and warmth to all nations and all the peoples of the world in our endeavour to build a better world.”\textsuperscript{1072}

It must be noted that section 15(1) of the Constitution protects not only freedom of religion but also “conscience”, “thought”, “belief” and “opinion”.\textsuperscript{1073} Importantly, the Bill states that the right to freedom of conscience\textsuperscript{1074} requires the youth to not only allow others to choose and practice the religion of their choice, to hold their own beliefs and opinions and express them, but also to “respect the beliefs and opinions of others”, even when in strong disagreement with those beliefs and opinions.\textsuperscript{1075} According to the Bill, this is a requirement of democracy.

The concept of creating a Bill which emphasises the youth’s responsibilities towards others and attempts to cultivate respect for diversity, is indeed praiseworthy; however, since it’s unveiling, the Bill has been subject to criticism for presenting religion and religious leaders as the moral authorities in society and for being too religious\textsuperscript{1076} and paternalistic by indoctrinating the youth with conservative values.\textsuperscript{1077}

\textsuperscript{1070} Goldberg (n1068) 4.
\textsuperscript{1071} 4.
\textsuperscript{1072} The same sentiments of celebrating diversity were expressed by the Constitutional Court Pillay at para 107 and is contained in the National Policy (discussed above).
\textsuperscript{1073} These concepts are defined in the discussion on section 15 in Chapter 6.
\textsuperscript{1074} According to De Waal and Currie, conscience relates to moral judgement. See De Waal & Currie (n18) 290; Morality and religion are inextricably related. See Devlin The Enforcement of Morals (1965) 4.
\textsuperscript{1075} See the Bill.
\textsuperscript{1076} Chief Rabbi, Warren Goldstein, an executive member of the NRLF, has stated that the idea for a Bill of Responsibilities is “very much based on Judaism”... “The Torah speaks in the language of tomorrow. The significance of the bill for South Africa in the 21st century is to transform the society into a better one, the country into a better place, its thrust comes from the Torah itself and to remind us that ‘G-d’s wisdom is for all time.’” See Goldberg (n1068) 4; Ebrahim Bham, an executive member of the NRLF stated that: “for a Muslim, [the] responsibilities outlined in the Bill constitute religious duty.” Also it has been reported that the launch of the Bill in Cape Town, was opened by a teacher saying “I greet you all in the name of the
Initially, in the provisions dealing with equality, the Bill stated that the right to equality places a responsibility on everyone not to discriminate unfairly against anyone else “on the basis of race, gender, religion, national, - ethnic- or social origin, disability, culture, language, status or appearance.”\footnote{1078} This section omitted many of the important and progressive grounds upon which discrimination is forbidden in section 9 of the Constitution and the Equality Act, namely: gender, sex, marriage, pregnancy, colour, disability, conscience, belief and sexual orientation. The omission of sexual orientation was particularly disturbing considering the discrimination endured by gay, lesbian and transgendered youth in the school environment.\footnote{1079} This served as a primary example of how the Bill, a purportedly secular document, promoted particular conservative beliefs. On a positive note, this provision in the Bill has been amended to include all the grounds contained in section 9 of the Constitution, including sexual orientation.

However, a few other problem areas still persist. For example, the right to family and parental care places a duty on the youth to honour and respect their parents, to help them, to be kind and loyal to all family members and to “recognise that love means long-term commitment, and the responsibility to establish strong and loving families.”\footnote{1080} This provision is particularly bizarre. It reflects a conservative view of the meaning of love and family. It is submitted that it is not the duty of the state to dictate the meaning of love to its citizens. Furthermore, it is not for the state to decide what constitutes a “strong, loving” family. An individual may not have any inclination to establish a family at all- that is a matter of personal

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\footnote{1077}

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Bilchitz (n1077); In this regard De vos writes: “Given the fact that gay, lesbian and transgender youth are particularly vulnerable as they are still coming to terms with their sexuality — a sexuality they are often told by parents, by their religious leaders, by teachers and by fellow learners are perverted and sinful — it is an outrage that this document deliberately skirts the issue. Gay, lesbian and transgender youth are often relentlessly taunted and bullied by peers — which in extreme cases lead to suicide — yet this document suggests that it is perfectly acceptable to discriminate against them.” See De Vos “What a load of dangerous nonsense” at http://constitutionallyspeaking.co.za/category/freedom-of-religion/ (Date accessed: 10 June 2011).
\footnote{1079}

See the Bill.
\footnote{1080}
\end{flushright}
choice depending on each person’s freedom of conscience, religion, thought, belief and opinion.\textsuperscript{1081}

Moreover, the Bill places a limitation on free expression in that it requires that the youth “not tell or spread lies, and to ensure others are not insulted or have their feelings hurt.”\textsuperscript{1082} It is questionable whether this limitation is reasonable and justifiable or not. It limits the youths’ right to exercise their constitutional right to freedom of expression (which is the implementation of freedom of religion, thought and belief) without fear of insulting or hurting the feelings of others. This stipulation goes far beyond the specific exclusions on freedom of expression contained in section 16 of the Constitution.\textsuperscript{1083} The concern is that it requires that the youth be passive and obedient and withhold expression of any controversial opinions.\textsuperscript{1084}

Overall, the Bill, with its conservative religious undercurrent, is construed by some as religious indoctrination and contrary to the Constitution. The National Policy, discussed above, which is also said to flow “directly from … Constitutional values”, expresses that public schools “may not violate the religious freedom of pupils and teachers by imposing religious uniformity.”\textsuperscript{1085} However, the Bill, in certain respects, runs contrary to this. As a result, there have been calls for a re-drafting of the Bill to truly reflect the values of all South Africans.\textsuperscript{1086} Until then, there is concern that the Bill will continue to impact upon learners’ freedom of religion in South African schools by continuing to influence them towards adopting a particular conservative brand of beliefs.

6 CONCLUSION

The South African Constitution guarantees everyone the immediately realisable and equally accessible right to “basic education”.\textsuperscript{1087} Significantly, the Constitutional Court has made an
express link between the best interests of the child principle and the duties of the state to fulfil the right to basic education\textsuperscript{1088} and address the problem of unequal access to education.\textsuperscript{1089}

Furthermore, section 29(2) of the Constitution provides for the right to receive education in the official language of one’s choice where reasonably practicable. Overall, in the interpretation of section 29(2), South African case law has indicated that in the interests of equalising access to education, the equality rights of children may supersede the language rights of schools. Since the issues regarding language, race and religion are inevitably intertwined, much of the principles extracted from the case law pertaining to language rights, are applicable to matters concerning religion.\textsuperscript{1090}

Importantly, section 20(1) of the Schools Act allows SGB’s to develop the rules regarding the role of religion within schools in a way which serves the best interests of each school. This means that the school can establish a religious ethos and create rules which acknowledge the majority faith. However, schools have to ensure that in doing so, that they do not unfairly discriminate against children who do not belong to the chosen faith. Regrettably, the Schools Act emphasises the importance of protecting the interests of the schools but does not make mention of the best interests of the child principle.\textsuperscript{1091} Neither is this principle mentioned in the National Policy. This impact of this on children’s rights in the context of religion in schools is addressed later on this thesis.\textsuperscript{1092}

Importantly, the state has attempted to address the legal issues pertaining to the teaching of religion in public schools through the provisions of the National Policy, which provides for non-devotional religion education as part of the school curriculum. The National Policy aims to eliminate sectarian religious education that caters only to majority beliefs. Instead, it introduces compulsory religion education into the curriculum, which involves an academic study of different religions. The aim is to teach religious tolerance and foster an understanding between faiths at school level. Although this is a seemingly positive change towards respecting religious diversity, it must be questioned whether compulsory religion education is in accordance with freedom of religion. Also it must be questioned whether a

\textsuperscript{1088} Rivonia at para 69.
\textsuperscript{1089} Rivonia at para 2.
\textsuperscript{1090} Mentioned in Chapter 2; Illustrated in discussion on freedom of religion of children in private schools in Chapter 7.
\textsuperscript{1091} See Chapter 7.
\textsuperscript{1092} See Chapter 7.
subject as personal as religion can be taught in a neutral/objective perspective. It is submitted that the problem lies both in the content of the subject and the manner in which the subject is taught. This is a key area of concern that requires further analysis in this thesis.1093

Also, integrally linked to education rights are associational rights. The Constitution guarantees everyone the rights to freedom of association. However, it also ensures protection from unfair discrimination through the equality clause. There is concern that associational rights exercised within schools may conflict with other rights such as children’s rights, freedom of religion and the right to equality. As is illustrated, the tussle between these competing rights is particularly problematic in religion-based private schools.1094

From the perspective of religion, the establishment of private schools remains an area of concern. On one hand the right to establish private schools enhances religious and cultural rights; but on the other hand, it does not afford the equal opportunity to learners who are not of the chosen faith to assert their religious freedom at school. The interpretation of section 29(3) in Wittmann, allows private schools to require religious conformity by way of a waiver of the freedom of religion of the non-adherent child. This thesis questions whether this interpretation is in accordance with the values reflected in the Constitution.1095

1093 See Chapter 7.
1094 See Chapter 7.
1095 See Chapter 7.
CHAPTER 6
FREEDOM OF RELIGION

“Only the individual can think, and thereby create new values for society, nay, even set up new moral standards to which the life of the community conforms. ... The ideals which have lighted my way, and time after time have given me new courage to face life cheerfully, have been Kindness, Beauty and Truth.”

1096

1 INTRODUCTION

The purpose of this Chapter is to outline and assess the current South African law pertaining to freedom of religion, the basis of which is section 15 of the Constitution. This Chapter explores the constitutional provisions relating to freedom of religion, as well as the connection between religion, culture and freedom of expression.

The Chapter discusses freedom of religion in accordance with the following themes: 1) the protection of religion in the Constitution 2) the nature of freedom of religion; 3) the waiver of freedom of religion; 4) unfair discrimination on the basis of religion; 5) the relationship between religion and culture; 6) Determining centrality and sincerity in cases involving religion and culture; 7) the relationship between religion and freedom of expression; 8) a school’s duty to limit freedom of religion and 9) reasonable accommodation of religious practices in schools. Lastly, this Chapter contains a discussion on the South African Charter of Religious Rights and Freedoms – which aims to enhance the religious rights in section 15.

The discussion herein must be considered in light of South Africa’s international obligations with regards to freedom of religion and within the context of South Africa’s history on

1096 Albert Einstein, 1954.
1097 The rights to dignity; equality and freedom of association have already been discussed in previous Chapters and therefore need not be discussed separately in this Chapter; however, must be borne in mind throughout this Chapter.
religion in schools; also bearing in mind the children’s rights issues and educational issues discussed in Chapters 4 and 5, respectively.

2  FREEDOM OF RELIGION

2.1  THE PROTECTION OF RELIGION IN THE CONSTITUTION

Importantly, the Constitution guarantees everyone the right to freedom of religion, which includes the right to hold religious beliefs; to announce one’s religious beliefs publicly and the right to manifest such beliefs.\textsuperscript{1098} Section 15 of the Bill of Rights states that:

\begin{quote}
“(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Religious observances may be conducted at state or state-aided institutions, provided that:
\begin{itemize}
\item[(a)] those observances follow rules made by the appropriate public authorities;
\item[(b)] they are conducted on an equitable basis; and
\item[(c)] attendance at them is free and voluntary.”
\end{itemize}
\end{quote}

Although this thesis has primarily focussed on the term “religion”, section 15(1) of the Constitution protects not only religion but also “conscience”, “thought”, “belief” and “opinion”. The term religion is not an easy term to define. The dictionary meaning of religion is an “action or conduct indicating belief in, obedience to, and reverence for a god, gods, or similar superhuman power; the performance of religious rites or observances.”\textsuperscript{1099} John Witte offers a broad definition, namely that religion:

\begin{quote}
“embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to fundamental questions.”\textsuperscript{1100}
\end{quote}

\textsuperscript{1098}  \textit{Prince} at para 38.
\textsuperscript{1100}  Witte \textit{God’s joust, God’s justice – Law and religion in the Western tradition} (2006) 100-101; Witte also offers a narrower definition that religion embraces “a creed, a cult, a code of conduct, and a confessional community”. Quoted in Venter (n873) 434.
It is clear by these definitions that religion is not founded “solely upon reason, but primarily upon belief.”1101 The inclusion of religion in the same clause as belief and conscience, both of which relate to an individual’s state of mind; emphasises that religion is understood as a set of beliefs that an individual may hold regardless of others. It is understood to be individualistic and personal.1102 Included in religious freedom is the right to reject religious beliefs; meaning that belief systems that are not religious, are equally protected alongside religion.

The term “belief” in section 15 refers to beliefs that are not centred on a God or deity, such as, rationalism or free thought.1103 Van der Schyff notes that it covers other secular belief systems that are not religious, for example, atheism,1104 agnosticism secular humanism.1105 In the case of Wittmann, Van Dijkhorst J held that: “[Religion] cannot include the concepts of atheism or agnosticism which are the very antithesis of religion.”1106

The term “conscience” denotes moral judgement.1107 Van der Vyver comments that freedom of conscience is far wider than religion or belief, since it includes both persuasions that are religious and those that are not.1108 However, he notes that “thought” is the widest of the concepts included in section 15.1109 “Thought” encompasses all application of human reason.1110 It is clear that section 15(1) covers this wide range of views of learners at schools, including religious, philosophical and political views.1111

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1101 436.
1102 Pillay at para 143.
1103 De Waal & Currie (n18) 290; Murdoch (for the Council of European Human Rights) states that: “the belief must ‘attain a certain level of cogency, seriousness, cohesion and importance’; and secondly, the belief itself must be one which may be considered as compatible with respect for human dignity. In other words, the belief must relate to a ‘weighty and substantial aspect of human life and behavior’ and also be such as to be deemed worthy of protection in European democratic society.” See Murdoch Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights: Council of Europe Human Rights Handbooks (2012) 16; See discussion in Campbell and Cosans v. the United Kingdom [1982] ECHR 1 (25 February 1982) §36.
1104 At heism is defined as “the position that affirms the non-existence of God. It proposes positive disbelief rather than mere suspension of belief.” See Rowe “At heism” in Routledge (ed) Routledge Encyclopedia of Philosophy 1998.
1105 Van der Schyff (n34) 61-62; See Farlam “The ambit of the right to freedom of religion: a commentary on S v Solberg” 1998 14 SAJHR 298 308 fn 20; De Waal and Currie concur that atheism would be included under belief or conscience. See De Waal & Currie (n18) 290.
1106 Para 449. See full quote in Chapter 3.
1107 De Waal & Currie (n18) 290.
1108 Van der Vyver “Suspension, derogation and de facto deprivation of fundamental rights in Bophuthatswana 1994 THRHR 257 267; Van der Schyff (n34) 61-62.
1109 Van der Vyver (n1108) 265.
1110 De Waal & Currie (n18) 290.
1111 Naidu “The right to freedom of thought and religion and to freedom of expression and opinion” 1987 Obiter 59 62.
Section 15(2) deals with the right to conduct “religious” observances. Ultimately, section 15(2) places a responsibility on the state to create conditions for the exercise of religious freedom within schools and other state-aided institutions, without favouring any particular religion. This does not require that schools make provision for prayers from every denomination represented in the pupil body; but it does allow for prayers that are considered to be most appropriate for a particular school, to be conducted in an equitable manner and in a manner that does not amount to direct or indirect coercion of those learners from other faiths.

In this regard, a distinction must be drawn between religious instruction, religion education and religious observance. Religious observance refers to individual or collective scripture reading, prayers, moments of silence for personal devotion or meditation and, possibly, the exhibition of symbols. On the other hand, religious instruction refers to the teaching of specific religious beliefs. Religion education refers to the teaching about different religions and worldviews from an academic perspective. Whereas the right to conduct religious observances in school is expressly protected by the Constitution, the right to receive religious instruction or religion education are not. Significantly, in terms of section 15(2), religious observances are required to be free and voluntary. A good indicator of this is way in which the school treats the non-participants. This element of freedom of choice to participate in religious observances is an essential component to freedom of religion.

2.2 THE NATURE OF FREEDOM OF RELIGION

The nature of the right to freedom of religion has been interpreted on numerous occasions by the Constitutional Court. In *S v Lawrence* ("Lawrence"), Chaskalson P relied on the

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1112 A state-aided institution is neither public (as in state-controlled) nor private; rather, it lies somewhere in between. De Waal and Currie define state-aided institution as “not public, but funded by the state to an appreciable extent and subject to extensive state regulation.” The term “state-aided institution” includes more than schools; it includes, for example, other educational institutions; state hospitals and state prisons. See De Waal & Currie (n18) 303. Van der Schyff observes that the institutions connection to the state is more relevant than the function of the institution itself. See Van der Schyff (n34) 66.
1113 Dickinson & van Vollenhoven (n14) 12.
1114 See also section 20(1) of the Schools Act.
1115 Devenish (n52) 92.
1116 Foster et al (n34); Van der Schyff *The Right to Freedom of Religion in South Africa* (2001) 151; See Human Rights Committee General Comment No. 22 (n482).
1117 Dickinson & van Vollenhoven (n14) 16.
1118 Addressed in Chapter 7.
1119 1997 4 SA 1176 (CC) ("Lawrence").
definition of freedom of religion proposed by Supreme Court of Canada Canadian case resting on similar facts, namely *R v Big M Drug Mart* ("Big M Drug Mart"); which offered a comprehensive summary of the components of freedom of religion. In his judgement, Dickson CJC stated as follows:

“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.”\(^{1120}\)

However, Dickson CJC went on to say freedom of religion means more than this; it also implies an absence of coercion or constraint, meaning that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.\(^{1121}\) The dissenting judgement offered a much wider definition, infusing freedom of religion with an equality aspect, not just the requirement of voluntariness.\(^{1122}\) The argument in favour of recognising the equality aspect in freedom of religion is that it prevents the state from privileging one faith over others (discussed below).\(^{1123}\) This case indicated a division in the Constitutional Court on the very nature of freedom of religion.

In defining the nature of the right of freedom of religion in the case of *Christian Education* the court deferred to the meaning utilised by Chaskalson in *Lawrence*; meaning that religious freedom would only be infringed if the appellant could show that there had been coercion or constraint on the part of the state.\(^{1124}\) In this case there was no dissent to the use of this definition, unlike in *Lawrence*, where five of the nine judges disagreed with Chaskalson P’s view on the extent of the right.\(^{1125}\) A notable difference in *Christian Education* was that the

\(^{1120}\) (1985) 13 CRR 64 ("Big M Drug Mart") at para 97; *Lawrence* at para 92.

\(^{1121}\) *Lawrence* at para 92.

\(^{1122}\) O’Regan J, in the minority judgement of *Lawrence*, argued that freedom of religion requires more of the legislature that it to refrain from coercion but also requires “fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion.” See *Lawrence* at para 128. According to O’Regan J, the requirement of equity demanded that the state act even-handedly in relation to different religions. This does not, in her opinion demand a commitment to a complete secularism or complete neutrality. However, for religious observances at national level, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others. See *Lawrence* at paras 121-122; Rautenbach concurs that: “The scope of section 15(1) is twofold, namely firstly to demand the freedom to practise one’s religion without interference from the state and secondly to demand religious equality.” See Rautenbach *et al* (n983) 8.

\(^{1123}\) Cheadle (n315) 209.

\(^{1124}\) Para 104.

court gave due respect to the significance of religious freedom and related rights and recognised the connection between religion and dignity. According to the court, religious and cultural rights affirm the right of people to be “who they are without being forced to subordinate themselves to the cultural and religious norms of others”\textsuperscript{1126} or in other words the “right to be different”.\textsuperscript{1127} Also, the court focussed on the substance of freedom of religion as a constitutional right as depicted in the following statement:

“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.”\textsuperscript{1128}

It should be noted that in \textit{Christian Education}, with the claimants being part of a powerful mainstream religion and not a minority, the court showed much more sensitivity and understanding\textsuperscript{1129} in dealing with religious sentiments than in \textit{Lawrence}.

In the case of \textit{Prince}, the court set out the content of the right as including: “(a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one’s religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs….\textsuperscript{1130} Furthermore, the court expressed its approval of the definition utilised in \textit{Big M Drug Mart} (quoted above) and once again recognised that implicit in freedom of religion, is the absence of coercion or constraint.\textsuperscript{1131} It is clear from the above that the Constitutional Court has consistently relied on the definition of freedom of religion as the requiring the absence of coercion or constraint on religious beliefs.

\textsuperscript{1126} \textit{Christian Education} at para 24
\textsuperscript{1127} Para 24; Krooez “God’s Kingdom in Law’s Republic: Religious Freedom in South African Constitutional Jurisprudence” 2003 19(3) SAJHR 469 478; In \textit{Prince}, the minority came to the conclusion that there was a duty on the courts to guarantee the Rastafari a reasonable means within which to exercise their religious rights (para 163). The minority made the decision to safeguard the “right to be different” (para 170).
\textsuperscript{1128} \textit{Christian Education} at para 36.
\textsuperscript{1129} du Plessis (n758) 29.
\textsuperscript{1130} \textit{Prince} at para 38.
\textsuperscript{1131} Para 38.
Furthermore, all the above-mentioned cases recognised that freedom of religion is not absolute; it may be limited if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” Such limitation may be justified by a legitimate state interest such as protecting public safety or protecting the rights of others. This means that constitutional case law has consistently confirmed that freedom of religion exercised within schools may include the right to believe; the right to announce and manifest those beliefs and the “right to be different.” However, it is clear that the right to announce and manifest those beliefs may be subject to limitations by school rules.

2.3 THE WAIVER OF FREEDOM OF RELIGION

The term “waiver” is used when a person agrees not to exercise a right in future. The important questions that need to be answered are: can a fundamental human right, more particularly freedom of religion, be waived and if so, to what extent? The issue of waivers is an “underdeveloped and confusing area” of constitutional law, partly due to the fact that there is no constitutional provision dealing with waivers of rights in this or any other jurisdiction. In addition, there are no definitive answers to these questions in constitutional jurisprudence.

De Waal and Currie assert that waivers are in certain circumstances constitutionally permissible. In principle, freedom rights such as freedom of religion may be waived if the person does so freely, without duress or misapprehension. The nature and purpose of the fundamental right in question are factors that need to be considered when determining the constitutionality of the waiver. For example, the rights to life and dignity, due to their nature, are inalienable and cannot be waived. Whereas rights with positive and negative

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1132 Section 33 of the interim Constitution or Section 36 of the Constitution.
1133 See discussion below on a school’s duty to limit freedom of religion.
1134 The discussion of waivers of rights in general is beyond the scope of this thesis. This discussion is limited to what is relevant to waivers of freedom of religion in private schools.
1135 De Waal & Currie (n18) 43.
1137 Woolman (n1136) 12.
1138 De Waal & Currie (n18) 43; See S v Gasa 1998 (1) SACR 446 (D); In the case of S v Pienaar 2000 (7) BCLR 800 (NC) at para 6, it was stressed that the person’s choice to waive a right must be informed and considered.
dimensions such as freedom of religion, can in certain circumstances be waived.\textsuperscript{1139} Contrastingly, there is legal authority which doubts whether a waiver of constitutional rights is enforceable.\textsuperscript{1140} In \textit{S v Shaba}\textsuperscript{1142} the court held that a person can choose in a particular instance not to exercise a right for good reason but cannot completely abandon such right. It is therefore impermissible to waive a fundamental right by virtue of the principles applicable to waiver found in the contract law.\textsuperscript{1143}

Overall, there is very little jurisprudence on the issue of waivers of religious rights other than the interpretation in \textit{Wittmann}.\textsuperscript{1144} Another case dealing with this issue is \textit{Garden Cities Inc Association v Northpine Islamic Society} (\textquotedblright Garden Cities\textquotedblright ),\textsuperscript{1145} in which the High Court upheld an agreement by which the respondent waived the right to practice his religion in a particular way. This case, however, dealt with a waiver of one aspect of a religious practice (the sound amplification) and not the complete waiver of a person’s right to freedom of religion (the right to practise Islam). Unfortunately, the case did not expand on the requirements that need to be met for a waiver of rights to be constitutionally permissible.

On the other hand, it is clear that a person can waive a right conferred by the terms of a contract (as opposed to the waivers of a rights conferred by law).\textsuperscript{1146} There is, however, a strong presumption against waiver in the contract law;\textsuperscript{1147} meaning that it must be clearly proved that the person who is alleged to have waived his or her right, knew what the right

\begin{thebibliography}
\item De Waal & Currie (n18) 42–44.
\item Devenish (n64) 551; Woolman states that: a “waiver of constitutional rights should never be tolerated.” “Let me put the argument that follows in its simplest form: (1) In a regime of rights in which the Constitution is the supreme law, the only real question is whether the Constitution permits certain kinds of action or proscribes certain kinds of action. (2) Once a court determines what the Constitution allows or does not allow, there is no longer any question of waiver: you either have a right to do something (and can then, for instance, contract in that space) or you don’t (and then no action, such as a contract, may take place).” See Woolman (n1136) 13.
\item (1998) 2 BCLR 220 (T).
\item Devenish (n64) 551.
\item Discussed in Chapter 5.
\item 1999 (2) SA 268 (C) (\textquotedblright Garden Cities\textquotedblright ). In this case the respondent had bought land on which to build a mosque but had agreed not to use sound amplification equipment for the call to prayer. He acted to the contrary and was interdicted by the High Court. He argued that the Constitution did not permit the waiver of a fundamental aspect of one’s faith. The Court did not address this difficult issue, but held that since the amplification of the call to prayer was not a fundamental tenet of Islam, the agreement did not infringe upon the respondent’s religious freedom and could therefore be upheld.
\item Ware writes: “One can alienate one’s rights in two ways: in exchange for consideration or in the absence of consideration. To put it another way, one can trade away one’s rights, or one can give away one’s rights. In some legal contexts, such as contract law, the term “waiver” is often used to refer only to giving away one’s rights.” See Ware “Arbitration clauses, jury-waiver clauses and other contractual waivers of constitutional rights” 2004 \textit{Law & Contemporary Problems} 167 169.
\item Christie (n619) 511.
\end{thebibliography}
was\textsuperscript{1148} and had the intention to waive it.\textsuperscript{1149} Visser notes that the agreement to waive may be implied, but the courts will not lightly infer the abandonment of a right.\textsuperscript{1150} Importantly, the contract law emphasises that the law will not recognise a waiver of rights which is contrary to public policy.\textsuperscript{1151} In the case of \emph{Sasfin (Pty) Ltd v Beukus},\textsuperscript{1152} Smalberger JA stated that:

“The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expediency, will accordingly, on the grounds of public policy, not be enforced.”\textsuperscript{1153}

The learned scholar Aquilius defines a contract against public policy as “one stipulating performance which is not \emph{per se} illegal or immoral but which the courts, on grounds of expediency, will not enforce, because performance will detrimentally affect the interest of the community.”\textsuperscript{1154} More simply put, Ngcobo J in the case of \emph{Barkhuizen v Napier ("Barkhuizen")}\textsuperscript{1155} defined public policy as “the legal convictions of the community; it

\begin{itemize}
\item 512-513; \emph{Gordan v AA Mutual Insurance Assn Ltd} 1988 SA 398 (W); Visser et al (n616) 12; Bhana makes a distinction between direct and indirect waivers as follows: “a contractual restriction is direct when a contract purports deliberately to restrict a particular facet of a party’s religious practice. In other words, the party agreeing expressly to a particular restriction is likely to have applied his or her mind to the implications of such agreement, for his or her right to freedom of religion.” For example, the waiver in the case of \emph{Garden Cities}. “In contrast, a contractual restriction is indirect when a contract, although seemingly neutral, has the (inadvertent) effect purportedly of impinging on a party’s right to freedom of religion. In other words, the party agreeing to such a restriction is not likely to have applied his or her mind to the precise implications of such agreement, for his or her right to freedom of religion.” An example of such a contractual restriction is found in the case of \emph{Pillay} discussed below. Bhana urges the court to bare this in mind when deciding whether or not to uphold a waiver. Bhana \emph{Constitutionalising Contract Law: Ideology, Judicial Method and Contractual Autonomy} (2012) 202-203.
\item The requirements expounded in \emph{Ex parte Sassens} 1941 TPD 15 20, were as follows: “The necessity of full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract, in which one party is taken deliberately to have surrendered his rights: there must be proof of an intention so to surrender, which can only exist where there is knowledge both of the facts and the legal consequences thereof.”; In \emph{Hepner v Roodepoort- Mariasburg Town Council} 1962 4 SA 772 (A), the court held that: “The onus is on the appellant to show that the respondent, with full knowledge of his rights, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.”
\item (149/87) [1988] ZASCA 94; [1989] 1 All SA 347 (A) (19 September 1988) ("Sasfin"). \emph{Sasfin} at para 8-9; In \emph{Magna Alloys and Research SA (Pty) Ltd v Ellis} 1984 (4) SA 874 (A), Rabie CJ held that restraints of trade were \emph{prima facie} valid and enforceable unless they are contrary to public policy; Van der Merwe observes that public policy relates to the goals of society on an abstract level, whereas public interest is the more concrete expression of the values and norms of society which are realised when policy is implemented. However, this distinction is not absolute. Public policy and public interest influence and shape each other, therefore the terms are sometimes used interchangeably. See Van der Merwe \emph{et al Contract General Principles} (2003) 177.
\item Aquilius “Immorality and Illegality in Contract” 1941 58 SALJ 337 346. \emph{(CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) ("Barhuizen").

\end{itemize}
represents those values that are held most dear by the society.”¹¹⁵⁶ In this case the Constitutional Court confirmed that what is contrary to public policy must now be determined by the values that underlie the Constitution, meaning that a term that is inimical to constitutional values is contrary to public policy and therefore unenforceable.¹¹⁵⁷ This reconfirmed the statement made by Cameron JA in the Supreme Court of Appeal case of *Brisley v Drotsky*¹¹⁵⁸ that: “In its modern guise, public policy is now rooted in our Constitution and the fundamental values it enshrines.”¹¹⁵⁹ It is submitted that the protection of the best interests of minor children forms part of the values system of South African society.¹¹⁶⁰ As a result certain restrictions must be placed on a parent’s right to contract on behalf a child (based on public policy) to ensure the protection of the interests of the minor child.¹¹⁶¹

Nevertheless, determining whether or not an agreement is contrary to public policy does require a balancing of competing values.¹¹⁶² It must be recognised that upholding the sanctity of a contract (*pacta servanda sunt*) is one of the values. It is the underlying principle in contract law which needs to be protected as far as possible.¹¹⁶³ In *Sasfin*, Smalberger JA stated that no court should shy away from its duty to declare a contract contrary to public policy when the occasion demands it. However, he warned that this power should be exercised with caution and “only in the clearest of cases”, so as not to cause uncertainty as to the validity of contracts. Furthermore, courts must be careful not to declare that a contract is contrary to public policy merely because (some of) its terms offend an individual’s sense of propriety and fairness. In this regard Smalberger referred to the words of Lord Atkin: “the doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.”¹¹⁶⁴ This principle was confirmed by the Supreme Court of Appeal in *Napier v Barkhuizen*.¹¹⁶⁵

¹¹⁵⁶ Para 28.
¹¹⁵⁷ Para 29; Nevertheless the impact of the Constitution on the enforceability of contracts continues to be controversial.
¹¹⁵⁸ 2004 (4) SA 1 (SCA).
¹¹⁵⁹ Para 91; Discussed in Bhana (n1148) 3-4.
¹¹⁶⁰ Now affirmed by section 28 (2) of the Constitution.
¹¹⁶¹ See example in Chapter 2 at paragraph 2.2.
¹¹⁶³ See *Brisley v Drotsky*.
¹¹⁶⁴ *Sasfin* at para 12; Quote taken from *Fender v St John-Mildmay* (1938) AC 1 at 12; the judgement in *Sasfin* was reinforced in *Botha (now Griessel v Finanscredit (Pty) Ltd* 1989 3 SA 773 A 7821-783C; In *Morrison v Anglo Deep Gold Mines Ltd* 1905 TS 775 779 at paras 784-785, Innes CJ stated: “Now it is a general
It is clear from the above that public policy generally favours freedom of contract\textsuperscript{1166} (or in this case the freedom to waive). In general, parties should comply with contractual obligations (waivers) that were made freely and voluntarily. However, freedom of contract cannot be unlimited. The validity of all law, including waivers, depends on their consistency with the values that underlie the Constitution. The application of the principle \textit{pacta sunt servanda} is, therefore, “subject to constitutional control”.\textsuperscript{1167} All in all, the crux of the matter is that even in cases where a waiver of rights is legally permissible, it may be unenforceable in that it is inconsistent with the provisions of or values of the Constitution. A waiver cannot make otherwise unconstitutional laws or conduct valid.\textsuperscript{1168}

On a practical level, there have been instances, where a parent signs a code of conduct in order for their child to be admitted to a school and then subsequently allows the child to dress or adorn themselves in defiance of the code, based on religious or cultural rights. The decision in \textit{Pillay} indicated that the contractual undertaking by a parent (on behalf of the learner child) to avoid certain forms of religious/cultural expression, did not protect the decision of the school (based on the code of conduct) from constitutional scrutiny and review. Subsequent to her consent to the code of conduct, the parent had the right to question whether the decision by the school/the rule in the code of conduct was discriminatory or not.

2.4 **UNFAIR DISCRIMINATION ON THE BASIS OF RELIGION**\textsuperscript{1169}

In light of the historical context of religion in schools, a pressing issue in South African schools is that of unfair discrimination on the basis of religion; or alternatively religious favouritism of one faith over others. According to Freedman, the right to religious freedom can operate both as a religious right and as an equality right. The liberty aspect entails the right to entertain any religious beliefs one chooses with the absence of coercion or constraint...
by the state. The equality aspect involves freedom from government practices which favour one religion over another. This coincides with sentiments expressed by O’Regan J in the case of Lawrence (discussed above).

Lawrence is the primary Constitutional Court case which dealt with unfair discrimination on the basis of religion and religious favouritism by the state. As will be seen, although this case does not pertain to schools, its principles illustrate some important points applicable to issues pertaining to religion in schools. The appellants in this case contended that Liquor Act’s prohibition on the sale of alcohol on particular “closed days” (namely, Sundays, Good Friday and Christmas), showed that the legislation had a religious purpose, one which favoured Christianity above other belief systems. It was argued that the provision “coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose”, and therefore infringed upon the freedom of religion of those persons who do not hold such beliefs.

Importantly, the appellant’s contended that the history of the legislation confirmed that closed days were introduced to serve a religious purpose. At the inception of the interim Constitution on 27 April 1994, the restrictive provisions of the Liquor Act applied not only to Sundays, but to all public holidays of a religious nature, which at the time included Good Friday, Ascension Day, the Day of the Vow and Christmas Day, all significant holy days of

1170 Freedman “The right to religious liberty, the right to religious equality and section 15(1) of the South African Constitution” 2000 STELL LR 99 100; As Black J stated in Engel v Vitale, 370 US 421 (1962) at para 431: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” In this case the US Supreme Court held unconstitutional a New York practice recommending the reading of a non-denominational prayer in state schools. The prayer read as follows: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”

1171 Kroeze (n1127) 475. See reference to the Act in n273 above.

1172 Lawrence at para 85.

1173 The Friday before Easter, which is a Christian holy day commemorating the resurrection of Christ.

1174 The day commemorating Christ’s visible ascent from earth.

1175 “The Day of the Vow (Afrikaans: Geloftedag or Dingaansdag) is the name of a religious public holiday in South Africa until 1994, when it was renamed the Day of Reconciliation. According to an Afrikaner tradition, the Day of the Vow traces its origin as an annual religious holiday to the Battle of Blood River on 16 December 1838. The besieged Voortrekkers took a public vow (or covenant) together before the battle, led by either Andries Pretorius or Sarel Cilliers. In return for God’s help in obtaining victory, they promised to build a church. Participants also vowed that they and their descendants would keep the day as a holy Sabbath.” See Anon “Lessons from the Day of the Vow at http://faithandheritage.com/2011/01/lessons-from-the-day-of-the-vow/ (Date accessed: 23 June 2012). Anon “Day of Reconciliation” at http://www.savenvenues.com/events/southafrica/day-of-reconciliation/ (Date accessed: 23 June 2012).

1176 The anniversary of the birth of Christ.
the Christian faith.\textsuperscript{1177} If the selection of these particular days had a religious objective then this was sufficient to constitute an infringement of freedom of religion.\textsuperscript{1178}

As mentioned, the court in \textit{Lawrence} made reference to a Canadian case, \textit{Big M Drug Mart}, which concerned the provisions of the Canadian Lord’s Day Act. The Act prohibited any work or commercial activity on the Lord’s Day, namely Sunday. The name of the Act made it apparent that the purpose of the Act was religious in nature, namely to compel the observance of the Christian Sabbath.\textsuperscript{1179} In this case, the court stated that:

\begin{quote}
“A finding that the Lord’s Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country.”\textsuperscript{1180}
\end{quote}

Therefore there was no difficulty for the court in \textit{Big M Drug Mart} in holding that a law which compels the observance of the Christian Sabbath by those who did not hold the belief, infringed upon their religious freedom.\textsuperscript{1181} The court illustrated with the following example:

\begin{quote}
“If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. . . . any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.”\textsuperscript{1182}
\end{quote}

Similarly, in \textit{Lawrence}, Chaskalson P, admitted that constraints on freedom of religion could be imposed in subtle ways and that selecting days which are significant within Christianity to serve a legislative purpose might be construed as giving preferential treatment to Christianity, leaving observers of other religions to feel slighted. Despite this, he failed to see how the Liquor Act compelled observance to Christianity.\textsuperscript{1183} He agreed with the contentions of the respondent and found the connection between the purpose of the Liquor Act and Christianity to be “too tenuous”.\textsuperscript{1184} The appeal was therefore on this basis.\textsuperscript{1185}

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\textsuperscript{1177} See Wulfsohn “Separation of Church and state in South African law II” 1964 SALJ 226 226.  
\textsuperscript{1178} \textit{Lawrence} at para 86.  
\textsuperscript{1179} Para 88.  
\textsuperscript{1180} Para 87; \textit{Big M Drug Mart} at para 93.  
\textsuperscript{1181} \textit{Lawrence} at para 89.  
\textsuperscript{1182} \textit{Big M Drug Mart} at para 99.  
\textsuperscript{1183} \textit{Lawrence} at para 90.  
\textsuperscript{1184} Para 105.  
\textsuperscript{1185} Para 108.
\end{flushleft}
According to Chaskalson P, there may be circumstances in which endorsement of religion by the state would contravene freedom of religion. This would be the case if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them with regard to observing their own religion. Whether direct or indirect, coercion must be established to give rise to a claim of infringement of freedom of religion. The onus was on the appellant to show that there had been such coercion or constraint. In Chaskalson P’s opinion, this had not been established.  

In a concurring judgement, Sachs J, did not agree with the observation of Chaskalson P, that coercion, whether direct or indirect, had to be established in order to find that freedom of religion had been violated. He found that the provisions on “closed days” endorsed Christian values and made them binding on the whole nation and this did not coincide with the values expressed in the Constitution. According to Sachs J, the objective of section 14 (the freedom of religion clause in the interim Constitution) is “to keep the state away from favouring or disfavouring any particular world-view, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters, must.” Even if there is no compulsion to observe a religious practice, the effect of the relevant provision is still to “divide the nation into insiders who belong, and outsiders who are tolerated.”

Nevertheless, Only O’Regan J, in the minority judgement rejected the majority’s finding that the legislature’s purpose in enacting the definition of “closed day” was a secular one. According to O’Regan J, even if it were, the question in each case will not be the question of purpose alone, but one of whether the general purpose and effect of the provision constitutes an infringement of freedom of religion. Consequently, O’Regan J (in utilising her wider definition of freedom of religion) submitted that the majority judgment showed “religious favouritism”. It appears that the majority looked for coercion to observe Christian holidays without considering the subtle message that the choice of Sunday as a “closed-day” sends a message to minority religious groups and non-believers that could cause them to feel marginalised and offended. The majority in Lawrence failed to consider the indirect impact that the seemingly neutral provisions of the law had on minority religions. Also, the majority

Para 104.
Para 179.
Para 160.
This was based on a wider definition of freedom of religion as discussed above.
Para 127.
Para 171.
in Lawrence failed to take cognisance of the history of religious favouritism\textsuperscript{1192} in any meaningful way.

Contrastingly, Sachs J outlined particular examples of where the legislature expressed a clear preference for Christianity in the past.\textsuperscript{1193} Prior to 1994, there were a number of statutory provisions with a religious foundation that depicted a Christian bias.\textsuperscript{1194} For example, the Publications Act 42 of 1974 caused the entire censorship system to succumb to the principles of Christian morality.\textsuperscript{1195} In addition, education in public schools for white children was based on Christian National Education and education in black schools had to have a Christian character.\textsuperscript{1196} Furthermore, the crime of blasphemy applied to the slandering of the God acknowledged by Christianity only.\textsuperscript{1197} Christianity was associated with what was considered to be “civilized peoples”\textsuperscript{1198} and Christian values were very often utilised in the interpretation and development of the law.\textsuperscript{1199} Moreover, the apartheid state required observance of certain aspects of Christianity and did not recognise marriages of other faiths. This disregard for the sanctity of Customary, Hindu and Muslim marriages has been the cause of much ill-feeling within those communities.\textsuperscript{1200}

\textsuperscript{1192} See Chapter 2.
\textsuperscript{1193} Lawrence at para 149.
\textsuperscript{1194} Paras 149 and 151; See Chapter 2.
\textsuperscript{1195} Para 149; See Van der Westhuizen “Freedom of Expression” in Van Wyk (n876) 264 at 282: “[South Africans] have been subjected to a system of censorship which was intended to impose the Calvinist morality of a small ruling establishment on the entire population.”
\textsuperscript{1196} Para 149-151.
\textsuperscript{1197} See Van der Vyver in Joubert & Scott (n2 42) 197; See case examples in Wulfsohn (n51) 93-96.
\textsuperscript{1198} Seedat’s Executors v The Master (Natal) 1917 AD 302 at 307 (per Innes CJ); See also Ismail v Ismail 1983 (1) SA 1006 (A) at 1026.
\textsuperscript{1199} Lawrence at para 151.
\textsuperscript{1200} In Narayan (ed) The Selected Works of Mahatma Gandhi: Satyagraha in South Africa (1928) at 377-8, M K Gandhi refers to the judgment in the Cape Supreme Court setting aside the practice of forty years, which “... thus nullified in South Africa at a stroke of the pen all marriages celebrated according to the Hindu, Musalman and Zoroastrian rites. The many married Indian women in South Africa in terms of this judgement ceased to rank as the wives of their husbands and were degraded to the rank of concubines, while their progeny were deprived of their right to inherit the parents’ property. This was an insufferable situation for women no less than men, and the Indians in South Africa were deeply agitated.” The shock to Indian women was so great that for the first time they joined in the Satyagraha campaign. Gandhi continued (at 388):
“It was an absolute pure sacrifice that was offered by these sisters, who were innocent of legal technicalities, and many of whom had no idea of country, their patriotism being based only upon faith. Some of them were illiterate and could not read the papers. But they knew that a mortal blow was being aimed at the Indians’ honour, and their going to jail was a cry of agony and prayer offered from the bottom of their heart, and was in fact the purest of all sacrifices.” Quoted in Lawrence at fn34.
In a similar case to Lawrence, namely, Gold Circle (Pty) Ltd and Another v Premier, KwaZulu-Natal;\(^{1201}\) it was contended that section 4(3) of the Regulation of Racing and Betting Ordinance 28 of 1957 (KZN), which prohibited the holding of horse races on “closed days”, namely Sundays, Good Friday, Ascension Day and Christmas Day, had the effect of promoting the principles of Christianity by recognising these Christian days of worship as worthy of being given special treatment. It was contended that Christians benefit by having their religious days recognised\(^{1202}\) and fostered and in turn, non-Christians are deprived of secular activities such as racing on closed days.\(^{1203}\) Despite discussing and applying the principles utilised in Lawrence, the court found that non-Christians are unfairly discriminated against under s 9(3) of the Constitution in that they are receiving neither the equal protection nor the equal benefit of the law.\(^{1204}\) In this regard, Southwood AJ stated:

> “I am not considering Sunday alone, but the whole of s 4(3) which mentions Sunday, Good Friday, Ascension Day and Christmas Day together, and then treats them in the same way. Also, I am not considering the supplying of wine, but the carrying on of the whole business of horse racing meetings in KwaZulu-Natal on the closed days. It seems to me that the purpose of prohibiting horse racing on the closed days is to promote the precepts of Christianity. It is sought to promote them by recognising these Christian days of worship as worthy of being given special treatment and by eliminating, on the closed days, the secular attractions of horse race meetings so that those attractions do not compete with the behaviour and worship expected of Christians on those days. While s 4(3) seeks to promote these precepts, it does not seek to do so by compulsion, but by removing competing attractions. Although s 4(3)’s purpose is aimed at Christians, its effects are visited on Christians and non-Christians alike.”\(^{1205}\)

Accordingly, the court found that section 4(3) offended against the right to freedom of religion and was therefore constitutionally invalid on two counts. Although only a High Court judgment, this case recognised the existence of the symbolic effect of indirect discrimination

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\(^{1201}\) 2005 (4) SA 402 (D) (“Gold Circle”).

\(^{1202}\) Gold Circle at p 406: “Christians observe the closed days, Sundays, to rest from secular pursuits and to worship; the others to commemorate various events of special significance in their religion, and to worship. People in other religions, agnostics and atheists do not recognise the days as having any special significance.”

\(^{1203}\) p 414.

\(^{1204}\) It is important to take note that Gold Circle was interpreted according to the Constitution and not the interim Constitution as in Lawrence. As the court points out, there is a significant difference between section 8 of the interim Constitution and section 9 of the Constitution, namely change from the “equal protection of the law” in ss (1) of section 8, to which every person is entitled, to the “equal protection and benefit of the law” in ss (1) of section 9. See Gold Circle at p 414.

\(^{1205}\) Gold Circle at p 412.
in the form of religious favouritism and that discrimination may exist even in the absence of coercion to conform.\textsuperscript{1206} Much the same as the Liquor Act and Racing and Betting Ordinance (and other laws influenced by Christianity), a school’s code of conduct may appear to be neutral on the face of it, but in effect enforces mainstream-majoritarian beliefs, behaviours and forms of dress. Chapter 2 illustrated how Christianity has influenced and shaped laws and policy on education and noted that remnants of its influence continue to persist in schools\textsuperscript{1207}—often through codes of conduct.

For example, in the case of Pillay, the primary issue was indirect discrimination on the basis of religion. In this case, a (South Indian, Tamil, Hindu) learner made an application for an exemption from the school’s code of conduct to enable her to wear a nose-stud,\textsuperscript{1208} based on religious and cultural grounds.\textsuperscript{1209} The school’s refusal to grant the exemption resulted in a claim of unfair discrimination on the basis of religion and/or culture. In this case, the court noted that the provisions of the code may appear to be neutral but actually enforce mainstream and historically privileged forms of adornment at the expense of minority and historically excluded forms. The ground of discrimination is still religion or culture as the code has a disparate impact on some religions and cultures.\textsuperscript{1210} This means that there was an

\textsuperscript{1206} The existence of indirect discrimination was also acknowledged in \textit{Gauteng Education}; See du Plessis (n52) 439; See Blake & Litchfield (n273) 515; See also \textit{Matukane and others v Laerskool Potgietersrus} (1996) 1 All SA 468 (T).

\textsuperscript{1207} See du Plessis (n53).

\textsuperscript{1208} See significance of the nose stud in \textit{Pillay} at paras 7 and 11.

\textsuperscript{1209} The connection between and difference between religion and culture is pointed out in Chapter 1 and is discussed further below. The expert witness in the case of \textit{Pillay} conceded that it was difficult to distinguish between Hindu culture and Hindu religion and described the situation as a “universal dilemma of all cultures and religions”. See \textit{Pillay} at para 13.

\textsuperscript{1210} \textit{Pillay} at para 44; In the similar, Labour Court case of POPCRU, the applicants sought an order declaring that the dismissal of a group of Rastafarian workers was automatically unfair as contemplated by section 187(1) (f) of the Labour Relations Act and/or that their dismissal amounted to unfair discrimination on the basis of their religion and culture, in terms of section 6 of the Employment Equity Act no 55 of 1998. The dismissal arose as a result of the refusal of the workers to cut their dreadlocks in accordance with the Dress Code. Paragraph 5.1 of the Dress Code stated that: “the hair may not be longer than the collar of the shirt when folded down or cover more than half of the ear. The fringe may not hang in the eyes. The hair may not be dyed other than the natural colour, including ‘Rasta man hairstyle, for men.’” The second, fifth and sixth applicants contended that they wore dreadlocks for religious reasons as they were Rastafarians. The third and fourth applicants stated that they had worn dreadlocks for cultural reasons. In addition, the applicants sought an order declaring that the Dress Code with reference to a failure or refusal to cut dreadlocks to be unconstitutional (at para 1). The respondents opposed the claim by contending that reason for the dismissal had nothing to do with unfair discrimination, but rather because the workers had failed to comply with the Dress Code (at para 2). In addition, the respondents contended that the Dress Code applied equally to all, regardless of their religion or culture, and did not have a disparate impact on any member or class of members, on the grounds of religion or culture, therefore the claim under the Employment Equity Act had to fail. The court found that the dismissal of each of the five applicants on the basis of gender was automatically unfair (at para 239). The Department of Correctional Services appealed the Labour Court judgment. The appeal was dismissed by the Labour Appeal Court. See \textit{Department of Correctional Services}
undue burden placed on learners of certain religions and cultures, who were prohibited from expressing themselves fully. This case illustrated the importance of cases involving religion and cultural rights being considered in light of their historical context.\textsuperscript{1211} It appears that the courts’ interpretation of unfair discrimination on the basis of religion has evolved since the \textit{Lawrence} judgment to truly recognise the impact of indirect discrimination that seemingly neutral provisions of the law, may have on (minority) religions.

Also, the court in \textit{Pillay} pointed out that neither the Equality Act nor the Constitution required identical treatment,\textsuperscript{1212} just equal concern and equal respect.\textsuperscript{1213} This coincides with the CRC Committee General Comment No 5 (2003) which states: “It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment.” This means that a learner may be granted an exemption for a sincerely held religious belief and other learners within the school, who have to conform to the code of conduct as is, cannot claim that this is unfair.

The case of \textit{Christian Education} coincided with this principle in \textit{Pillay}, by way of the following extract:

“\textit{It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community...}”


\textsuperscript{1211} In the High Court decision of \textit{Navaneethum Pillay v KwaZulu-Natal MEC of Education and Others} 2006 (10) BCLR 1237 (N) at para 17, the court noted that the learner was part of a group that had endured systematic inequality in the past and that the school’s argument that its rule prohibiting the wearing of jewellery was a general one applicable to every learner, only prolonged that discrimination. The High Court highlighted the past and present marginalisation of Hindus and Indians in South Africa. It held that the school’s insistence upon uniformity or similar treatment only served to uphold structures of discrimination; The dissenting judges in \textit{Prince} placed the claim for a religious exemption within an historical context. In fact, the High Court decision of \textit{Prince}, the court emphasised the importance of contextualising the balancing exercise required by section 36 of the Constitution (paras 151-152).

\textsuperscript{1212} Para 103.

\textsuperscript{1213} This coincides with \textit{Fourie} at paras 60, 95 and 112; \textit{City Council of Pretoria v Walker} 1998 (2) SA 363; 1998 (3) BCLR 257 (CC) at paras 81 (Langa DP) and 130 (Sachs J); \textit{President of the Republic of South Africa and Another v Hugo} 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41; \textit{Prinsloo v Van der Linde and Another} at para 32; For the link between equality and respect, see Frankfurt “Equality and Respect” 1997 64(1) Social Research 3-15.
and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.\textsuperscript{1214}

Significantly, Pillay recognised how seemingly neutral rules can place an undue burden on certain religions and culture, thereby discriminating against them. It also affirmed that sometimes fairness requires that people or different religions be treated differently.\textsuperscript{1215}

On a practical level in a school context, direct discrimination on the basis of religion may occur, for example, where a teacher uses religion education lessons or the \textit{Bill of Responsibility for the Youth of South Africa}\textsuperscript{1216} to indoctrinate learners in a particular set of beliefs. It may also occur when schools compel learners to participate in religious observances against their will or when a public school excludes admission to non-adherents of a particular faith.\textsuperscript{1217} But, usually religious discrimination is far more subtle than this. For example, when teaching about religions, even the most subtle comments, facial expressions and tone of voice of a teacher can indicate disregard for a particular religion-which in turn may influence learners in their thinking about that religion.\textsuperscript{1218} Furthermore, when it comes to school prayers, if the school prayers are voluntary and learners are allowed to opt-out based on religious freedom; it may seem that there is no unfair discrimination. However, if the singling out process is handled in an insensitive or degrading manner, this situation could amount to indirect coercion, in that it places pressure on learners to participate in the observances of the favoured religion.\textsuperscript{1219} An exemption process which does not take cognisance of the child’s dignity and best interests, in effect highlights the religious difference

\textsuperscript{1214} \textit{Christian Education} at para 42.
\textsuperscript{1215} In both \textit{National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others}, 1998 (12) BCLR 1517 (CC) and \textit{National Coalition for Gay and Lesbian Equality and Another v. Minister of Home Affairs and Others}, 2000 (2) SA 1 (CC), the Court made it clear that equality does not mean that differences are to be eliminated, but that equality demands respect for and tolerance of diversity and that unfair discrimination must be understood in the context of the experiences of those primarily affected.
\textsuperscript{1216} Discussed in Chapter 5.
\textsuperscript{1217} Private schools are dealt with in Chapters 5 and 7.
\textsuperscript{1218} Summers & Waddington (n115) 201-202.
\textsuperscript{1219} Even though South Africa does not have an establishment clause, this pronouncement in \textit{Lawrence} should be considered in the light of the U.S Supreme Court’s decision in \textit{Engel v. Vitale} (1962), which held that schools could not require recitation of a denominationally neutral prayer, even though students who did not wish to participate could remain silent or excuse themselves from the room. The court believed that when the state endorses or gives financial support to one religion, it indirectly coerces minorities to conform to the “accepted” religion. Although the state may allow religious observances, they must be conducted on an equitable basis; The case of \textit{Abington School Dist v Schemp} 374 (1963) 203, extended the decision in \textit{Engel v Vitale} beyond officially composed prayers to Bible readings and the Lord’s prayer.
of the learner instead of protecting the learner from (indirect) religious discrimination. This opinion was recognised in the case of Wittmann in which the court stated:

“It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults. Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate…”

As a result, some schools may opt for allowing for moments of silence in assemblies rather than the reading of religious prayers (despite the school being attended by a religious majority) – not because there is a legal imperative for such a decision, but because the SGB deems it to be (morally speaking) the “right thing to do” in the interests of all learners and staff.

There has not been a Constitutional Court case directly relating to the issue of opting out in a public school setting as yet, however, a prominent Canadian case that illustrates this point serves as comparative example. The landmark decisions of Zylerberg v Sudbury Board of Education (“Zylerberg”), essentially brought to an end the notion that Ontario school-children should be brought up with a “good Christian education.” In the Zylerberg case, Philip Zylerberg, a Jewish parent, along with other parents (all non-Christians and atheists) believed that the process of applying for exemption was a form of coercion to conform to the “accepted” religion and therefore a violation of the Canadian Charter. The Sudbury Board of Education and the Government of Ontario relied on the argument that section 28 served a legitimate purpose of instilling important moral values in school-children and that any interference with religious freedom was slight. The Court of Appeal found that section 28(1) of the Regulation infringed section 2(a) of the Charter. The court found that the infringement of minority rights was not insubstantial and did not impair the rights of the minorities “as little as possible.” The court stated that the exemption process in this particular case,
stigmatised minority students who would be required to single themselves out as being different.\textsuperscript{1225}

\section*{2.5 THE RELATIONSHIP BETWEEN RELIGION AND CULTURE}

Although, religious and cultural rights are profoundly interconnected,\textsuperscript{1226} the Constitution recognises that culture is not the same as religion. Whereas religious belief is individualistic and need not be shared by others, culture, on the other hand, relates to traditions and beliefs developed by a community. Culture is “a particular way of life of an identifiable group of people.”\textsuperscript{1227} Bennet describes culture as encompassing “a people’s entire store of knowledge and artefacts, especially the languages, systems of belief, and laws that give social groups their unique characters.”\textsuperscript{1228} This means that individuals acquire their sense of cultural identity from a group with whom they share a common identity, a shared religion, a shared language or a shared history.\textsuperscript{1229}

Belonging to a community means more than merely associating with it; it includes taking part in community practices and traditions and manifesting that community’s culture.\textsuperscript{1230} De Waal and Currie reason:

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“The right of a member of a cultural or linguistic community cannot meaningfully be exercised alone. Enjoyment of culture and use of language presupposes the existence of a community of individuals with similar rights. . . . Therefore an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture.”\textsuperscript{1231}
\end{quote}

For this reason, section 31 contains a specific right that members of a religious community have the right to enjoy their culture or practice their religion with other members of their community. Importantly, the protection of culture in the Constitution is extended to all

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\textsuperscript{1225} Dickinson & Dolmage “Education, religion and the courts in Ontario” 1996 21(4) Canadian Journal of Education 363 369. The manner in which religious exemption processes are handled in schools is a key issue that is addressed in detail in Chapter 7.
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\textsuperscript{1226} This was recognised in the case of Pillay at para 13.
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\textsuperscript{1227} Currie (n561) 35.19.
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\textsuperscript{1229} Pillay at para 144; See also Rautenbach et al (n983) 5-6.
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\textsuperscript{1230} Para 53.
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\textsuperscript{1231} De Waal & Currie (n18) 623-624.
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cultures regardless of popularity. Section 31 protects both the right of the group to enjoy their culture and religion and the right of the individual to participate in the cultural or religious group of his or her choice. It provides as follows:

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

The reason for the inclusion of religion in section 31 of the Constitution is that where a group of people are of the same religion, the group may also share associative practices.

It should also be noted here – as alluded to above – that the right to freedom of religion and the right to culture overlap to a certain extent. For example, in the case Pillay, it was unclear whether the wearing of the nose stud by young females is a Hindu religious requirement or an Indian cultural practice. The court decided that wearing a nose stud amounted to a voluntary expression of South Indian Tamil Hindu culture, a culture that is closely entwined with Hindu religion. The court therefore concluded that the nose stud had both religious and cultural significance.

The court in Pillay found that religious and cultural practices are of equal importance. It is more about what the practice means to a person than how it is classified. Any predetermination of the importance of a practice will often be based on a flawed, imperfect categorisation of the practice that will fail to accommodate those who do not conform to the norm. The court found it was imperative to make the point that cultural convictions or practices may be as important to those who hold them as religious beliefs are to those who

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1232 Pillay at para 54.
1233 Currie (n561) 35.13-35.14.
1234 Also explained in Chapter 1.
1235 Pillay at para 47.
1237 Pillay at para 60.
1238 Para 91.
find deeper meaning in a higher power rather than in a community of people.\textsuperscript{1239} A cultural practice may hold deeper meaning to an individual than it does to others within that culture.

The court noted that even though cultures are associative, the cultural practices and beliefs of each individual may differ, and people find their cultural identity in different places, but the importance of that identity remains. A single culture cannot be said to be unified. Cultural groups are not static—they are ever-changing and evolving.\textsuperscript{1240} The Constitution protects every voice within a culture, not just the most powerful voice.\textsuperscript{1241} This means that people within one culture may carry out different cultural practices or may carry out the same cultural practice differently.

In deciding whether the nose stud was a religious or cultural practice or both, the court in \textit{Pillay} stated that “the temptation to force [grounds of discrimination] into neatly self-contained categories should be resisted.”\textsuperscript{1242} In summary, religion and culture are different concepts that influence people’s lives in very different ways; however, as previously noted, the lines between religion and culture are flexible. Religious belief influences and forms cultural practices and cultural practices often attain religious significance.\textsuperscript{1243} It is therefore possible for practices to be both religious and cultural.\textsuperscript{1244} Importantly, \textit{Pillay} also emphasised that culture is as intertwined with an individual’s dignity and identity as religion is;\textsuperscript{1245} and therefore cultural practices are to be equally respected as religious practices.

\section{2.6 DETERMINING CENTRALITY AND SINCERITY IN CASES INVOLVING RELIGION AND CULTURE}

When deciding whether or not to grant a religious exemption based on the right to religious freedom, South African courts use at least three criteria: 1) requiring the claimant to prove that the prohibited practice is central to his/her religion; 2) identifying the sincerity of the

\begin{footnotesize}
\begin{enumerate}
\item Para 53.
\item Para 152.
\item Sections 7(1), 9 (1), 30 and 31 of the Constitution.
\item Para 60; quote taken from \textit{Harksen v Lane NO and Others} at para 49.
\item \textit{Pillay} at para 60.
\item Paras 47 and 60.
\item Paras 62 and 64.
\end{enumerate}
\end{footnotesize}
claimant’s belief and 3) interpreting the practice contextually to determine if the Constitution excludes it from protection.1246

In *Prince*, the majority noted that a crucial aspect of the enquiry into the infringement of religious freedom is the centrality of the practice in question.1247 Contrastingly, Ngcobo J, in the minority judgement, held that the court should not be concerned with the question of centrality. Religion, as he put it, is a matter of faith and belief. A religious practice may strike someone outside the faith as bizarre or illogical, but the practice nevertheless deserves constitutional protection. He stressed that humans should be free to believe in what they cannot prove. For this reason, he felt it undesirable for courts to discuss whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.1248

In the case of *Pillay*, which involved a practice that was both religious and cultural, the court found that the centrality of the practice is a core concern in deciding what would be considered reasonable accommodation of the practice concerned. This entails that those persons who appear to adhere to religious or cultural practices, but are willing to forego it if needs be, cannot expect the same accommodation as a person whose identity would be seriously undermined if they are not allowed to adhere to their belief.1249

Importantly, however, the court in *Pillay* questioned whether an objective enquiry can be made into the centrality of the practice to a particular religion or culture. Such an enquiry would mean substituting the adherent’s belief on the meaning of the practice with the court’s belief. The court in *Pillay*, held that if the a practice is central to a particular learners faith, it is not for the court to tell that learner that she is wrong because the court cannot possibly relate to her religion or culture in the same way as she does.1250

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1246 de Waal, Mestry & Russo “Religious And Cultural Dress at School: A Comparative Perspective” 2011 14(6) PER 70; De Waal & Currie (n18) 341-342; See Lenta’s list of questions that need to be posed to establish which claimants should be entitled to religious exemptions (supposing there is such a right) in Lenta “Is there a right to religious exemptions?” 2012 129(2) SALJ 303 328-329.
1247 *Prince* at paras 41- 43; *Christian Education South Africa v Minister of Education* 1999 (4) SA 1092 (SE); 1999 (9) BCLR 951 (SE) 11001-1101 A; *Pillay* at para 67.
1248 *Prince* at para 42.
1249 *Pillay* at para 86.
1250 Para 87; In the Labour Court case of *POPCRUL*, the applicants submitted that the court should not be concerned with the validity or correctness of the Rastafarian faith or beliefs but only with their sincerity. They referred to the case of *United States v Bellard* 322 US 78 (1944), wherein the court stated: “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.
Importantly, in *Pillay*, the court emphasised that the colonialist approach to customary law was to attempt to force a set of rules and practices into a neat box of coherency and unity. This fossilises the law instead of viewing it as “living customary law”\(^\text{1251}\) – law that is evolving. The courts must accept that “[t]radition is not cast in stone, it changes and people in the end begin to ascribe a meaning to it that probably is different from what you and I may think it to be.”\(^\text{1252}\) Ultimately, centrality of belief can only be judged with sole reference to how important the belief or practice is to the claimant’s religious or cultural identity. The centrality of the practice to the remainder of the community can be used as evidence, but only to assist in establishing subjective centrality.

Similarly in the Labour Appeal Court case of *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others*, the court stated:

“There is also no dispute between the parties that the wearing of dreadlocks is a central tenet of Rastafarianism and is a form of personal adornment resorted to by some who follow the spiritual traditions of Xhosa culture. Courts, in any event, are not usually concerned with the centrality or rationality of beliefs and practices when determining questions of equality or religious and cultural freedom. The authenticity of a party’s belief or adherence is of limited relevance. Provided the assertion of belief is sincere and made in good faith, the court will not embark on an inquiry into the belief or practice to judge its validity in terms of either rationality or the prevailing orthodoxy. Equality and freedom of religion and culture protect the subjective belief of an individual provided it is sincerely held…”\(^\text{1253}\)

On the issue of sincerity, in *Pillay*, when the learner was first asked to remove the nose stud, she agreed to do so - but this could have been out of fear or uncertainty of what would happen should she go against the authority of the school’s headmistress. Thereafter, she continuously defied the will of the school by not removing the nose stud in order to uphold her beliefs, and in doing so endured ill-treatment from peers and prefects, coupled with media exposure about

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\(^\text{1251}\) Religious experiences which are as real as life to some, may be incomprehensible to others, yet the fact that they be beyond the ken of mortals does not mean that they can be made suspect before the law.” See paras 86 – 87.

\(^\text{1252}\) See *Bhe* at para 87.

\(^\text{1253}\) Stated by Professor Rehana Vally, an anthropologist at Pretoria University in Van Rooyen “Principal turns a beady eye on boy’s tradition” Sunday Times (31 January 2009) at

http://www.thetimes.co.za/PrintEdition/News/Article (Date accessed: 10 February 2009).

This led the court to conclude that the wearing of the nose stud was a sincerely held religious and cultural belief to the learner herself. Also, the court found that once religious and cultural significance has been proven, the mainstream popularity of a religious or cultural practice should no longer be relevant.

Significantly, the court in Pillay, had to decide on whether or not the Equality Act and the Constitution applied to voluntary religious and cultural practices, an issue which had never before arisen before a South African court. The mandate on a person to adhere to a practice is relevant because many people will feel that voluntary practices are not central to their religious or cultural identity. However, the court observed that there will also be those who feel a practice is central to their identity even though it is voluntary. They too deserve protection. The court’s opinion was that the question of whether a practice was mandatory or voluntary is irrelevant in deciding if the practice deserves protection.

The reason for protecting mandatory practices is traditionally because it presents the believer with ‘Hobson’s choice’, either observe your faith or comply with the law (as was the case in the Prince). However, there is more to protecting religious and cultural rights than protecting adherents from hard choices - their beliefs are central to their identity, human dignity and equality.

Voluntary practices are as much a part of, and equally important to identity and dignity as mandatory practices. While some cultures may have obligatory rules which act as conditions for membership of the culture, others have no authoritative body or text that determines the rules to be followed by that culture. Each member will then choose the practices that he or she feels is necessary to express being part of that culture. This means that cultural practices may differ from family to family and there may be different interpretations as to the importance and correctness of the practice- but all are equally worthy of protection.

1255 Pillay at para 58.
1256 Para 106.
1257 Para 88.
1258 Para 62.
1259 Para 66.
All is all, the principle arising out of Pillay is that when considering whether or not to grant the religious or cultural exemption, a school must consider all the relevant factors but the ultimate question is: How central is the practice to that particular learner’s religious or cultural identity?\(^{1260}\) Unquestionably, religious and cultural rights are not absolute. Even the most central aspects of a religion and culture can be limited for the greater good, but the more significant to a person’s identity it is, the more justification is needed for the limitation.\(^{1261}\)

### 2.7 THE RELATIONSHIP BETWEEN RELIGION AND FREEDOM OF EXPRESSION

Section 16 of the Constitution guarantees everyone the right to freedom of expression.\(^{1262}\) The term “expression” encompasses more than just speech. It includes amongst others, activities such as drawings, painting, sculpting, dancing, the publication of photographs, as well as symbolic acts such as the burning of a flag and physical gestures. Freedom of expression also includes outward expressions such as (religious and cultural) dress, adornments and hairstyles.\(^{1263}\) De Waal and Currie view every act by which a person attempts to express some emotion, belief or grievance” as being constitutionally protected under section 16.\(^{1264}\) Importantly, the connection of freedom of expression to religion and culture has been articulated as follows:

“[I]t is only in a society in which individuals freely exercise the right to their own cultural and religious practices…that qualifies as a democratic society in which freedom of expression is exercised to the fullest.”\(^{1265}\)

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\(^{1260}\) Para 88.

\(^{1261}\) Para 95. See discussion on limitations below.

\(^{1262}\) Section 16 (1) states that: “Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.”
This provision coincides with Article 13 of the CRC which states: “The child shall have the right to freedom of expression.”

\(^{1263}\) In the case of Pillay, the respondent’s case was primarily based on equality, but also made claims on the basis of freedom of expression and freedom of religion. See para 28.

\(^{1264}\) De waal & Currie (n18) 311. See discussion in van Vollenhoven et al (n740) 119 121.

\(^{1265}\) Burns Communications Law (2009) 115.
The importance of freedom of expression was recognised by the Constitutional Court in *South African National Defence Union v Minister of Defence*¹²⁶⁶ in which O’ Regan J stated: “The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.” Furthermore, the South African judiciary has acknowledged that freedom of expression is the freedom upon which all other freedoms are dependent.¹²⁶⁷ It fact, it has been said that: “[f]reedom of expression constitutes the implementation of the individual freedom of thought.”¹²⁶⁸ The correlation between expression and religious rights was recognised by the Constitutional Court in *Case and Another v Minister of Safety and Security and Others: Curtis v Minister of Safety and Security*,¹²⁶⁹ when Mokgoro J stated that freedom of expression must not be viewed in isolation but seen…

“...as part of a web of mutually supporting rights enumerated in the Constitution, including the right to ‘freedom of conscience, religion, thought, belief and opinion’, the right to privacy and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communication interaction that is of both instrumental and intrinsic value.”¹²⁷⁰

The application of section 15 of the Constitution means that an adherent to a religion has the right to express him/herself regarding that religion and to practice their religion.¹²⁷¹ Religious expression in the form of clothing and adornments indicate not only an individual’s distinctive personality, but also an association with a collective identity. In many cases, where one’s choice of attire conforms to what the majority perceives as acceptable, it goes unnoticed. However, when attire draws significant attention, it is generally because the attire signifies the wearer’s assertion of difference. The issue of religious dress or display of religious symbols in schools most often involves the claims of minorities wishing to assert their religious/cultural identity. The response of the law to the exercise of the right to be different, tests the limits of liberalism and tolerance in many democracies.¹²⁷²

¹²⁶⁶ 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC).
¹²⁶⁷ *Mandela v Falati* 1994 (4) BCLR (W); 1995 (1) SA 251 (W).
¹²⁶⁸ Naidu (n1111) 68.
¹²⁶⁹ 1996 (3) SA 617 (CC).
¹²⁷⁰ Para 27; See also *S v Makwanyane* at para 675.
¹²⁷¹ Burns *Communications Law* (2009) 103- 104.
¹²⁷² Ross (n4) 4.
These days, schools are faced with the challenge of dealing with the conflict between religious and cultural expression and the maintenance of a school dress code. It can be said that learners who are required to wear school uniforms or adhere to a dress code are limited in terms of this form of expression. Arguments in favour of school uniforms suggest that school uniforms promote discipline and advance academic performance and that religious expression may be a threat to the order within a school. Others believe that this argument is invalid and note that there are many well-functioning schools that do not require uniforms. In fact, Alston et al have put forward that restrictions on dress have no justification and constitute an invasion of a learner’s right to individuality, dignity and expression. In this regard, Wellman asserts that the rationale behind a limitation on dress should only be twofold: namely, to prevent learners from dressing in a way that provokes immoral behaviour and to prevent learners from deliberately offending others. Alternatively, there is the belief that any person who is offended by the manifestations of another’s religious beliefs, should have no right to suppress those beliefs.

Currently, the establishment of school dress codes rests with the SGB of each school. However, the Guidelines for the consideration of Governing Bodies in adopting a Code of Conduct for Learners lists freedom of expression as a learner right and lists the “right to wear” and “clothing selection” as an aspect of freedom of expression. Alston et al argue that this impliedly places certain restrictions on the rights of SGB’s to determine a school’s dress code. However, SGB’s are only required to consider these guidelines when adopting a new code of conduct; they are not bound by them.

Prohibiting all forms of religious dress and symbols impedes religious and cultural rights as well as freedom of expression. Therefore, some schools have opted to adopt measures to

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1274 Adhar & Leigh (n26) 374.
1275 Alston et al (n1273) 166.
1276 163.
1277 Wellman Real Rights (1995) 93; One could add to this the inability to compete financially in the race to wear fashionable clothes. These pressures to “fit in” may be as problematical as “religious” pressures.
1278 Adhar & Leigh (n26) 243.
1279 20 (1) (d) of the Schools Act 84 of 1996.
1280 Para 4.5.1; See full reference in n991 above.
1281 Alston et al (1273) 165.
1282 Pillay at para 34.
1283 Van der Schyff (n34) 145.
respect the diversity of all learners and allow all religious dress and symbols as long as their use is based upon sincerely held beliefs. This standpoint is based on the fact that true pluralism is defined as allowing people to express their differences. Indeed, this could be a way of embracing the diversity of a ‘rainbow’ nation; however, it raises practical problems for schools.

The practical implications of permitting religious expression in schools may be chaotic. It may be that a religious observance is viewed as a threat to good order within the school. This leaves an adherent in a position to choose between their faith and school rules. In some cases these rules are subtle, seemingly neutral rules that apply to all, but have the effect of discriminating against some on the basis of religion. Schools are faced with the dilemma of sustaining cultural and religious sensitivity whilst maintaining order, discipline and respect towards all learners in the environment. As a result, schools need to establish rules and processes to reasonably accommodate religious and cultural expressions in a manner which makes learners of all religions and cultures feel that they are equally worthy and respected, while at the same time ensuring that its educational objectives are achieved.

2.8 A SCHOOL’S DUTY TO LIMIT RELIGIOUS FREEDOM

It is widely accepted that freedom should end where harm is caused to others. According to John Stuart Mill: “[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” Professor Denise Meyerson takes this argument further and suggests that rights should only be limited when the reason is to prevent “neutral harm”. Legitimate reasons for limiting freedom would be “public” reasons and not sectarian ones. “Public” reasons can be construed as “presently accepted general beliefs and reasoning found in common sense, and methods and conclusions of science when these are not controversial.” These reasons may offend adherents of a particular religion – be it Christianity or another religion- but they can be

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1284 See discussion on indirect discrimination in Chapter 4 and above in this Chapter.
1285 Prince at para 172.
1286 Discuss further in para 2.8 below.
1287 In this regard, see Van Rooyen (n1252).
1288 Smith (n1125) 8.
1292 224.
accepted as reasonable because they are neutral and do not conform to one particular worldview.\textsuperscript{1293}

As previously mentioned, freedom of religion protects not only the right to adopt religious beliefs, but also to manifest those beliefs.\textsuperscript{1294} The right to adopt religious beliefs is absolute but the right to manifest those beliefs in public is not\textsuperscript{1295} for the reason that such manifestations may have a negative effect on, or be harmful to, the public. Therefore government may limit manifestation of religious practices by enacting regulations that aim to protect society. The limitation analysis must strike a balance between the individual’s fundamental right to religious freedom and the state’s responsibility to regulate conduct in the interests of society.\textsuperscript{1296} The courts have had the responsibility of conducting this balancing exercise on numerous occasions.

For example, in \textit{Lawrence} (discussed above), the majority of the court believed that the Liquor Act served a legitimate purpose in diminishing the consequences of alcohol abuse and that Sunday was chosen as the day of rest simply out of convenience.\textsuperscript{1297} The legitimate government purpose was regarded as paramount to public safety and superseded any claims for infringement of religious rights. However, the minority judgment noted that most Christian denominations considered it central to their faith that Sunday be observed as the day of rest. In addition, both Good Friday and Christmas day, which have direct foundations in Christianity, were days which have been recognised as public holidays in South Africa. The inevitable conclusion therefore would be that these particular days were selected as closed days because of their significance in Christianity. If the purpose of the provisions of the Liquor Act was to limit alcohol consumption on secular days of rest, then why were only these particular public holidays selected? Had all public holidays been included, the provision could be considered neutral.\textsuperscript{1298} The effect of selecting only days that have significance in Christianity is that the state had thereby endorsed Christianity and chose to enforce Christian

\textsuperscript{1293} Smith (n1125) 8. For example, corporal punishment being disallowed in schools- although it may amount to a Christian religious tenet or children being prohibited from carrying dangerous weapons to school, although these weapons may be expressions of religion/culture. These examples are discussed below.

\textsuperscript{1294} Section 15 of the Constitution.

\textsuperscript{1295} Freedman (n37) 135.

\textsuperscript{1296} 135.

\textsuperscript{1297} \textit{Lawrence} at para 95.

\textsuperscript{1298} Para 159.
morals. The “closed day” provision is a remnant from a time where almost all business activities were prohibited on Sundays for religious reasons.\textsuperscript{1299}

Although part of the objective of the provision may be a secular, one cannot deny that the selection of religiously-based days as “closed days” was intended to acknowledge and adhere to the sentiments of those Christians who require special observance of these days. Indeed, Sundays have become the common day of rest, but it is as a result of a pattern that has been established over the years by legislation that conformed to Christian norms and morals. The court exercised its duty to limit religious rights in a manner which continued to enforce majoritarian norms- a reason that was not purely neutral. It must be noted, however, that \textit{Lawrence} was the Constitutional Court’s first judgement relating to discrimination on the basis of religion and the court’s approach in dealing with minority religions with due sensitivity has evolved since then.\textsuperscript{1300}

Years later, in \textit{Christian Education}, the Constitutional Court found that section 10 of the Schools Act did limit the appellant’s freedom of religion, but that the infringement was justified owing to the harm and indignity caused by corporal punishment in schools.\textsuperscript{1301} The court concluded that the Christian practice of corporal punishment, (even in a Christian private school) could not survive- as it conflicted with other rights and values within the Constitution.\textsuperscript{1302} The granting of an exemption would result in the entire purpose of the provision being undermined. In this case, Sachs J approved of Meyerson’s approach (discussed above)\textsuperscript{1303} and found corporal punishment in schools to be a neutral harm. This judgment did not “suppose the correctness of any sectarian view”\textsuperscript{1304} and the limitation of rights did not reflect any “doctrinal bias”,\textsuperscript{1305} nor was it an attempt to elevate one particular

\begin{footnotesize}
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\item \textsuperscript{1299} Paras 125 and 126.
\item \textsuperscript{1300} Currently South African provinces differ on Sunday liquor laws. Whereas Gauteng contemplates a complete ban in terms of the Gauteng Liquor Bill 2013, Kwa-Zulu Natal’s Liquor Licensing Act No 6 of 2010 permits the sale of alcohol on Sundays. See Lancaster “Provinces differ on Sunday liquor law” found at http://www.iol.co.za/news/south-africa/provinces-differ-on-sunday-liquor-law1.1485377#.UZeBd3YaLIU (Date Accessed: 12 May 2013); The Democratic Alliance is reconsidering the by-law which bans on alcohol sales on Sundays in Cape Town, which comes into effect on 20 May 2013. See Phakhathi “DA rethinks Sunday liquor ban, seeks to amend by-law” found at http://www.bdlive.co.za/business/retail/2013/03/28/da-rethinks-sunday-liquor-ban-seeks-to-amend-by-law (Date accessed: 18 May 2013).
\item \textsuperscript{1301} \textit{Christian Education} at para 49-50; Also see the UK House of Lords case of \textit{R (Williamson) v Secretary of State for Education and Employment 2005 2 AC 246} (HL).
\item \textsuperscript{1302} Para 52.
\item \textsuperscript{1303} Para 33-35.
\item \textsuperscript{1304} Smith “Freedom of Religion: The Right to Manifest our Beliefs” 2002 119 SALJ 690 690.
\item \textsuperscript{1305} \textit{Christian Education} at para 690
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world view over others. The state, in this case was not motivated by sectarian concerns but more a neutral desire to protect all children in all schools from harm.

In the case of Prince, the appellant was a Rastafarian, who challenged the constitutionality of the prohibition on the use of cannabis in that it did not make an exemption for religious use thereby encroaching on his right to freedom of religion in terms of section 15 of the 1996 Constitution. The appellant claimed that the use of cannabis was central to his religion, Rastafarianism. Simply put, the appellant contended that the impugned provisions went too far, in other words that the legitimate government purpose served by the prohibition could be achieved by less restrictive means. Based on the evidence submitted, the majority of the Constitutional Court dismissed the appeal. The court found that the legislation did indeed infringe upon the freedom of religion of the Rastafari, but that the limitation was justifiable in that it forms part of a worldwide attempt to curb the distribution and use of cannabis and it coincided with South Africa’s international obligations. Once again, the state’s concern for public safety and order (a neutral harm) reigned supreme.

As mentioned, the case of Pillay, dealt with the constitutionality of not granting religious and cultural exemptions to school uniforms. The court separated its inquiry into the constitutive parts of this section: Is there a legitimate purpose for the refusal? Does the limitation achieve the purpose? Are less restrictive means available to achieve the purpose? In the court’s opinion, granting religious and cultural exemptions do not undermine the purpose and value

1306 Para 690.
1307 Para 699; The court noted at para 51, that parents could still apply corporeal punishment in private and thereby fulfill what they see as their religious responsibility.
1308 Prince at para 4.
1309 Paras 1 and 43.
1310 Para 4.
1311 Para 97.
1312 Para 131; Van der Schyff (n97) 132-133.
1313 Para 140; See arguments against the Prince judgment in Lenta “Religious Liberty and Cultural Accommodation” 2005 122(2) SALJ 352 375-376.
1314 South Africa has ratified the Single Convention on Narcotic Drugs, 1961 as amended by Protocol (1), 1972, and has signed, with reservations, the Convention on Psychotropic Substances (1971), entry into force 16 August 1976, in accordance with article 26(1) and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), entry into force 11 November 1990, in accordance with article 29(1).
1315 On the contrary, US Supreme Court decision, of Gonzalez, Attorney General et al v O Centro Espírita Beneficente União Do Vegetal et al No 04-1084 (2006), members of the Christian Spiritists church, wished to import hoasca, a tea containing a federally proscribed hallucinogen, for religious use. The Court dismissed the government’s argument that it had a compelling interest in the uniform application of the law to the extent that no exemption could be granted to accommodate the religious use of hoasca. The Court held that the government’s failure to grant an exemption to the claimants was inconsistent with their religious freedom.
1316 Pillay at para 97.
of school uniforms. There was no evidence presented to show that an exemption would adversely affect discipline in the school. The court did not believe that refusing the exemption achieved the intended purpose. For that reason, the court in Pillay believed that the school could maintain control by establishing strict procedural requirements for an exemption process in order to discourage frivolous requests.

In Pillay, any arguments in favour of public order and uniformity fell way to the responsibility on institutions to accommodate claims of religious/cultural expression. This was mainly because the religious practice in question was not objectively harmful to other learners or the school, unlike the religious practice in Christian Education. Generally, it seems that the Constitutional Court is inclined to limit manifestations of religion that are harmful to the public, where the reasoning behind the limitation is neutral and reasonable and not motivated by sectarian concerns. This means that any person who is offended by the manifestations of another’s religious beliefs, that are objectively non-threatening, has no right to suppress those beliefs.

2.9 REASONABLE ACCOMMODATION OF RELIGIOUS PRACTICES

The most prominent case on reasonable accommodation of religious practices within schools is the case of Pillay. The court in Pillay held that a society which values dignity, equality, and freedom must require people to take positive action to accommodate diversity. According to the court, positive action might be as simple as granting and regulating an exemption from a code of conduct or it may require that the rules or practices be changed or even that monetary loss be incurred by institutions. Whether that meant the school in question should have permitted the religious practice in question depended on the significance of the practice to learner and the hardship that would be endured by the school in permitting the learner to conduct to it.

The question is how far must a school go to accommodate those who are different? In this regard the court in Pillay, employed the term “undue hardship”, which has been used as the
test for reasonable accommodation in both the United States and Canada. The United States Supreme Court held that employers need only incur “a de minimis cost” in accommodating religion, while the Canadian Supreme Court held that “more than mere negligible effort is required to satisfy the duty to accommodate.” The Canadian approach is more in line with the spirit, values and principles of the Constitution. However, what is reasonable depends on the facts of each case.

In Pillay, the court recognised the need for deference to experts, including school authorities, who are well-qualified and knowledgeable to make decisions and agreed that it must give due weight to their decisions depending on the logic of such decisions. But the question before the court was whether or the right to equality had been violated which means determining what obligation there was on the School to accommodate diversity reasonably. The court held that these are questions that the courts are best qualified to answer. It is a constitutional duty that cannot be replaced by any school authority’s view of fairness.

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1322 Trans World Airlines Inc v Hardison 432 US 63 (1977) at 84.
1323 Central Okanagan School District No 23 v Renaud [1992] 2 SCR 970 at 984a; In Sherbert v Verner 374 US 398 (1963), the applicant was a Seventh-day Adventist who was dismissed from her employment for refusing to work on a Saturday, the Sabbath day of her faith. She contested a statute that denied unemployment benefits to anyone who was available to work but refused to accept work, on the basis that it violated her freedom of religion. The Supreme Court held that the government could burden the free exercise of religion only if it was protecting a “compelling interest” by the least intrusive means possible (paras 406-409). In weighing up the state’s interest against the impact on religion, the court decided that the religious exemption must be upheld. Similarly, in Wisconsin v Yoder 406 US 205 (1972), a case with even more drastic consequences than Sherbert, members the Old Order Amish were convicted under state criminal law for not sending their children to public school beyond the eighth grade. Formal education beyond the eighth grade is strictly forbidden for Amish faith, therefore the Order challenged the law on the basis that it violated their freedom of religion. The court held that it could not enforce the criminal statute against the Amish because this would compel them “to perform acts undeniably at odds with fundamental tenets of their religious belief” (para 208). This case reconfirmed the “compelling interest” test and it ensured that the faithful were not put in a position to choose between their religion and the law. The “compelling interest” test was abolished with respect to “free exercise” claims at the time of Employment Division, Department of Human Resources of Oregon v Smith 494 US 872 at 917 (1990). However, the judgement in Smith invoked tremendous criticism, therefore the compelling test was restored in 1993 by way of the Religious Freedom Restoration Act. See Freedman (n648) 671-673.
1325 Pillay at para 76.
1326 Para 81.
The court noted that consultation and public participation on local decisions, such as drawing up a code of conduct or refusing to grant an exemption, was indeed valuable and helped promote democracy.\(^\text{1327}\) However, this did not protect the decision of the school based on the code of conduct from constitutional scrutiny and review. It must be borne in mind that local decisions may infringe on the rights of historically marginalised groups because power and influence is not distributed equally within the community. Democracy and consultation are important but nevertheless must be scrutinised by the courts.\(^\text{1328}\)

The court in *Pillay*, also found that asking the learner to go to another school, which would permit the religious/cultural practice in question, would marginalise the religions and cultures that do not fit into the confines of the code of conduct and this would be contrary to the values of the Constitution.\(^\text{1329}\) The court noted, however, that there may be cases where the availability of another school would be a relevant consideration in finding reasonable accommodation\(^\text{1330}\) but did not elaborate on the circumstances in which this would be appropriate.

The ultimate question required by reasonable accommodation is whether allowing the particular religious practices imposes too great a burden on the school.\(^\text{1331}\)

In the particular circumstances of the learner in *Pillay*, the court concluded as follows: The discrimination had a serious impact on learner and the legitimate purpose of school uniforms was not undermined by the nose stud. Allowing the nose stud did not place an undue burden on the school. Therefore, reasonable accommodation would be achieved by allowing the learner to wear the nose stud. The court therefore confirmed the High Court’s finding of

\(^{1327}\) Para 82.

\(^{1328}\) Para 83; For example in *Doctors for Life International (DFL) v The Speaker of the National Assembly and others* CCT 12/05, the constitutionality of the Choice on Termination of Pregnancy Amendment Act was challenged by DFL on the basis that National Council of Provinces did not comply with its constitutional obligation to facilitate public involvement in the passing of the Bill. As Ngcobo J stated in this case: “the law is based on the will of the people” (at para 142). The concern is that if the religious majority is anti-abortion then upholding the “will of the people” will suppress the voices of minorities. How will the rights and beliefs of the marginalised be protected if the court places them at the mercy of public will? These sentiments are expressed in Bohler-Muller “Judicial Deference and the Deferral of Justice in Regard to Same-sex Marriages and in Public Consultation” 2007 40 *De Jure* 90 111.

\(^{1329}\) See *Fourie* at para 60 in which the court stated: “The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”

\(^{1330}\) *Pillay* at para 92.

\(^{1331}\) Para 95.
unfair discrimination. In other words, if the discrimination against the learner outweighs the burden on the school, the practice should be accommodated.

The school in Pillay argued that celebrating diversity could lead to a “parade of horribles” or a “slippery slope scenario” where learners could come to school in dreadlocks, body piercing tattoos, loincloths many other undesirable adornments. On this point, the court stated that if such practices were sincerely held religious and/or cultural practices- then so be it. If learners were too afraid to express themselves in the past, they should no longer be afraid. The court found that the possibility of abuse by the insincere should not adversely affect the rights of the sincere. According to the court, diversity needs to be celebrated, not feared. This is what the Constitution envisages. The court stated further that: “[t]he display of religion and culture in public is not a ‘parade of horribles’ but a ‘pageant of diversity.’” This stance in Pillay, was extremely wide, going far beyond mere accommodation but requiring celebration of diversity. With Pillay being a Constitutional Court case, it has set a precedent for South African court cases with regards to the generous accommodation of religious/cultural rights, which may have far-reaching consequences in future. The impact of Pillay on private schools is yet to be seen.

The decision in Pillay coincided with Fourie in which the court held that:

“[t]he acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. 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. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.”

1332 Para 112.
1333 This term was used by O’Connor J in Oregon v Smith 494 US 872 (1990) at 902 to describe the list of extreme examples of possible religious exemptions which they used to justify their decision that neutral rules would not violate the First Amendment.
1334 Pillay at para 107; See also the case of Antonie discussed in n726.
1335 Para 107.
1336 Para 60.
Moreover, this same sentiment is expressed as an objective of the state in the National Policy, which is articulated as follows: “As a democratic society with a diverse population of different cultures, languages and religions we are duty bound to ensure that through our diversity we develop a unity of purpose and spirit that recognises and celebrates our diversity.”

The question is whether Pillay goes too far in accommodating diversity and whether it will lead to disruption of order in schools. On this note, the court found that if accommodation placed an unreasonable burden on a school, the school would then be justified in not granting it. The court limited its wide stance on accommodation to some extent with this statement. However, the court went on to say that merely wanting to preserve uniformity will not be a sufficient reason to refuse an exemption. Also, the court noted that some observances may be so inconspicuous that they do not require departure from the ordinary uniform and may never become an issue. Each case will be different and will raise different concerns.

Significantly, Pillay set out the factors that a school would have to consider in making a decision on whether or not to grant an exemption. The Pillay case indicated that one way

1337 See the Minister’s forward. This was discussed in more detail in Chapter 5.
1338 Both Pillay and Multani contrast with the United Kingdom case of Begum in which the House of Lords, the country’s highest court, ruled unanimously in favour of a school in the case of a Muslim schoolchild who had been denied access to school when she insisted on wearing a full length jilbab to school. According to the court, the claimant’s right was not infringed because there was nothing to stop her from going to school where her religion did not require a jilbab or where she was allowed to wear one. Other Muslim learners wore the shalweer kameez (an outfit consisting of loose trousers, a tunic and a headscarf) without any issue being raised. Others simply wore the hijab (a simple scarf) with the school uniform, and some chose not to cover their heads at all. The court believed that the learner’s request to wear the jilbab took accommodation too far (at note 62). The parent’s in Begum had selected that school knowing full well the requirements of the school’s dress code. The court believed the school’s decision was justified under Article 9 of the European Convention of Human Rights by the school’s need to protect the rights and freedoms of others. The court concluded that the school had not only gone out if its way to respect “Muslim beliefs but did so in an inclusive, unthreatening…way” (at paras 14-15). See Ross (n4) 31. In the subsequent case of Playfoot (a minor), R (on the application of) v Millais School [2007] EWHC 1698 (Admin) (16 July 2007), the High Court refused to grant an exemption to permit a female pupil to wear an abstinence ring as part of her Christian virtues. The court rejected the claim primarily on the grounds that the practice was not a religious requirement, unlike other practices that the school had accommodated, such as the wearing of headscarves.

1339 Pillay at para 107.
1340 Para 114.
1341 Namely, the cultural or religious significance of the practice on which the application for an exemption is based; the meaning of that practice to the learner concerned; whether the cultural or religious practice is mandatory or voluntary; whether the relevant cultural or religious community considers it to be a practice which usually warrants exemption from school rules; the extent of the exemption required (in other words how far should the school rules be deviated from?) and the effect of granting the exemption on the achievement of a “disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.” See Pillay at para 178. The quoted text is taken from section 8(2) of Schools Act.
to accommodate pluralism in one institution is to have wide consultations to establish rules for the institution. This will make the content more acceptable and also legitimate. However, as explained earlier, some schools are still in a process of transitioning from separate race schools to multi-racial schools and where social dynamics have caused the race division to be maintained, schools with changing demographic profiles need to repeat the consultation process at regular intervals in order to include the opinions of new faces. This is the only way to ensure that school rules evolve and are more sensitive to minority faiths and cultures.

Furthermore, where a school sets a code of conduct that could possibly encroach on freedom of religion and/or cultural rights, it must establish a fair procedure for granting exemptions. The procedure must allow learners and their parents to explain their reasons for wanting the exemption, that is, why the practice is significant to them. This affords respect to those seeking an exemption to have the opportunity to be heard and it affords respect to the school to be consulted before a school rule is deviated from.

Importantly, the Pillay judgement did not abolish school uniforms. It only required that schools make exemptions for sincere religious and cultural beliefs and practices, with it being clear that religion and culture sometimes overlap and that each is as important as the other. There is concern that a myriad of applications for exemptions will negate the need for school uniforms. In other words, too many exceptions to a general rule, negates the need for a general rule. However, the decision in Pillay confirmed that the exemption is more important that the rule and implied that a numerous of applications for exemptions is, in the court’s opinion, highly unlikely.

Significantly, the court made it clear that some practices may bring a real possibility of disruption and threaten academic standards or discipline, which may justify refusing an exemption. Pillay indicates (in line with Christian Education and Prince) that some religious practices may be too dangerous/threatening for a school to permit. The nose-stud was clearly non-threatening. However, Lenta comments that the Constitutional Court would
be highly unlikely to grant an exemption for a traditional weapon (as in the case of Multani), for example, considering the difference in the social contexts of South Africa and Canada, South African being a more prevalently violent country.\textsuperscript{1348}

Overall it seems that schools will be required to accommodate religious/cultural practices for as long as the practice does not impose an unreasonable burden on the school or does not constitute a danger (determined objectively and neutrally) to other learners in the environment. The outcome will depend on the circumstances of each case.

3 SOUTH AFRICAN CHARTER OF RELIGIOUS RIGHTS AND FREEDOMS

As mentioned in Chapter 3, section 234 of the South African Constitution provides for the adoption of national Charters of Rights in order to “deepen the culture of democracy established by the Constitution.”\textsuperscript{1349} The Constitution envisages, in other words, that the rights in the Constitution may be extended, supplemented, and given content by way of such additional charters.

The South African government has made use of section 234 of the Constitution for the first time with the signing of the South African Charter of Religious Rights and Freedoms (The Charter), signed by every major religious group in South African as well as representatives of leading South African Constitutional Commissions\textsuperscript{1350} on 21 October 2010.\textsuperscript{1351} The Charter states that: “the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa.”\textsuperscript{1352}

The pertinent question is: why is there a need for a Charter when religious rights are already articulated in section 15 of the Constitution? It has been submitted that the court’s utilisation

\textsuperscript{1348} Lenta (n842) 288 in which Lenta refers to Altbeker A country at war with itself: South Africa’s crisis of crime (2007) 12.
\textsuperscript{1349} Section 234 of the Constitution.
\textsuperscript{1350} Including the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities.
\textsuperscript{1351} Benson (n327) 128.
\textsuperscript{1352} See Preamble.
of section 15 as it stands, will give further content to the right on a case by case basis which is a “piecemeal process”,\textsuperscript{1353} over which religious organisations have no control. The Charter on the other hand, would flesh out the rights conferred in section 15 and provide a guide (binding if enacted into law) both to legislators and to courts and tribunals on the interpretation of freedom of religion\textsuperscript{1354} within South Africa and internationally.\textsuperscript{1355}

The Charter drafting process consisted of significant consultations with major religious organisations, consideration of their comments by the Continuity Committee\textsuperscript{1356} and numerous amendments to the Draft in response to these comments.\textsuperscript{1357} The effect of this has been that formally or informally, the Charter has acquired the support of most religious communities and institutions in South Africa.\textsuperscript{1358} The Charter was signed publicly on 21 October 2010, followed by a meeting of the signatories that established a South African Council for the Protection and Promotion of Religious Rights and Freedoms in terms of Section 185(1)(c) of the Constitution and other relevant provisions of the Promotion and Protection of Cultural, Religious and Linguistic Communities Act 19 of 2002.\textsuperscript{1359} After the signing, a representative Continuity Committee was elected to advocate the further progress of the Charter.\textsuperscript{1360}

The most significant provision in the Charter, with specific reference to the issue of religion in schools, is the very detailed Article 7, which contains the right of every person to be educated, to educate and to have their children educated in accordance with their religious or philosophical convictions.\textsuperscript{1361} Importantly, the addition of the words “philosophical convictions” incorporates respect for belief systems that are not religious.

\textsuperscript{1354} Benson (n327) 126 and 129.
\textsuperscript{1355} For a comparison of developments in Canada, see Benson “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” 2007 21(1) Emory International Law Review 111.
\textsuperscript{1356} Continuity Committee of the South African Charter of Religious Rights and Freedoms and South African Council for Protection and Promotion of Religious Rights and Freedoms, 2010, consisting of eight people, specifically created to facilitate the drafting process.
\textsuperscript{1357} Benson (n327) 127.
\textsuperscript{1358} Malherbe (n1353) 628.
\textsuperscript{1359} Benson (n327) 128.
\textsuperscript{1360} This Committee will oversee the establishment of a council to consider any further comments and amendments from institutions and communities that have endorsed the Charter and it will approach the government with an objective to creating a final document and request that it be enacted into law in terms of section 234 of the Constitution. See Malherbe (n1353) 628.
\textsuperscript{1361} This coincides with Article 18(4) of the ICCPR and Article 5(2) of the Declaration.
Article 7 states furthermore that:

7.1. the state, which includes any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions. This inclusion of the rights of the parent is noteworthy. South Africa does not mention the rights of the parent in its constitutional provisions on children’s rights or educational rights as it does in the Charter. This indicates that religious communities expect parents to be consulted on religious matters relating to their children and to be given the opportunity to withdraw their children from activities that might conflict with their beliefs. Take note that this provision is particularly pertinent to the discussion on compulsory religion education, discussed in Chapter 7.

7.2. every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities. The preference for a particular religious ethos does not constitute discrimination in breach of the Constitution with respect to religious education. This provision aims to acknowledge the religious majority at the institution concerned.

7.3. every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children (or their parents) who do not subscribe to the religious or other convictions practised in that institution, waive their right to insist not to participate in the religious activities of the institution.

Other significant rights and freedoms stipulated in the Charter may be summarised as follows:

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1362 Section 29 of the Constitution.
1. The right to believe according to their own religious or philosophical convictions, and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.  

2. The right not to be forced to believe, what to believe or not to believe, or to act against their convictions.

3. The right not to be forced to act against their convictions.

4. The right to the impartiality and protection of the state in respect of religion with the stipulation that the state may not promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion. Furthermore, no person may be unfairly discriminated against on the ground of their religion.

5. The right to the private or public, and individual or joint, observance or exercise of their religious beliefs, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, order, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies. This is subject to the duty of reasonable accommodation and the need to provide essential services.

Article 1.

Article 2.

Article 2; Article 2 of the Charter states furthermore:

“2.1. Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.

2.2. Every person has the right to have their religious beliefs reasonably accommodated.

2.3. Every person may on the ground of their religious or other convictions refuse to (a) participate or indirectly assist in or refer for certain activities, such as of a military or educational nature, or (b) perform certain duties or deliver certain services, including medical or related (including pharmaceutical) services or procedures.

2.4. Every person has the right to have their religious or other convictions taken into account in receiving or withholding of medical treatment.

2.5. Every person has the right not to be subjected to any form of force or indoctrination that may cause the destruction of their religion, beliefs or worldview.”

Article 3.

Article 4; Article 4 of the Charter states furthermore:

“4.1. Every person has the right to private access to sacred places and burial sites relevant to their religious or other convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.

4.2. Persons of the same conviction have the right to associate with one another, form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.

4.3. Every person has the right to communicate nationally and internationally with individuals and institutions on religious and other matters, and to travel, visit, meet and enter into relationships or association with them.”
6. The right of every person, religious community or religious institution to maintain traditions and systems of religious, personal, matrimonial and family law that are consistent with the Constitution.  

7. The right to freedom of expression in respect of religion which includes the right to religious dignity, that is, the right not to be victimised or slandered on the ground of their faith, religion, convictions or religious actions. The advocacy of hatred that is based on religion, and that constitutes incitement to imminent violence or to cause physical harm, is prohibited.  

8. The right of every person to receive and provide religious education, training and instruction on a voluntary basis.  

9. The right of religious institutions to jurisdictional independence to (a) determine its own confessions, doctrines and ordinances, (b) decide for itself in all matters regarding its doctrines and ordinances, and (c) in compliance with the principles of tolerance, fairness and accountability regulate its own internal affairs. This is subject to the qualification that every religious institution is subject to the law of the land, and must justify any disagreement, or civil dissent, on the basis of its religious convictions or doctrines.

4.4. Every person has the right to single-faith religious observances, expression and activities in state or state-aided institutions, as regulated by the relevant institution, and as long as it is conducted on an equitable and free and voluntary basis.”

This principle of reasonable accommodation is contained in section 14(3)(i)(ii) of the Equality Act and was utilised by the Constitutional Court in Pillay at para 72.


5. Article 5.  

6. Article 6; Article 6 of the Charter states further:  

“6.1. Every person has the right to (a) make public statements and participate in public debate on religious grounds, (b) produce, publish and disseminate religious publications and other religious material, and (c) conduct scholarly research and related activities in accordance with their religious or other convictions.

6.2. Every person has the right to share their religious convictions with others on a voluntary basis.

6.3. Every religious institution has the right to have access to public media and public broadcasting in respect of religious matters and such access must be regulated fairly.”

8. Article 8.

9. Article 9 (1): Article 9 of the Charter states further:  

“9.2. Every religious institution is recognised and protected as an institution that functions with jurisdictional independence, and towards which the state, through its governing institutions, has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.

9.3. The state, including the judiciary, must respect the jurisdictional independence of every religious institution, and may not regulate or prescribe matters of doctrine and ordinances.

9.4. The confidentiality of the internal affairs and communications of a religious institution must be respected. Specifically, the privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected in legal proceedings.

9.5. Every religious institution is subject to the law of the land, and must justify any disagreement, or civil dissent, on the basis of its religious convictions or doctrines.”
Overall, the Charter provides more detailed content to the right to freedom of religion than any international Convention to which South Africa is party. If passed into law, the Charter could serve as a guide in future cases relating to religious rights. According to Professor Iain Benson, the location of section 234 in the Constitution, suggests that any legislation passed under this provision will be afforded a kind of “super statutory” or constitutional status. Notwithstanding this, the Charter will nevertheless be subject to the Constitution. If there is any inconsistency between the Charter and the Constitution, the Constitution will prevail.

One area of concern in the Charter is the right of religious institutions to maintain jurisdictional independence is of particular concern, in that religious institutions may permit discrimination on one or more of the restricted grounds and justify this discrimination in terms of religious doctrine. Another concern is the provision in Article 7(3) which states that private schools may require non-adherent children (or rather their parents) to “waive their right to insist not to participate in the religious activities of the institution.” The impact of this on children’s rights is discussed more fully in Chapter 7.

Furthermore, the protection from victimisation or ridicule afforded by Article 6 of the Charter has been correctly criticised for going too far, especially when read in conjunction with Article 2(2) which states that: “Every person has the right to have their convictions reasonably accommodated.” One can argue that if reasonable accommodation is interpreted as immunity from criticism, then those who wish to express negative sentiments with regard to religion, are limited in terms of their right to expression. There is concern that once the state starts creating special protection for religious interest groups through Charters such as these, it cannot in principle refuse to do so for all other interests groups. Moreover, it is submitted that freedom of religion does not require any further protection than it already receives through the Constitution and the Equality Act.

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1374 Professor Iain Benson was involved in the charter drafting process from the beginning and he served as one of eight members of the Continuity Committee that considered comments on the Charter from institutions and communities.

1375 Benson (n327) 126.

1376 Malherbe (n1353) 628.

1377 Article 9.

1378 The conflict between freedom of association and equality is discussed in Chapter 5.


1380 Discussed in Chapter 4.
It must be noted that the Charter is a relatively recent development and therefore academic opinion and analysis of its provisions is minimal. Also, the Charter has not been practically applied yet; therefore the significance of its impact on religious rights remains to be seen.\footnote{A Steering Committee has been established of members and experts that will continue to raise support for the Charter and draft a constitution for the Council to move ahead in discussions with the government. See Benson (n327) 128.}

### 4 CONCLUSION

Section 15 of the Constitution protects not only religion but also “conscience”, “thought”, “belief” and “opinion”. This means that equally protected alongside religion are other belief systems, non-belief and refusals to participate in religious activities.\footnote{De Waal & Currie (n18) 290; This point is significant to the discussions in Chapter 7.} The Constitutional Court has held that freedom of religion includes the right to believe; to announce those beliefs; to manifest those beliefs\footnote{\textit{Prince} at para 38.} and the right to be different in schools.\footnote{\textit{Christian Education} at para 24.} Importantly, the Constitution does not endorse a particular religion, but instead guarantees everyone the rights to freedom of religion and protection from unfair discrimination\footnote{Section 9(2).} on the grounds of religion, belief and conscience.

The Constitutional Court has made it clear that whereas the right to adopt religious beliefs is absolute, the right to manifest those beliefs in public is not.\footnote{Freedman (n37) 135.} It certain circumstances, the right to freedom of religion may have to be limited in order to protect the safety and well-being of all learners or to protect the legitimate educational goals of the state.\footnote{See the discussion on teaching religion in public schools in Chapter 7.} Case law indicates that the courts are inclined only to limit manifestations of religion that are neutrally harmful to others or that disrupt school activities,\footnote{Lenta (n842) 290.} that is - limitations that are not motivated by sectarian concerns. This would be reasonable and justifiable in terms of section 36 of the Constitution. Merely being offended by another’s manifestation of their religious beliefs; is insufficient reason to suppress it.
The case law discussed in this Chapter indicates that the Constitutional Court has consistently relied on the narrow definition of freedom of religion as requiring the absence of coercion or constraint on religious beliefs. However, it is submitted that freedom of religion must be interpreted widely so as to include its equality aspect (not just voluntariness) and to consider the history of the marginalisation of minority faiths. This equality aspect aims to ensure equality amongst religions and protects against religious coercion by the state.\footnote{1389}{Lawrence at paras 103, 122 and 148.} This would require that the state, more particularly schools, act even-handedly in relation to different religions and not favour one religion to the exclusion of others.

It is clear from the issues addressed in this Chapter that the practical application of the guarantee of equality and non-discrimination between religions, is problematic. Schools have the arduous task of having to strike a balance between giving due acknowledgement to the majority religion while at the same accommodating minority religions. In developing and applying codes of conduct, schools have to be mindful of subtle forms of discrimination that persist through seemingly neutral provisions in codes of conduct. These provisions may enforce mainstream beliefs and behaviours which have the effect of side-lining children who belong to minority religions and cultures. Many schools operate on the basis that the existence of a religious exemption procedure amounts to sufficient accommodation of religious minorities. However, this thesis argues that schools often do not consider the impact of the insensitive handling of religious exemption procedures on children’s rights.\footnote{1390}{See Chapter 7.}

This Chapter also highlighted the inherent link between religion and culture. Although religion is different from culture, the two are so closely connected that they often overlap.\footnote{1391}{Pillay at paras 47 and 60.} It is therefore possible for a practice to be entirely religious or cultural or a mixture of the two.\footnote{1392}{Mentioned in Chapter 1; See Pillay at para 47.} As a result, many issues pertaining to religion in schools also involve cultural rights. Importantly, this Chapter emphasised that cultural practices are equally important to religious practices and are to be given equal respect.

Furthermore, the application of the reasonable accommodation principle was generously interpreted in Pillay. The court held that sincerely held religious and cultural practices must not only be accommodated- but celebrated. This means that the preservation of uniformity is
insufficient reason to refuse a religious/cultural exemption. Significantly, Pillay has set a precedent for South African court cases which requires the generous accommodation of religious/cultural rights in schools. However, the court noted that if accommodation of a religious practice imposes an unreasonable burden on the school, the practice should be disallowed. The next Chapter explores the impact of the reasonable accommodation principle on the religious freedom of children in private schools.\footnote{1393}

Importantly, the passing of the Charter provided a significant landmark for those who are concerned with constitutional development. An important element included in the Charter is the right of parents to be consulted regarding the religious activities of their children in schools\footnote{1394} - a right which is not expressly recognised in the Constitution - but one that is evidently expected by religious communities.\footnote{1395}

Ultimately, South Africa has made significant strides towards improving the protection minority religions. Many of the changes in the law on religion in schools post – 1994 are positive. However, this thesis argues that there is still much room for improvement, particularly with regard to the recognition and application of children’s rights in matters pertaining to religion in schools.\footnote{1396}

\footnote{1393}{See Chapter 7.}
\footnote{1394}{Article 7.}
\footnote{1395}{This is pertinent to the discussion on teaching of religion in public schools in Chapter 7}
\footnote{1396}{See Chapter 7.}
1 INTRODUCTION

This Chapter addresses the major concerns pertaining to the issue of religion in schools that have been identified in this study. Three issues have been identified for discussion, namely: 1) the role of children’s rights in issues pertaining to religion in schools; 2) the religious rights of children in private schools and 3) the teaching of religion in public schools. The Chapter contains a summary of the current law on each of these issues, the problems associated with each of the issues, as well as recommendations for improvement.

2 THE ROLE OF CHILDREN’S RIGHTS IN ISSUES PERTAINING TO RELIGION IN SCHOOLS

This thesis focused on the link between children’s rights, education and religious rights. The preceding Chapters have highlighted the fact that schools are the environment where all three of these rights intersect. In order to ascertain the practical role that children’s rights should play in religious matters in the school environment, it is first necessary to sum up the current law on children’s rights as applicable to the issue of religion in schools. This discussion is divided into three sections, namely: 1) summary of the current law on children’s rights; 2) problems with the current position and 3) recommendations.
2.1 SUMMARY OF CURRENT LAW ON CHILDREN’S RIGHTS

Importantly, the CRC requires States Parties to protect the physical, mental and spiritual well-being of children\textsuperscript{1397} and to take measures to protect children from all forms of physical or mental violence.\textsuperscript{1398} These provisions have been translated into section 28(1)(d) of the Constitution, which protects all children from maltreatment and degradation, including all forms of psychological harm such as intimidation, ridicule and harassment and other forms of degrading treatment. Correspondingly, the Children’s Act includes “the need to protect the child from any physical or psychological harm” as a factor in determining the best interests of the child.\textsuperscript{1399} Section 28(1)(b) of the Constitution provides children with the right to parental and “alternative care”.\textsuperscript{1400} It was emphasised in Chapter 4 that “alternative care” includes schools and educators acting \textit{in loco parentis} with regard to learners within the school environment.\textsuperscript{1401} In addition to these specific children’s rights, section 24 of the Constitution guarantees everyone the right to an environment that is not harmful to their health and well-being. This would include the school environment.\textsuperscript{1402}

Significantly, the CRC\textsuperscript{1403} and the ACRWC\textsuperscript{1404} place an obligation on all States Parties to take appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s dignity. Importantly, human dignity, equality and freedom are included as the founding values upon which the Constitution is based.\textsuperscript{1405} These values serve as guiding principles for the legislature, executive and judiciary and inform the understanding of all the rights in the Bill of Rights.\textsuperscript{1406} Correspondingly, section 10 of the Constitution protects everyone’s inherent right to dignity. This means that schools are required to protect the inherent dignity of every child within the school environment. Furthermore, section 10 of the Schools Act, prohibits the administration of corporal punishment in schools. In the case of \textit{Christian Education} the court held that, although section 10 limited the freedom of religion of

\textsuperscript{1397} Article 27(1).
\textsuperscript{1398} Article 19.
\textsuperscript{1399} Section 7(1)(k).
\textsuperscript{1400} The rights and duties of parents towards their children are recognised in Article 5 of the CRC which states: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable…” and Article 3(2) of the CRC which states: “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents…”
\textsuperscript{1401} Smith (n601) 34.
\textsuperscript{1402} See Chapter 4 at paragraph 2.
\textsuperscript{1403} Article 28(2).
\textsuperscript{1404} Article 1.
\textsuperscript{1405} Section 1 of the Constitution.
\textsuperscript{1406} See discussion in Chapter 1 at paragraph 3.
school operating on a Christian ethos, the infringement was justified owing to the harm and indignity caused by corporeal punishment in schools. This case emphasised that the constitutional duty of the state to protect the dignity and well-being of all children outweighed the freedom of religion of schools.

Importantly, Article 13(1) of the ICESCR requires States Parties to recognise the right of everyone to an education. The specific right of the child to education is recognised in Article 28(1) of the CRC. At national level, a child’s rights to basic education and further education are recognised in section 29(1) of the Constitution. Furthermore, Article 29(1) of the CRC requires that the education of the child be geared towards development of respect for human rights and the development of the respect of a child’s cultural identity as well as his or her language and values. Significantly, the CRC Committee has commented that Article 29(1) necessitates that the education of a child be “child-centred” and “child-friendly”.

Also connected to children’s rights, Article 1 of the UDHR recognises the principle that all people are born equal. In addition, Article 2 of the CRC requires that States Parties protect all children against all forms of discrimination. As mentioned above, the Constitution includes equality as one of its founding values. Also, section 9 of the Constitution includes the right to equality and prohibits unfair discrimination by the state and any person, whether directly or indirectly, on various grounds, including age, religion and culture. That means that schools must ensure that learners are not disadvantaged due to certain characteristics that make them different from other learners. This principle is reiterated in the Equality Act. Significantly, both Article 3 of the CRC and Article 4 of the ACRWC give recognition to the best interests of the child principle in all actions concerning children. Article 5 of the Declaration mentions the best interests of the child as a consideration in all matters.

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1407 Christian Education at paras 49-50.
1408 As mentioned in Chapter 3, Cabinet has announced its intention to ratify the ICESCR.
1409 Article 29(1)(c)
1411 Mentioned in Chapter 1 at paragraph 3.
1412 Section 9(3).
1413 Section 9(4).
1414 Section 9(3) states 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”. Section 9(4) states that: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”
1415 See sections 1(xxi)(a) and 6 of the Equality Act.
concerning the religious rights of children. In this regard, section 28(2) guarantees that in all matters relating to children, the best interests of the child are of paramount concern. The principle was applied in recent prominent case law involving educational matters, such as *Laerskool Middelburg* and *Mikro* and *Rivonia*. Also, the best interests principle is given further content in section 7 the Children’s Act. It should be noted that the Schools Act mentions the promotion of the best interests of the *school* in developing codes of conduct, but makes no mention of the protecting the best interests of the child. Neither is the principle mentioned in the National Policy.

Connected to the best interests of the child, Article 12 of the CRC and Article 4 of the ACRWC require that the views of a child be taken into consideration in matters affecting the child. In addition, the CRC includes the child’s right to be heard in judicial and administrative proceedings affecting the child, whether personally or through a representative. Section 10 of the Children’s Act encompasses this principle by providing for the right of participation by the child (of sufficient maturity) in any matter concerning that child. It requires further that the views expressed by the child must be given due weight. In addition, section 31(1) of the Children’s Act requires that the views expressed by the child in certain matters affecting the child, be given due consideration. Notably, the case of *McCall v McCall*, recognised the “child’s preference” as a factor in determining the best interests of the child.

Specifically related to religion, Article 14(1) of the CRC and Article 9(1) of the ACRWC protect the freedom of thought, conscience and religion of children. In addition, Article 18(1) of the ICCPR emphasises that freedom of religion includes the right to manifest beliefs through worship, observance and practice. In this regard, South Africa constitutionally protects everyone’s freedom of conscience, religion, thought, belief and opinion and the right to conduct religious observances in public institutions. Furthermore, section 16 of the Constitution protects the right to freedom of expression, including religious and cultural expressions in the form of dress, adornments and hairstyles. Importantly, Article 30 of the

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1416 Section 20 (1)(a).
1417 Other than section 8(5) which mentions protecting a learner’s interests in disciplinary procedures.
1418 Article 12 (2).
1419 Section 10.
1420 *McCall* at paras 204 1/J- 205G.
1421 Section 15(1).
1422 Section 15(2).
1423 Discussed in Chapter 6.

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CRC and Article 12 of the ACRWC recognise the rights of children of religious or linguistic minorities to enjoy their own culture and to profess and practise their own religion. Cultural and linguistic rights are protected in sections 30 and 31 of the Constitution.

2.2 PROBLEM WITH THE CURRENT POSITION

In general, the legal framework protecting children’s rights in relation to the topic of religion in schools is sufficient. The problem with the current position does not lie in the law itself. The problem lies in the insufficient recognition and application of children’s rights in matters pertaining to religion on a practical level in the school environment. In light of the current law expounded above, it is submitted that children’s rights have a paramount and practical role to play in religious exemption procedures in schools. However, the policy makers have not always made the explicit link between children’s rights and issues pertaining to religion in schools in order for schools to follow suit and recognise children’s rights in their codes of conduct and religious exemption procedures.

For example, at present there is no express mention of children’s rights or the best interests of the child, in the National Policy. Since the National Policy provides the framework within which schools must create practical rules on religious issues, its inclusion of children’s rights could translate into practical rules in the school environment. Furthermore, there are no specific national guidelines on religious/cultural exemptions which create uniformity or consistency in the way religious exemption procedures are conducted and which recognise the importance of safeguarding children’s rights. The danger in not having these practical guidelines was illustrated in the case of Pillay (discussed below).

On a practical level, in terms of section 8(1) and section 20(1) of the Schools Act, an SGB is allowed to develop a code of conduct and mission statement for its school. This would include rules regarding the role of religion within that school or rules which establish a religious ethos for the school. In order to reasonably accommodate religious and cultural diversity, schools often include in their code of conduct the option to apply for religious/cultural exemptions. In other words, if parents do not wish for their child to

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1424 Minor insufficiencies are pointed out below.
1425 Illustrated below.
1426 Section 20(1)(c) of the Schools Act.
participate in religious observance or want their child to display a form of religious or cultural expression, they can apply for their child to be exempted from the application of particular school rules. In the case of Pillay, the Constitutional Court compiled a set of factors that a school would have to consider in making a decision on whether or not to grant religious/cultural exemption. These factors were articulated as follows:

- the cultural or religious significance of the practice on which the application for an exemption is based;
- the meaning of that practice to the learner concerned;
- whether the cultural or religious practice is mandatory or voluntary;
- whether the relevant cultural or religious community considers it to be a practice which usually warrants exemption from school rules;
- the extent of the exemption required (in other words, how far should the school rules be deviated from?) and
- the effect of granting the exemption on the achievement of a “disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.”

It is evident that these factors are based on religious and cultural concerns and the interests of the school. However, it is submitted that a key factor was overlooked, namely: have the rights and best interests of the child been considered and applied throughout the exemption process?

In cases such as Laerskool Middelburg, Mikro and Kotze v Kotze, South African courts have emphasised the need to protect children’s rights, particularly the best interests of the child in all matters, including religious and educational matters. However, in the case of Pillay, which serves as the highest authority on religious/cultural exemptions in South Africa, children’s rights were only alluded to, but not explicitly dealt with. Moreover, the best interests of the child principle, was not expressly mentioned.

In fact, in the case of Pillay, it was mentioned that the learner suffered a great deal of insensitive treatment from teachers, peers and prefects after having her nose pierced. She was

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1427 As provided for in section 8(2) of the Schools Act (discussed in Chapter 5).
1428 Cases discussed in Chapter 4.
1429 Pillay at para 56.
regularly threatened with disciplinary action. She had to endure harassment and ridicule in order to defend her cultural and religious rights. In the process of waiting for her disciplinary hearing, her parent obtained an interim order restraining the school from interfering with, harassing, intimidating, demeaning, humiliating or discriminating against learner. In addition, the psychological pressure and intimidation placed on the learner in Pillay, caused her academic grades to suffer. This was not in accordance with the learner’s rights in terms of Articles 19 and 27(1) of the CRC and section 28(1)(d) of the Constitution, as it allowed the child to endure psychological harm. This should not be the case. Since the school has a duty of care towards the child in loco parentis, it is submitted that religious/cultural exemptions should be handled in a way that ensures that the child’s physical, mental and academic well-being is not compromised or jeopardised in any way.

The case of Pillay illustrated that, even in schools with an outstanding reputation for accommodating diversity through reasonable accommodation (as was the case with Durban Girls’ High School), the vulnerable position of the child may not be adequately recognised and protected during exemption procedures. It is submitted that specific, practical, national guidelines on the issue, which encompass children’s rights, could serve to avoid instances such as these.

2.3 RECOMMENDATIONS

In accordance with the current law position discussed above, it is submitted that schools must consider children’s rights, particularly the best-interests-of-the-child principle as central in developing and implementing religious/cultural exemption procedures. In other words, schools must adopt a child-centred approach in dealing with such matters.

As a matter of compliance with a constitutional requirement, it is recommended that the appropriate education policy and legislation be amended so as to recognise the integral role of children’s rights in the matter at hand (and other education matters). It is recommended that

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1430 Para 90.
1431 Para 10.
1432 Para 90.
1433 As required by Article 27(1) of the CRC.
1434 Pillay at para 113.
1435 This is in accordance with Article 3 of the CRC, Article 4 of the ACRWC, Article 5 of the Declaration and section 28(2) of the Constitution.
specific provisions relating to children rights be introduced into the National Policy to the effect that: a) children’s rights are an integral component to dealing with issues pertaining to religion in education; b) the best interests of the learner are a paramount concern in all matters pertaining to religion in education; and c) the dignity of the learner must be respected throughout any process or procedure relating to religious/cultural exemptions. Once these amendments are made to the National Policy, the corresponding changes to the Schools Act will then have to follow accordingly to the effect that: a) children’s rights are an integral component to dealing educational matters; b) the best interests of the learner are a paramount concern in all educational matters; and c) the dignity of the learner must be respected throughout any process or procedure involving a child. The amendments to the National Policy would be more specific with regards to religion. These provisions will be in accordance with sections 10 and 28 of the Constitution.\textsuperscript{1436}

The inclusion of such clauses will further emphasise the state’s recognition of children’s rights in matters pertaining to religion in schools. This will create legal obligations for school administrators and SGBs on the inclusion of children’s rights in religious exemption processes. It is submitted that an express stance by the state in this regard will set the tone for the manner in which religious exemptions procedures are handled in schools.

It is recommended further that “National Guidelines on Religious/cultural Exemptions” in schools be developed in order to set specific legal parameters within which each school can adopt religious/cultural exemption procedures that best suits each school. In accordance with the Schools Act, each school should still develop a code of conduct/policies which best suits its unique environment, but the rules should fall within the confines set out in the guidelines (discussed below). These guidelines should ensure that the current law discussed above is given practical effect in the daily lives of school-children, in a uniform and consistent manner. Without specific, practical guidelines, schools may not provide adequate and consistent protection for children’s rights. A few recommended guidelines are expanded on below. These recommendations are made bearing in mind the values upon which the Constitution is based, namely, human dignity, equality and freedom.

\textsuperscript{1436} Also, it is in accordance with Article 3 of the CRC, Article 4 of the ACRWC and Article 5 of the Declaration.
First of all, all schools’ codes of conduct must set out a detailed procedure for applying for religious/cultural exemptions. This will serve as a clear guide to learners, parents and educators on how to conduct themselves during a religious exemption process.\(^{1437}\) A detailed procedure will also ensure consistency and equality in the manner in which exemption processes are conducted. It is insufficient for codes of conduct to simply state that applications for religious/cultural exemptions are permitted. In the case of \textit{Pillay}, the absence of a clear procedure resulted in a parent using undesirable methods to raise her religious/cultural concerns.\(^{1438}\) This situation left the learner child in the middle of a long-running dispute between her parent and the school which hampered her education.\(^{1439}\) It is submitted that a clear process will minimise such disputes.\(^{1440}\) Moreover, in accordance with the CRC Committee’s interpretation of the role of education in terms of Article 29(1) of the CRC, it is submitted that the detailed religious exemption procedure should be child-friendly and child-centred. The requirements of a child-friendly approach are illustrated by the recommendations below.

Importantly, all school codes of conduct should contain an express prohibition against all forms of bullying, victimisation, harassment, intimidation, threats or pressure on a child who is seeking religious/cultural exemption or displaying a religious/cultural expression - whether it be by fellow learners, school prefects or educators. A reporting procedure to a neutral body (for example, an official in the department of education) must be established to address any contraventions of the above prohibition - which must be enforced through strict disciplinary measures. The aspect of neutrality in the reporting procedure is essential in protecting the child from further victimisation from within the school. The process is likely to involve the parents, the child, the school principal, the SGB and the alleged perpetrator (and their parents if it involves another child). This recommendation is in accordance with sections 9, 10, 24 and 28(1)(d) of the Constitution. It is also in accordance with Articles 19 and 27(1) of the CRC. The implication of this recommendation for children is that they would no longer have to fear

\(^{1437}\) \textit{Pillay} at para 37.

\(^{1438}\) \textit{Pillay} at para 108.

\(^{1439}\) In fact, the learner finished school without the issue being resolved. See \textit{Pillay} at para 20 which states: “The Department then lodged a notice purporting to withdraw from the case on the basis that the matter had become moot on two grounds. Firstly, Sunali would no longer be at school by the time the case was decided....”

\(^{1440}\) \textit{Pillay} at para 38.
victimisation for wanting to assert their religious rights.\textsuperscript{1441} It also ensures that the school offers a safe environment\textsuperscript{1442} for the child to flourish in.

Importantly, if a child has engaged in wearing/displaying a religious symbol, teachers should not be allowed to physically remove or confiscate religious symbols without a proper exemption procedure being followed to completion. If the child has not yet applied for an exemption, teachers must direct the child as to the proper procedure to follow. As soon as a child has applied for a religious/cultural exemption, all teachers of that child must be informed of that fact and directed to allow the official process to be completed without interference. Religious symbols are often sacred and their forced removal is likely to be offensive to the child’s dignity. Any forced removal of religious symbols in the classroom would be contrary to the child’s dignity, the freedom of security of the person, their religious rights and their children’s rights. It would also be contrary to the principles articulated in Articles 27(1) and 28(2) of the CRC.

Furthermore, in accordance with the child’s right to dignity in terms of section 10 of the Constitution, all meetings/communications relating to the religious/cultural exemption should be conducted in private and not discussed in the presence of other learners so as to avoid placing any stigma or humiliation on the child. The devastating psychological effects of insensitively singling out a child as being “different” were mentioned in Chapter 4. The protection of the child from this form of psychological harm is in accordance with section 28(1)(d) of the Constitution and section 7(1)(k) of the Children’s Act. The implication of this recommendation is that it fosters a relationship of trust between the child and school authorities.\textsuperscript{1443}

In terms of the school’s duty of care towards the child\textsuperscript{1444} and Article 12(2) of the CRC, children should be allowed adult representation in all meetings/conversations in relation to: the nature of the exemption sought; the centrality of the religious/cultural practice or the sincerity of the child’s beliefs. In accordance with section 28(1)(d),\textsuperscript{1445} a child should not be confronted with these issues on their own in order avoid the child feeling intimidated by

\textsuperscript{1441} This will uphold Article 14(1) of the CRC, Article 9 of the ACRWC and sections 15 and 28 of the Constitution.

\textsuperscript{1442} As required in 24 of the Constitution.

\textsuperscript{1443} This recommendation is also supported by the right to privacy in section 14 of the Constitution.

\textsuperscript{1444} See section 28(1)(b) of the Constitution and section 32 of the Children’s Act.

\textsuperscript{1445} Section 28(1)(d) relates to the child’s right to be protected from maltreatment, neglect, abuse or degradation.
school authorities. The parents of the child should receive official notification of any and all meetings in relation to the religious exemption sought and permitted to represent their child’s interests. The rationale behind this recommendation is the same as the rationale behind Article 12(2) of the CRC and section 28(1)(h) of the Constitution - which ensure that children have the right to legal representation in civil proceedings affecting them, if a substantial injustice would otherwise result. It recognises that children may lack the maturity to represent their own best interests adequately.

Although, adult representation of the child’s interests is important, it is imperative that the child’s “voice” be considered as an essential component in religious/cultural exemption process. This entails that a child of sufficient maturity should be given the opportunity to be heard (either personally or through the representative) in relation to the sincerity of their belief in the religious/cultural practice concerned. This is in accordance with Constitutional Court judgements. Both the case of Pillay and Christian Education referred to the importance of hearing from the person whose religious/cultural rights are at issue. Furthermore, this recommendation is in accordance with Article 12(2) of the CRC and section 10 of the Children’s Act, which provides every child with the right to participate in any proceedings that relate to that child. This recommendation also gives due respect to the child as the holder of the right to freedom of religion.

In accordance with section 10 and section 28(1)(b) of the Constitution, children who receive exemptions from religious observances should be given constructive activities to perform that are in accordance with the child’s dignity. It is imperative that activities be constructive and not demeaning to the child in any way. For example, a child being allowed to do reading or research is likely to constitute a constructive intervention but a child being forced to do chores such as cleaning the school kitchen, would be demeaning. The school must show due sensitivity to the child who is being singled out by ensuring that their dignity is respected at all times. Lastly, it is suggested that, in accordance with section 28(2) of the Constitution, Article 3 of the CRC and Article 4 of the ACRWC, that the chosen constructive activity

1446 Section 28(1)(h); Discussed in Sloth-Nielsen (n759) 495.
1447 Christian Education at para 53
1448 Pillay at para 56.
1449 Para 53.
1450 Section 15 of the Constitution and Article 14(1) of the CRC.
should be disclosed to and agreed upon by parents\textsuperscript{1451} to ensure that it is in accordance with the child’s best interests.

It should be noted that, as much as a school is responsible for protecting the dignity of the child in the school environment, the co-operation of the parents of the child is needed in order for an exemption procedure to operate effectively. Accordingly, parents - in accordance with their duty of care over their children - need to abide by school rules by following the exemption procedures correctly. This would include approaching a school for permission for the religious exemption before allowing the child to initiate the practice - as opposed to commencing with the practice and then demanding that the school accept it after the fact.\textsuperscript{1452} Proper conduct by parents will assist in safeguarding the interests of the child.

The above discussion has illustrated that ways in which children’s rights can be given practical effect in religious/cultural exemption procedures. It is imperative that the role of children’s rights be crystallised in all processes and procedures relating to religious/cultural exemptions at school. It is submitted that, if a school gives practical recognition to the rights of the child, the child will in turn develop respect for human rights. This is one of the objectives of education.\textsuperscript{1453}

3 \textbf{FREEDOM OF RELIGION OF CHILDREN IN PRIVATE SCHOOLS}

Chapter 5 alluded to the implications of the right to establish private schools on the freedom of religion of non-adherent children attending private schools. The issue is exceedingly complex, since it involves a tussle between the various interrelated rights of private schools (educational, associational, cultural rights and freedom of religion); and the interrelated rights of non-adherent learners (dignity, equality, children’s rights, educational and freedom of religion). This conflict of rights was highlighted in the controversial case of \textit{Wittmann}. This discussion is divided into three sections: 1) summary of the current law pertaining to private

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\textsuperscript{1451} The child is entitled to this “parental care” in terms of section 28(1)(b) of the Constitution. The rights and duties of parents over their children are recognised in Articles 3(2) and 5 of the CRC.
\textsuperscript{1452} \textit{Pillay} at para 108.
\textsuperscript{1453} Article 29(1) of the CRC.
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schools; 2) summary of the current law protecting the freedom of religion of children in private schools and 3) problems and recommendations.

3.1 SUMMARY OF CURRENT LAW PERTAINING TO PRIVATE SCHOOLS

Article 26(3) of the UDHR confers on parents the “right to choose the kind of education” their children should receive. This provision recognises that parents have the right to choose between public and private education. The ICESCR obliges States Parties to respect the educational freedom of parents by allowing them to choose and establish private educational institutions. Similarly, Article 11(4) of the ACRWC allows parents to choose schools for their children “other than those established by public authorities”, provided that these schools conform to the minimum standards approved by the state. Furthermore, Article 18(4) of ICCPR states that parents have the right to ensure the religious and moral education of their children in accordance with their religion or other beliefs.

In this regard, section 29(3) of the Constitution allows for the establishment of private schools that cater for the particular needs of cultural, linguistic or religious groups, provided that certain minimum standards are upheld by the school. Although these schools are private – they are bound to the Bill of Rights in terms of section 8(2) of the Constitution and must act within its parameters (where applicable). Correspondingly, the Schools Act provides for the establishment of private schools provided that these schools maintain a standard that is not inferior to public schools. Although private schools are generally independently funded, the state is not precluded from subsidising them. Importantly, the right to establish private schools assists in protecting the rights of religious communities to preserve their religion and culture through education.

In addition, section 29(3) of the Constitution enhances the cultural and linguistic rights encapsulated in sections 30 and 31 of the Constitution, including the right “to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.” However, section 31(2) contains a qualification that cultural rights may not be exercised in a

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1454 Ssenyonjo (n438) 360.
1455 Article 13(3).
1456 Section 29(3)(c).
1457 National Norms and Standards for School Funding, GN 2362, GG 19347 of 12 October 1998, provides uniform national norms on private schools subsidies; Section 48(2) of the Schools Act.
1458 Section 31 (1)(b).
manner inconsistent with any provision of the Bill of Rights. Sections 30 and 31 of the Constitution are in accordance with Article 30 of the CRC and Article 12 of the ACRWC, which grant children of religious minorities the right to enjoy their own culture and to profess and practise their own religion in community with other members of their group.\textsuperscript{1459} In addition, the UDHR\textsuperscript{1460} and the CRC\textsuperscript{1461} affords children the right to participate freely in cultural life. The rights in sections 29(3) and 31 of the Constitution are supplemented by the Constitution’s protection of freedom of association, which includes the right to establish, join, dissolve, leave or participate in the activities of an association, as well as the right not to join.\textsuperscript{1462}

Furthermore, section 29(3)(a) of the Constitution expressly prohibits admission criteria in private schools that are based solely on race.\textsuperscript{1463} This is particularly important in light of South Africa’s once racially divided education system. This is in accordance with the ICERD, which places responsibility on States Parties to eliminate racial discrimination in all spheres.\textsuperscript{1464} It requires that States Parties guarantee the right to equality before the law without any distinction on “race, colour, or national or ethnic origin.”\textsuperscript{1465} In this regard, the CRC Committee has confirmed that “[e]ducation should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena.”\textsuperscript{1466}

Overall, the inclusion of the right to establish private schools in section 29(3) of the Constitution is in accordance with the various international human rights instruments to which South Africa is party.\textsuperscript{1467}

\textsuperscript{1459} See Chapter 3 para 5.4.
\textsuperscript{1460} Article 27.
\textsuperscript{1461} Article 31.
\textsuperscript{1462} Section 18.
\textsuperscript{1463} See also section 7 of the Equality Act.
\textsuperscript{1464} Article 2.
\textsuperscript{1465} Article 5.
\textsuperscript{1466} CRC General Comment No. 1: The Aims of Education, 17 April 2001, CRC/GC/2001/1 para 11.
\textsuperscript{1467} Article 26(3) of the UDHR and Article 13 of the ICESCR discussed in Chapter 3; Article 2 of the First Protocol to the European Convention of Human Rights.
3.2 SUMMARY OF CURRENT LAW PROTECTING THE FREEDOM OF RELIGION OF CHILDREN IN PRIVATE SCHOOLS

It should be noted that the children’s rights discussed on paragraph 2.1 are also applicable to this discussion. Particularly relevant are section 28(2) of the Constitution, which contains the best interests of the child principle, and section 10 of the Constitution, which protects the child’s inherent right to dignity.

Aside from specific children’s rights (discussed above), children acquire religious rights in terms of Article 14(1) of the CRC and Article 9 of the ACRWC. In these children’s rights instruments, children are expressly mentioned as the holders of rights. Although Article 14(2) of the CRC protects the right of parents to direct their child in the exercise of his or her rights (by virtue of the child’s age and immaturity); it is recognised that this must be done “in a manner consistent with the evolving capacities of the child.”\(^{1468}\) This implies that, as the child evolves and matures, the direction given by parents may need to diminish.\(^{1469}\)

In addition, the UDHR, the ICERD\(^{1470}\), the ICCPR\(^{1471}\) and the Declaration\(^{1472}\) guarantee everyone the right to freedom of thought, conscience and religion, which includes the right to manifest such beliefs whether in public or in private. Importantly, Article 18(2) of the ICCPR recognises that freedom of religion entails the absence of any coercion which would impair a person’s freedom to have or to adopt a religion or belief of his or her choice. This provision coincides with the Constitutional Court’s definition of freedom of religion, which entails the absence of coercion or constraint; meaning that freedom of religion may be impaired when people are forced to act or refrain from acting in a manner contrary to their religious beliefs.\(^{1473}\) Importantly, however, the CRC does recognise that manifestations of religion may be limited in order to “protect public safety, order, health or morals, or the fundamental rights” of others.\(^{1474}\) The Declaration also protects the right of the child to be brought up in

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\(^{1468}\) Discussed in Chapter 3 at paragraph 5.4.
\(^{1469}\) Discussed in Chapter 4 at paragraph 2.
\(^{1470}\) Article 5(d)(vii).
\(^{1471}\) Article 18(1).
\(^{1472}\) Article 14(3).
\(^{1473}\) Lawrence; Prince; Christian Education.
\(^{1474}\) Article 14(3).
the “spirit of understanding, tolerance, friendship among peoples”, and “respect for freedom of religion or belief of others.”

The Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion in section 15. Furthermore, the Constitutional Court in *Christian Education* held that freedom of religion includes the right of people to be “different”. That entails being who they are without being compelled to adopt the religious and cultural norms of others. Moreover, in this case, the court recognised the inherent link between freedom of religion and human dignity. This link between religion and dignity was also recognised in the Constitutional Court cases of *Prince* and *Pillay*. Similarly, it is emphasised in Article 3 of the Declaration, which recognises discrimination on the basis of religion as an offence against human dignity.

Importantly, section 15(2) of the Constitution allows for religious observances to be conducted at “state or state-aided institutions”, provided that they are conducted on an equitable basis and attendance is voluntary. Importantly, however, the Constitution recognises that freedom of religion is not absolute. The right to manifest religious beliefs may be limited if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” This means that a child’s right to manifest religious beliefs in schools may be limited in order to protect the legitimate goals of the school or the rights of other learners within the school, if such limitation complies with the requirements of section 36 of the Constitution.

Inevitably intertwined with freedom of religion, is the right not to be unfairly discriminated against on the basis of religion. Article 7 of the UDHR and Article 26 of the ICCPR recognise

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1475 Article 5(3).
1476 *Christian Education* at para 24; Kroeze (n1127) 478; In *Prince*, the minority came to the conclusion that there was a duty on the courts to guarantee the Rastafari a reasonable means within which to exercise their religious rights (para 163). The minority made the decision to safeguard the “right to be different” (para 170).
1477 *Christian Education* at para 24
1478 Para 36.
1479 In *Prince*, Ngcobo J stated at para 51: “There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.”
1480 Langa CJ stated at para 62: “[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.”
1481 Section 36 of the Constitution.
the right of all people to equal protection of the law, which requires a prohibition on discrimination on the basis of religion. In addition, the Declaration aims to prevent and eliminate discrimination on the basis of religion.\textsuperscript{1482} The Constitution protects the right to equality in section 9. Furthermore, section 9 prohibits unfair discrimination by the state\textsuperscript{1483} and any person\textsuperscript{1484} (including a private school), whether directly or indirectly, on numerous grounds, including religion. The reference to unfair discrimination signifies that in certain circumstances, discrimination may be fair. This would be the case where the discrimination serves a legitimate societal goal. For example, the specific exclusion of discrimination\textsuperscript{1485} on the basis of race in section 29(3) implies that a measure of discrimination on the basis of religion and culture may not be unfair.\textsuperscript{1486} The discussion below questions whether a complete waiver\textsuperscript{1487} of the freedom of religion of a non-adherent child is an appropriate measure. Furthermore, the right of non-discrimination is reiterated in section 6 of the Equality Act.\textsuperscript{1488} Significantly, the Equality Act, which applies to both the state and private persons,\textsuperscript{1489} requires that the existence and extent of reasonable accommodation of diversity be considered as a factor in the determination of unfair discrimination.\textsuperscript{1490}

Lastly, children are conferred educational rights. The right to education is acknowledged in the UDHR,\textsuperscript{1491} the CRC\textsuperscript{1492} and the ICESCR\textsuperscript{1493}. In addition, Article 28(1) of the CRC recognises the right of the child to education, “with a view to achieving this right progressively and on the basis of equal opportunity.” The Declaration,\textsuperscript{1494} the CRC\textsuperscript{1495} and the ACRWC\textsuperscript{1496} highlight the need for education to promote understanding, tolerance and friendship among all religious groups. This is purported to be necessary in order to prepare

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\item \textsuperscript{1482} Article 4.
\item \textsuperscript{1483} Section 9(3).
\item \textsuperscript{1484} Section 9(4).
\item \textsuperscript{1485} It is questioned in the discussion below whether a certain measure of discrimination necessitates a complete waiver of religious freedom.
\item \textsuperscript{1486} De Waal & Currie (n18) 486; Devenish (n52) 154.
\item \textsuperscript{1487} This entails an agreement not to exercise a right in future.
\item \textsuperscript{1488} Religion is mentioned as a prohibited ground in section 1 (xxii)(a).
\item \textsuperscript{1489} Section 5.
\item \textsuperscript{1490} Section 14(3)(i)(ii).
\item \textsuperscript{1491} Article 26(1).
\item \textsuperscript{1492} Article 28(1).
\item \textsuperscript{1493} Article 13(1).
\item \textsuperscript{1494} Article 5(3).
\item \textsuperscript{1495} Article 29(1).
\item \textsuperscript{1496} Article 11(2)(d).
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children for a “responsible life in a free society.” The Constitution guarantees the right to “basic education” and “further education” in section 29. The right to establish private schools and the religious freedom of non-adherent learners was weighed up in the case of Wittmann. In this case, the court held that the right to establish private schools recognised the freedom to establish “parochial educational institutions with confessional religious observances and instruction, the attendance at which may be made obligatory.” The reasoning of the court was that “the outsider”, having being made fully aware of the religious ethos of the school, had the option not to join. In other words, associational rights entail that “the outsider” cannot be allowed to join on their own terms. The court held that:

“The right to exclusivity on the ground of culture, language or religion includes the right to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity.”

Despite the fact that the decision was made in terms of the interim Constitution - which was held to have no vertical effect, the court nevertheless analysed the legal issue as if section 14 of the interim Constitution was applicable. In doing so, Van Dijkhorst J employed such a narrow definition of the term “state-aided institution” that it meant that a private school which was subsidised by the state to the extent of R1.5 million per year, did not fall under the definition of a state-aided aided institution. This meant that (even if the interim Constitution was applicable) the private school was not bound by section 14(2) of the interim

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1497 Du Plessis and Another v De Klerk n1.
1498 Section 29(1), discussed fully in Chapter 5.
1499 Wittmann is discussed in Chapter 5.
1500 As per section 32(c) of the interim Constitution.
1501 In Wittmann at para 90, the court stated: “Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative.”
1502 In Wittmann at para 90-91, the court held that: “In respect of these educational institutions the fundamental freedom of religion of “outsiders” is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.”
1503 Wittmann at para 90.
1504 In Wittmann at para 93, the court held that: “The interim Constitution and in particular section 14(2) is not applicable to the relationship between the plaintiff and the German school as the latter is not a “state-aided institution” and organ of state. Even if it were, the plaintiff has waived the right to rely on section 14(2) of the interim Constitution.”
1505 Wittmann at para 85.
constitution (the equivalent of section 15(2) of the Constitution) and could therefore compel its pupils to attend religious observances.  

In this case, the court held that when a parent agrees to submit to a private school’s constitution and rules, they in effect waive their child’s freedom of religion. This decision indicated that the waiver of the freedom of religion of the child in the case of private schools is not unconstitutional in the case of private schools. This interpretation of the right to establish private schools has implications for children’s rights, education rights and freedom of religion of learners attending private schools that need to be addressed.

3.3 PROBLEMS WITH THE CURRENT POSITION

It is important to point out that the Wittmann decision was made in respect of the interim Constitution, which was held to have vertical effect only. This means that the interim Constitution (particularly section 14(2)) was not applicable to the relationship between the plaintiff and the private school. The situation under the interim Constitution was as follows: since private schools were not bound by section 14 of the Constitution, gaining admission into private school entailed an automatic waiver of the freedom of the religion of the child (that is, where the private school is not religion neutral). There was no constitutional duty on the private school to recognise the freedom of religion of a non-adherent learner, with the result that the child could be compelled to attend religious instruction and religious observances.

Contrastingly, section 8(2) of the Constitution provides for the horizontal effect of the Bill of Rights - meaning that the provisions of the Bill of Rights apply to the conduct of private persons (to the extent that they are applicable). Private schools, therefore, cannot act outside the bounds of the Bill of Rights. Under the Constitution, the wording of section 15(2) indicates that it is applicable only to the “state or state-aided institutions”; however, section

1506 De Waal & Currie (n18) 303.
1507 In Wittmann at paras 90-91, the court held that: “I hold therefore that even if the German school is a State-aided institution and organ of state the right of non-attendance in section 14(2) of the interim Constitution can validly be waived and that the plaintiff did just that by subjecting herself to the association’s constitution and the school’s regulations.”
1508 Wittmann at para 91-92.
1509 Section 15(2) states: “Religious observances may be conducted at state or state-aided institutions, provided that- (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary. See discussions on state-aided institutions in Chapters 5 and 6.
Section 15(1)\textsuperscript{1510} applies to both state and private institutions. This means that private schools which do not fall under the definition of “state-aided institution” are not bound by the limitations placed on the conducting of religious observances by section 15(2), but are bound by section 15(1);\textsuperscript{1511} whereas, private schools which are defined as “state-aided institutions” are bound by both sections 15(1) and 15(2).

Nevertheless, since there has not been a Constitutional Court decision on this issue, the Wittmann interpretation stands as the highest authority on the issue of the waiver of freedom of religion in private schools. As a result, private schools continue to circumvent their obligations in terms of freedom of religion by setting up school rules which require a waiver\textsuperscript{1512} of the religious freedom of the non-adherent child upon admission into the school.

The current problem is not that private schools expressly exclude children of other faiths, but rather that they may require conformity with the religious ethos of the school by all learners who attend the school. From the private school’s perspective, the waiver of the religious freedom of the non-adherent children assures them that the chosen religious ethos of the school will not be jeopardised or compromised by the presence of individuals adhering to other religions or no religion at all.\textsuperscript{1513} This is an important consideration for the school. However, it has severe implications for the child because it means that the school can compel...
the child to attend religious observances and religious instruction and restrict the child from manifesting their own religious beliefs or non-belief within the school environment.

If a waiver of freedom of religion is in place, the situation for non-adherent children under the Constitution is in effect the same as it was under the interim Constitution - they have no religious freedom within the private school. The major concern is that private schools can operate with complete disregard for the freedom of religion of non-adherent children. It must be pointed out, however, that some private schools choose to admit and reasonably accommodate non-adherent children without requiring conformity from them.\textsuperscript{1514} This is addressed below.

As mentioned above, there has not been a Constitutional Court decision on the constitutionality of the waiver of the religious freedom of a child in order to attend a private school; nor is there a constitutional provision dealing with the waiver of rights. Therefore there is no definitive answer on whether it is constitutionally permissible for a person to waive a fundamental human right and, if so, under which circumstances it would be permitted.\textsuperscript{1515} What is more, the waiver in this case is more complicated; because the non-adherent child is the holder of the right to freedom of religion\textsuperscript{1516} and yet the right is being waived by the parent on behalf of the child.\textsuperscript{1517}

This means that the waiver of a child’s freedom of religion may result in a clash between the child’s individual right to freedom of religion and the parent’s authority over the child’s educational and religious upbringing.\textsuperscript{1518}

Importantly, international human rights instruments and the Constitution recognise children as the holders of their own specific children’s rights and religious rights - aside from the rights

\textsuperscript{1514} This is discussed further below.
\textsuperscript{1515} See discussion in Chapter 6.
\textsuperscript{1516} Article 14(1) of the CRC; Article 9 of the ACRWC; section 15 of the Constitution; Article 28(1) of the CRC makes reference to the child as the holder of the right to education, without reference to the rights of parents.
\textsuperscript{1517} An alternative viewpoint is that the parent is not waiving the child’s freedom of religion but is waiving his or her authority over the child’s educational and religious upbringing. Nevertheless, even if the parent is waiving his or her own right and not the child’s, the religious freedom (and other rights) of the sufficiently mature child is inevitably impacted upon by the decision.
\textsuperscript{1518} Article 26(3) of the UDHR, Article 18(4) of the ICCPR and Article 14(2) of the CRC.
afforded to everyone. Both international law and domestic law emphasise the importance of the child’s voice and child participation in matters that affect the child’s rights - with the best interests of the child being the guiding principle. The case of Pillay emphasised the importance of hearing from the person whose religious/cultural rights are at issue - that being the child concerned. It can therefore be argued that, although children cannot be completely autonomous by virtue of their inexperience and vulnerability, once they are sufficiently mature, they have the right to express themselves in accordance with their own religion or beliefs. A child (of sufficient maturity) may wish to assert their freedom of religion or be exempt from religious observances/religious instruction and may find the waiver to be a violation of their freedom of religion – which they did not choose to waive.

On the other hand, although parents are not expressly given the constitutional right of parental authority over their children; the state often relies on the choices/decisions of parents in order to fulfil its constitutional obligations towards children. The role of the parent in matters pertaining to the education of the child is emphasised in international law. Although parents generally direct the education of their children, it is arguable whether this would include the decision on whether or not to waive the child’s freedom of religion in order to acquire access into a particular private school. It must be questioned, (if waivers are constitutionally permissible) whether one person may waive a right on behalf of another.

Importantly, the contract law indicates that a right (as conferred by a contract) may be waived by an agent on behalf of a principal. One can argue that the parent is the agent of the child for purposes of educational decisions relating to the child. After all, the parent is allowed to choose the type of education the child should receive (public or private); the parent selects a school based on various factors; the parent agrees to submit to the schools rules and

1519 Section 28 of the Constitution; the Children’s Act, the CRC and the ACRWC.
1520 Article 12 of the CRC, Article 4 of the ACRWC and section 10 of the Children’s Act.
1521 Article 5(4) of the Declaration and section 10 of the Children’s Act.
1522 Pillay at para 56.
1523 See discussion in Chapter 4.
1524 De Waal & Currie (n18) 457.
1525 Discussed in Chapter 3.
1526 Christian Education at para 15.
1527 In Pretorius v Greyling 1947 1 SA 171 (W): “if in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as the principal’s legal rights and intended to waive those rights, and it must also be proved that he was authorised to waive his principal’s rights.” See Christie (n619) 514.
1528 See issue of agency discussed in Chapter 4.
1529 See summary in paragraph 3.1 above; Article 26(3) of the UDHR; Article 13(3) of the ICECSR and Article 5(2) of the Declaration.
regulations on behalf of the child and the parent is entitled to make decisions about the religious or moral education of the child in accordance with their wishes and beliefs.\textsuperscript{1530} However, what the contract law makes clear is that the services of an agent must be carried out in accordance with the law, morality and public policy,\textsuperscript{1531} if not - no action arises out of it.\textsuperscript{1532} Contract law indicates that the courts will not enforce any arrangement (including a waiver) by a parent that is detrimental to the interests of the child - on the basis that it is contrary to public policy.\textsuperscript{1533}

This raises the important point that, even in cases where waivers are legally permissible (as with contractual rights), they may be unenforceable for being contrary to public policy.\textsuperscript{1534} In this regard, public policy amounts to the values that South African society holds “most dear.”\textsuperscript{1535} What is contrary to public policy is reflected in the values and provisions of the Constitution. It stands to reason that any arrangement that is contrary to the values and provisions of the Constitution is contrary to public policy and therefore unenforceable.\textsuperscript{1536} The case law indicates, however, that this principle must be exercised cautiously, only in clear cases where the harm to the public is “substantial and incontestable.”\textsuperscript{1537} The question is: if one were to extract this principle and apply it to the issue of the waiver of freedom of religion in private schools, would the enforcement of a waiver be in accordance with the values that South African society reveres? In order to establish that, one must first look at the dangers that the enforcement of such a waiver presents to society.

The societal harm of sectarian private schools that do not accommodate diversity is that they prevent children from different religious backgrounds from sharing their common experiences, which only increases divisiveness within society.\textsuperscript{1538} It results in the creation of exclusive groups of young children who never engage with children who are “different” to them. Levinson points out that in order to tolerate or respect others, one needs to interact with

\textsuperscript{1530} Article 18(4) of the ICCPR.
\textsuperscript{1531} Grotius 3.1.12.3; Grotius 3 1 42; Voet 2 14 16.
\textsuperscript{1532} Kerr (n621) 54-55.
\textsuperscript{1533} See discussion in Chapter 4 at paragraph 2.
\textsuperscript{1534} Christie (n619) 210, 398-399.
\textsuperscript{1535} Barkhuizen at para 28.
\textsuperscript{1536} Para 29.
\textsuperscript{1537} Sasfin at para 12; Fender v St John-Mildmay (1938) AC 1 at 12.
\textsuperscript{1538} SAHRC “The Exclusionary Policies of Voluntary Associations: Constitutional Considerations” 10.
them in meaningful ways, particularly at a young age before prejudices become hardened. This religious divisiveness is contrary the objectives of education in terms of Article 29(1) of the CRC, Article 11(2)(d) of the ACRWC, and Article 5(3) of the Declaration which emphasise the need for education to promote “understanding, tolerance and friendship” among all religious groups. It also runs contrary to the states goals of nation-building and celebrating diversity through education. After all, the Preamble of the Constitution states that, “South Africa belongs to all who live in it, united in our diversity.” Correspondingly, the court in Pillay observed that there is a “need for solidarity between different communities in our society” and the Constitution “does not envisage a society of atomised communities circling in the shared space that is our country, but a society that is unified in its diversity.”

Furthermore, due regard must be had for the impact of waivers of this nature on the children concerned. It has been established in this thesis that freedom of religion is a freedom that is inherently intertwined with each person’s identity and dignity. It can be argued that the complete waiver of the freedom of religion of a child has the potential to impair the fundamental human dignity of non-adherent learners. Ultimately, the child whose freedom of religion have been waived finds him/herself being compelled to attend religious instruction/religious observances contrary to his/her beliefs and restricted in terms of manifesting their own beliefs, in order to comply with school rules - a situation one could deem a “Hobson’s choice”. In the case of Christian Education, it was argued by the applicant that parents have a divinely imposed responsibility for the training and bringing up their children. However, the court held that parental consent does not override the state’s responsibility to protect safety and inherent dignity of all children.

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1540 Pillay at paragraph 107; Fourie at para 60; The goals of nation-building and celebrating diversity are mentioned in South Africa’s educational policies on religion and language (discussed in Chapter 5 and below).

1541 Para 155.

1542 Christian Education at para 36.

1543 In Pillay at para 62, Langa J states that: “The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson’s choice between observance of their faith and adherence to the law.” This was also mentioned in the case of Prince at para 44 wherein Ngcobo J stated: “They are forced to choose between following their religion or complying with the law.”

1544 Christian Education at para 5.

1545 Paras 49-50.
Importantly, section 28(2) of the Constitution and numerous international human rights instruments\textsuperscript{1546} emphasise that in all matters pertaining to children, the best interests of the child must be the paramount concern. This includes upholding the best interests of all children within private schools. Compelling a child to participate in religious observances and to receive sectarian religious instruction in a faith that is not his or hers, cannot be in the child’s best interests. Although private schools may have religious and associational rights that need protection, this does not absolve the state from its duty to protect the best interests and well-being of the non-adherent children within these schools. In \textit{Pillay}, the Constitutional Court did not enforce the contractual undertaking (waiver) by a parent that the child would abide by school rules (which required that the child would avoid certain forms of religious expression in school). The rules were found to be discriminatory towards the child on the basis of religion and culture. The court recognised that upholding such a contractual undertaking would give rise to unjust results for the child. Contrary to \textit{Wittmann}, the court in \textit{Pillay} would not allow a learner child to be discriminated against as a result of an agreement between the parent and the school.\textsuperscript{1547}

Another important consideration is that parents may have legitimate, well-founded reasons for having selected a particular private school that they believe serves the best interests of their child. For example, there may be a limited choice of schools in small communities; the chosen school may be a historically privileged school with better facilities than other schools or the school may offer particular subjects or extra-mural activities that other schools do not. This means that children of certain faiths have opportunities to attend better quality schools than others- without having to forgo their religion or other beliefs. One can argue that it is in the child’s best educational interests to be allowed to benefit from a private school without the school requiring a waiver of their religious freedom. It is submitted that non-adherent children should be given the equal opportunity to attend the best school that their parents can afford as adherent learners. The non-adherent child may well be a suitable candidate for admission in many ways - other than the fact that do not ascribe to the chosen religion in the school.

Consequently, it is submitted that the current approach is contrary to public policy for not being in accordance with the dignity, equality and best interests of school-children. In addition, it undermines the states goals of nation-building and celebrating diversity and

\textsuperscript{1546}See Article 3 of the CRC, Article 4 of the ACRWC and Article 5 of the Declaration.
\textsuperscript{1547}Discussed in Chapter 6.
therefore presents a substantial and incontestable danger to the interests of society. As a result, the current approach must be challenged. Even if waivers of freedom of religion are found to be constitutional in certain circumstances,\(^{1548}\) in this particular context, they should not be enforceable by the law. It is submitted that a definitive answer is required from the Constitutional Court on the constitutionality of the waiver of the freedom of religion of the non-adherent learners in private schools. An interpretation of this issue under the final Constitution, may well lead to a different conclusion than in *Wittmann*.

The problem with the current situation lies in the fact that the *Wittmann* interpretation of section 29(3), presumes that the waiver of the freedom of religion of non-adherents is essential to ensuring the practice and preservation of the religion ethos of the private school. De Waal and Currie agree with this presumption and assert that section 29(3) would mean very little if such a waiver is not recognised as constitutionally valid.\(^{1549}\) However, in a case where two fundamental rights (which are crucial to democracy) are in conflict, the courts have the task of balancing the two.\(^ {1550}\) In general, when this occurs, the provisions of the Constitution are interpreted in a way that they do not conflict with one another.\(^{1551}\) Furthermore, when interpreting a right, courts are required to promote the values that “underlie an open and democratic society, based on human dignity, equality and freedom.”\(^ {1552}\) This is analogous with ascertaining the legal convictions or “boni mores” of the community—which would require protecting the dignity and best interests of children.\(^ {1553}\)

This thesis argues that it is possible for section 29(3) and section 15 of the Constitution to be interpreted in a manner in which the associational rights of the school and the freedom of religion of non-adherent learners can co-exist in harmony. There is proof of this in the fact that many private schools accept and reasonably accommodate non-adherent children, while at the same time maintaining their religious ethos and continuing to conduct religious observances with the other adherent learners. In these schools, the associational rights of the school survive the presence of non-adherent children who still hold their religious freedom - subject to reasonable and justifiable limitations in terms of section 36 of the Constitution.

\(^{1548}\) For example, in the case of *Garden Cities*.

\(^{1549}\) De Waal & Currie (n18) 44.

\(^{1550}\) Section 36(2) of the Constitution.

\(^{1551}\) Rautenbach & Malherbe *Constitutional Law* (2009) 357; De Waal & Currie (n18) 163.

\(^{1552}\) See Chapter 1 paragraph 3.

\(^{1553}\) De Waal & Currie (n18) 140.
This entails that freedom of religion may have to be limited in order to give effect to section 29(3) - but not completely waived.

3.4 RECOMMENDATIONS

In light of the above, it is recommended that reasonable accommodation (as per section 14(3)(i)(ii) of the Equality Act)\footnote{Discussed in Chapter 4.} in private schools should be enforced in order to protect the freedom of religion of the non-adherent child while at the same time respecting the religious/associational rights of the school.\footnote{One could counter-argue this by stating that all religious communities have an equal right to establish private schools based on their own faith and therefore there is no need for “outsiders” to apply for their child to be accepted into a private school which is not of their faith and no need for private schools to compromise on their associational rights. In other words, all communities can establish private schools in terms of which their identities resonate best with their own religious convictions. However, an important point to the contrary, is that not all communities have access to the funds of sufficient numbers to be able to establish a private school/s.} Reasonable accommodation offers an alternative to enforcing conformity via a waiver of the freedom of religion of the child. It is conceded that the state should not unnecessarily interfere in the running of private schools – however, it should not tolerate a complete disregard for the religious freedom of children either. It is submitted that the state should ensure that private schools assure a minimum level of tolerance, pluralism\footnote{Beiter (n450) 171. Section 46(3) of the Schools Act states that: “the standards to be maintained by such school will not be inferior to the standards in comparable public schools.” It is submitted that certain minimum standards should pertain to reasonable accommodation of diversity as well.} and non-discrimination and this can be achieved through reasonable accommodation. This would be in accordance with sections 9, 15 and 29(3) of the Constitution and Article 29(1) of the CRC.

The reasonable accommodation principle requires that a school take positive action to accommodate diversity\footnote{Para 79; See the recommendation by Prof Amor (discussed in Chapter 3 at paragraph 5.4).} where such accommodation does not impose too great a burden on the school. It requires schools to accept the diversity in children who are “different”, rather than attempting to reject it. The positive action may be as simple as granting an exemption from certain aspects of the code of conduct on the basis of religion.\footnote{Para 79; See the recommendation by Prof Amor (discussed in Chapter 3 at paragraph 5.4).} This would entail that a private school admits non-adherent children with their religious differences and does not compel them to attend school assemblies, sing hymns, participate in a nativity play or attend religious instruction, for example, but rather allows the child to engage in constructive activities when religious observances or religious instruction is being carried out. The rights
of adherent learners are not encroached upon since they can continue to engage in the required religious activities and religious instruction of the school, despite the presence of non-adherent children. The same degree of accommodation may not be expected of private schools as public schools. 1559

Furthermore, if a non-adherent child were to be allowed to manifest their own religious beliefs in a private school - this manifestation would not be without limitation. 1560 The child would be bound by the school’s code of conduct and religious exemption processes. If the non-adherent child wishes to manifest a religious belief which imposes an unreasonable burden on the school or threatens the academic standards, discipline or chosen religious ethos of the private school - the manifestation may be disallowed. 1561 However, if a religious practice does not impose a burden or is not a threat to the order or religious ethos of the school - there is no reason why the private school cannot accommodate it. For example, if a Muslim child attending a Christian private school wants to conduct Islamic prayers in a private area within the school, where the Christian majority are not exposed to it and the school has an area available. In this case, there is no unreasonable burden on the school, nor any threat to its religious ethos.

It is submitted that non-waiver of freedom of religion and reasonable accommodation in private schools will ensure that children of all religions will be able to access the school of their parent’s choice (subject to affordability and places being available in the school) without having to choose between their religion and the best quality education available to them. 1562 This would be in the best interests of all learners regardless of their faith. Through reasonable accommodation, adherent learners will learn to interact with children of different faiths, as they will more than likely have to do once they leave the school environment. In other words, the practice of reasonable accommodation in private schools will prepare them for life in the religiously diverse society that exists beyond the school walls, while at the same time maintaining and practising their own religious beliefs.

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1559 See Pillay at para 114 in which the court stated: “The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption.”

1560 Section 36 of the Constitution; Article 14(3) of the CRC.

1561 Pillay at para 114; For example, if the fictional scenario in Chapter 4, paragraph 3.3 (regarding the Muslim learner wanting to wear a full burka to school) occurred in a private school.

1562 This eliminates the “Hobson’s Choice” mentioned above.
It must be made clear that this recommendation pertains to religion-based private schools and not all religious associations/institutions. Unlike other religious associations which have primarily religious goals, private schools carry out important societal goals such as facilitating the right to education and protecting the rights and best interests of its learners in its role as responsible “parent” (*in loco parentis*). One can argue that private schools exercise a public function in educating children in terms of the state’s requirement of compulsory education\(^{1563}\) and that the state exercises some control over these schools through registration requirements and subsides.\(^{1564}\) Therefore it is submitted that the associational rights of private schools cannot be treated the same in the law as the associational rights of purely religious associations. The protection of children’s rights in schools may require a greater degree of interference by the state. After all, it is the state’s duty to ensure that “education in all schools is conducted in accordance with the spirit, content and values of the Constitution.”\(^{1565}\)

### 4 TEACHING RELIGION IN PUBLIC SCHOOLS

#### 4.1 INTRODUCTION

Undoubtedly, the issue of teaching religion in schools is highly contentious. Dreyer asserts that religion education in schools is the area in which the “complex intersection of the histories of religion, politics and education becomes visible.”\(^{1566}\) There are polarised views on whether or not religion should be included in the public school curriculum and if so, whether it should be religious instruction in one faith or religion education about different religions. As discussed in Chapter 5, the state has opted to include religion education as a compulsory subject in the public school curriculum through the National Policy. This section analyses the impact of the current policy on the rights of learners and parents. This discussion is divided into three sections, namely: 1) summary of the history and current law on teaching religion in schools; 2) problems with the current position and 3) recommendations.

\(^{1563}\) Section 3(1) of the Schools Act.

\(^{1564}\) This was argued on behalf of the plaintiff in *Wittmann* at para 88.

\(^{1565}\) *Christian Education* at para 12 (emphasis added).

\(^{1566}\) Dreyer (n283) 41.
It is important to note that this discussion does not question the National Policy in its entirety. It focusses only on the issue of teaching of religion in schools.\textsuperscript{1567}

\textbf{4.2 SUMMARY OF THE HISTORY & CURRENT LAW ON TEACHING RELIGION IN SCHOOLS}\textsuperscript{1568}

The historical development of religion in schools\textsuperscript{1569} evidenced that South African education has been characterised by religious inequality. It is evident that Christianity (more specifically, Calvinism) was privileged above other faiths in the school system since the commencement of formalised education in South Africa. The \textit{apartheid} education system endorsed the ideology of Christian National Education (“CNE”), which entailed promoting Christian values through the education system.\textsuperscript{1570} This favoritism towards the majority faith in the education laws and policies, impacted severely upon the religious rights of children of minority faiths. After the adoption of the final Constitution as supreme law, the policy of CNE could not be continued.\textsuperscript{1571} The privileging of one faith in the education system did not correspond with the right to equality, the prohibition against discrimination on the basis of religion and the right to freedom of religion\textsuperscript{1572} afforded to everyone by the Constitution.

It was important to place the issue of teaching religion in schools in its historical context in order to generate a better understanding of the rationale behind the current laws and policies pertaining to religion in schools - which emphasise equality between faiths and respect for diversity.

Although the Constitution does not endorse a state religion; it does not completely separate church and state either. In the South African context, recognition must be given to the fact that the majority of the population is religious and the majority subscribes to Christianity. It stands to reason therefore, that the Constitution and other state laws and policies, give due respect to religion in general.\textsuperscript{1573} The Constitution emphasises the importance of religion in

\textsuperscript{1567} There are numerous provisions in the National Policy, such as those on religious observances, religious expression and respecting religious holidays, that are not in question.
\textsuperscript{1568} Take note that the discussion in paragraph 2.1 and 3.1 above are also applicable to this discussion.
\textsuperscript{1569} Chapter 2.
\textsuperscript{1571} Dreyer (n283) 42.
\textsuperscript{1572} Section 15.
\textsuperscript{1573} Discussed in Chapter 6 paragraph 2.
South African society, while at the same time respecting the freedom of religion of each individual in section 15. However, it is important to note that religious freedom may be limited if “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”– for example if necessary to pursue a legitimate state goal.\textsuperscript{1574}

Importantly, section 15 of the Constitution protects not only freedom of religion but also “conscience”, “thought”, “belief” and “opinion”. As already established, the term “freedom” denotes an absence of coercion or constraint on one’s beliefs.\textsuperscript{1575} The term “belief” protects the right to beliefs that are not centred on “God” or a deity. In other words, the right in section 15 recognises and protects non-religious belief systems. Overall, section 15 protects the right to hold, announce and manifest religious beliefs, but does not include the right to receive religious or religion education in public schools.\textsuperscript{1576}

Nonetheless, the National Policy\textsuperscript{1577} reflects the state’s belief that it is the responsibility of public schools to educate learners about religion.\textsuperscript{1578} Several strategies were considered by the state for dealing with the issue of teaching religion in schools - including the complete removal of religion from public schools. However, when considering the social context within which the National Policy operates - the state believed that a policy which completely excluded religion from public schools would have resulted in outrage from the religious majority and would not promote respect for religion as a whole.\textsuperscript{1579} Therefore the state opted for a co-operative model of education which left room for interaction between religion and state. It meant that religion could be allowed in public schools but in manner in which (purportedly) respects the freedom of religion of each person and protects everyone from religious discrimination.

The National Policy was drawn up in consultation with various religious leaders of the different religions. Whereas the previous policy allowed for religious instruction in just one faith if the SGB saw fit; the new Policy emphasises that imposing religious instruction in one faith upon learners is not in accordance with the Constitution.\textsuperscript{1580} As a result, the National
Policy emphasised that sectarian forms of religious instruction have no place in South African public schools. Instead, it introduced “religion education” - a comparative study of all religions – as a compulsory subject in the public school curriculum. As mentioned in Chapter 5, religion education forms part of the Life Orientation Learning Area for Grade R – Grade 12. In addition, the National Policy introduced a separate subject of “religious studies” as an optional, specialised and examinable subject form Grade 10-12. Religion education was introduced under the premise that the state is not responsible for the religious upbringing of a child, but rather for providing knowledge about different religions. Religious instruction is recognised as primarily the responsibility of the home, the family, and the religious community. The National Policy aims to teach about all religions from a neutral, academic point of view with the aim of giving due respect to the equal value of all religions, in the hope that this will foster understanding, reduce prejudice and encourage interaction between children of different faiths. From the state’s perspective, a policy of this nature furthers a state’s legitimate goal of increasing religious tolerance and celebrating diversity.

Nevertheless, the National Policy is not without its problems. The next section highlights the problem areas associated with the current position. For purposes of this discussion, cognisance must be taken of section 15, section 9, section 10, section 28 of the Constitution as well as the related international law provisions, which have been summarised in paragraphs 2.1 and 3.2 above. A few of these provisions are particularly relevant and need be emphasised once again. Importantly, Article 14 of the CRC and Article 9 of the ACRWC recognise the right of parents to direct the education of their children. In addition the Declaration provides that a child shall have access to education in the matter of religion or belief that is consistent

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1581 Joubert (n1028) 1.
1582 National Policy para 32; See Prinsloo (n1057) 320; The subject forms part of the Life Orientation Learning Area, under the focus area: Social Development from Grade R to 9 and Learning Outcome 2: Citizenship Education from Grade 10 to 12.
1583 National Policy para 33 states: “A new subject called Religious Studies shall also be introduced in the FET band for matriculation (or FETC) purposes, as an optional, specialised, and examinable subject, with a possible career orientation towards teaching, social work, community development, public service, and related vocations. This curriculum is still in development, and other subjects of religious specialisation, may be included from Grade 10-12.”; See Dreyer n283 44; Take note that the subject of “Religious Studies” still maintains a distinction between religion education and religious instruction but it allows learners to specialise in a specific context. See more on this in the Learning Programme Guidelines for the FET. See discussion in Prinsloo (n1057) 321.
1584 See the Manifesto.
1585 National Policy para 55.
1586 National Policy para 4.
1587 National Policy para 19.
1588 See Minster’s forward in National Policy.
with the wishes of his or her parents and that the child shall not to be compelled to “receive education” against the wishes of their parent.\textsuperscript{1589} Also, Article 18(4) of the ICCPR requires that states respect the rights of parents to ensure the religious and moral education of their children in conformity with their own beliefs. Importantly, the Human Rights Committee has commented that Article 18(4) entails that if the subject matter involves instruction in a particular faith, the option must be given to parents to withdraw their children from attendance. However, Article 18(4) allows for public schools to provide education in the general history of religions and ethics - if it is given in a neutral and objective way and shows due respect for the convictions of parents who are not religious.\textsuperscript{1590}

Furthermore, it was noted in Chapter 6 that the South African Charter of Religious Rights and Freedoms (The Charter), includes the right of every person to educate and to have their children educated in accordance with their religious or philosophical convictions.\textsuperscript{1591} This entails that public schools must consult with parents on matters pertaining to religion and must allow parents to withdraw their children from any activities or programs which are not in accordance with their religious or other beliefs.\textsuperscript{1592} The Charter was signed by representatives of \textit{every} major religious group in South Africa; which indicates that the religious communities in South Africa expect the state to respect the rights of parents with regards to the religious upbringing of their children.

\section*{4.3 PROBLEMS WITH THE CURRENT POSITION}

From the outset, it is submitted that the National Policy is correct in removing sectarian religious instruction from public schools as this would not be in accordance with the freedom of religion or equality rights of any learner who is not of the chosen faith. Also, in light of the history of religious discrimination\textsuperscript{1593} and the Constitution’s recognition of equality as a founding value, the state should not be involved in the promotion or favouritism of one faith at the expense of all others.\textsuperscript{1594} Although the religious majority may still wish for religious

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1589} Article 5(2).
\item \textsuperscript{1590} Discussed in Chapter 2.
\item \textsuperscript{1591} Article 7.
\item \textsuperscript{1592} Article 7.
\item \textsuperscript{1593} In recent years the courts have expressed the importance of considering historical context in cases pertaining to religion. See \textit{Prince} at para 152. See High Court decision referred to in \textit{Pillay} at para 17.
\item \textsuperscript{1594} Freedman mentions the equality aspect of freedom of religion which prevents government from favouring one religion over another. See Freedman (n1170)100; O’Regan J expressed this same sentiment in the minority judgement of \textit{S v Lawrence} at 128. See discussion in Chapter 6.
\end{itemize}
\end{footnotesize}
instruction in one faith to be included in public schools,\textsuperscript{1595} and although their opinion must be considered – the majority opinion cannot be decisive.\textsuperscript{1596} The state, in pursuit of its goals, must attempt to strike a balance between acknowledging the majority religion while at the same time respecting the rights of religious minorities. The removal of sectarian religious instruction and the inclusion of religion education in the National Policy is an attempt at finding this balance.

However, it must be recognised that the subject of “religion” in any format, is contentious. The very mention of religion as a topic sparks controversy because many people who are religious, fiercely guard their faith as part of their identity. In other words, to people who are religious, their religion is often so intertwined with their identity, self-worth and dignity\textsuperscript{1597} that to question or encroach on their religion is offensive to them as a person. As a result of the link between religion, identity and dignity, religion education is not the same as any other purely academic subject\textsuperscript{1598} in the school curriculum and cannot be treated the same. Due to the fact that religion is based on personal and individualistic beliefs\textsuperscript{1599} – one has to question whether or not it is in accordance with freedom of religion and belief to be compelled by the state to learn about religion (in any format).

The National Policy triggers an important question, namely: where does religion education end and religious instruction begin? A theoretical distinction is made between religion

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\item \textsuperscript{1595} Dreyer writes that “Many Christian organizations, from a variety of positions, opposed the new policy...The major criticism from the Christian sector of the South African society has been the multi-faith or multi-religious approach to the teaching of religion in public schools.” Dreyer has found that: “Some Christian groups, perhaps longing for the time when a theocratic model of church and state was dominant in South Africa, criticize this model as one in which the government is not fulfilling its obligations.” See Dreyer (n283) 45 and 49.
\item \textsuperscript{1596} In S v Makwanyane at paras 88 and 89, the Constitutional Court recognised that: “Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.” “This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.”
\item \textsuperscript{1597} Christian Education at para 36.
\item \textsuperscript{1598} In the case of Prince, Ncobo J pointed out that religion is not based on provable facts. He said: “Religion is a matter of faith and belief.” A religious practice may strike someone outside the faith as bizarre or illogical, but the practice nevertheless deserves constitutional protection. He stressed that humans should be free to believe in what they cannot prove. See Prince at para 42.
\item \textsuperscript{1599} Explained in Chapter 6.
\end{itemize}
education and religious instruction in the policy itself. However, in practice, it is uncertain what type of information would be considered neutral/objective and what type would be too religious. It is difficult to determine whether the religion education curriculum borders on being religious or not. For example, the National policy pays explicit attention to spirituality in paragraph 19, which states that: “Religion Education should enable pupils to engage with a variety of religious traditions in a way that encourages them to grow in their inner spiritual and moral dimensions.” This indicates that the National Policy has not just educational goals but also spiritual goals. Another example is that the National Policy states that in the Intermediate Phase of education, children will learn “stories, songs, sacred places, founders, rituals, and festivals.”

In this case, the subject matter extends beyond learning about the history or ethics of a religion. Many questions arise from this, such as: Do songs include hymns? Are religious teachings not encompassed in the stories? When learning about the rituals of others, how in depth does the information go? Furthermore, according to the National Policy, the Senior Phase of religion education includes the teaching of spiritual philosophies and how they link to social practices. Are spiritual philosophies neutral/academic information? Also one has to question whether it is for the state to determine what type of information is offensive/not offensive to anyone’s religious sensibilities. One can argue that this can only be determined by the holder of the religious freedom (or their parent in the case of very young children).

It is submitted that if the line between religion education and religious instruction is not clearly drawn in law and in practice, there is potential for the infringement of freedom of religion. It is for this reason that Amor, in his report as Special Rapporteur, recognised the potential value of religion education in society but argued that whenever “education in the field of religion” is part of the school curriculum – it should be optional, that is, the right to

\[1600\] See Chapters 1 and 5.
\[1601\] National Policy para 51.
\[1602\] History and ethics of religions are mentioned as acceptable topics in Article 18(4) of the ICCPR. See Chapter 3 para 5.4.
\[1603\] National Policy para 45.
\[1604\] This was recognised in the Canadian case of Canadian Civil Liberties Association v Ontario (1990) 46 CRR 316, where the Ontario Court of Appeal held that a regulation which provided for religion education in public schools was unconstitutional, despite its provision that sectarian religious instruction would be avoided and that attendance was voluntary. Although section 2(a) of the Canadian Charter prohibited religious indoctrination and not religion education - the court was of the opinion that religious education is the equivalent of religious indoctrination, regardless of how the subject matter is presented. The court recognised that it is difficult to draw a definitive line between what is “religion” and what is “religious”. Discussed in Wittmann at para 70; In this regard Chidester writes: “Nevertheless, Christian opponents of the policy insisted that anything that touched their religion was religious” See Chidester “Unity in Diversity: Religion Education and Public Pedagogy in South Africa 2008 55 Numen 272 -293.
withdrawal should be available to the conscientious objector. The rationale behind this perspective is that any education in the field of religion has the potential to infringe freedom of religion and the element of voluntariness is what safeguards freedom of religion.

The next question is whether or not it is the duty of public schools to teach about religion. Some believe that public schools should operate as an extension of the parents and continue the work of the parents as far as religious instruction is concerned. Ideally, they would like their children to receive religious instruction in their own faith in public schools. Others believe that it is not the task of public schools to teach about religion at all. The National Policy is premised on the state’s assumption and proposition that it is the responsibility of public schools to educate children about religions. In this regard, it is submitted that it is the duty of public schools to provide an education in the best interest of all children while ensuring equality amongst them and respecting the individual religious freedom of each child. This may include instilling them with values which teach them to become responsible citizens in the outside world. However, the National Policy links this promotion of values in schools with the teaching of religion. It upholds religion as the vehicle for the transmission of values to children and the answer to what it views as a decline in morals in society. While it is acknowledged that religion may be an effective reinforcement

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1605 See full quote in Chapter 3 at paragraph 5.4.
1606 van der Walt (in referring to religious parents) states that: “They also insist that their particular confessional religion education, or at least education linked to their own religion, be included in the public school curriculum. They argue that education, particularly religion education, is a unity, and that no gap should exist between parental home, church and school education. Since a child is a unity, such a gap would be detrimental to holistic upbringing.” See van der Walt “Religion in education in South Africa: was social justice served?” 2011 31(3) SAJE 381 382; van der Walt also found that in a study in Norway in 2000: “31% of the parents interviewed (all of them churchgoing Christians) said that they were not happy with the general religion education course offered in the public schools. They wanted the school to convey to the children that what they learnt at home was right and true. The more religiously active parents were more insistent than the passive ones that the school should confirm the religion taught at home.” See van der Walt “Institutional identity: a possible solution to the religion in/and education quandary” 2010 75(2) Koers 325 331.
1607 For example, the secularist viewpoint is that religion should play no part in public life.
1608 National Policy para 1.
1609 Section 29 of the Constitution.
1610 Section 28(2) of the Constitution.
1611 Section 9 of the Constitution.
1612 Section 15 of the Constitution.
1613 Para 7.
1614 Par 31 states: “We are all concerned about the general decline in moral standards in our country, and the high rates of crime, and the apparent lack of respect for human life, are worrying factors in this regard. We find ourselves in need of moral regeneration. For this to happen, the commitment of all people of good will is required. As systems for the transmission of values, religions are key resources for clarifying morals, ethics, and building regard for others.”
mechanism for morality, it must be recognised that it is not the only vehicle.\textsuperscript{1615} It can be argued that it is possible for a school to instil values in children in a way that does not involve religion and is not anti-religious. For example, the values of justice, equality, respect, truthfulness, compassion and non-violence (along with other constitutional values) can be taught through various methods in schools.\textsuperscript{1616} The teaching of these values can contribute to responsible citizenship and promote respect between all people of all walks of life.

Furthermore, there is concern that the National Policy interferes with the rights of parents to ensure the religious and moral education of their children in accordance with their beliefs\textsuperscript{1617} - a principle enshrined in international human rights instruments\textsuperscript{1618} and included in Article 7 of the Charter. This is of particular concern to parents of very young children. It can be argued that a parent can make little objection to their child learning neutral/academic information about other religions. However, as alluded to above, parents may question the neutrality of the information being imparted. This indicates that the translation of the objectives of the National Policy into a “neutral” curriculum is problematic.

If a parent believes (based on their interpretation of religious texts) and has taught a child that their religion represents the exclusive truth or is the only “true” religion - they may find lessons which present other religions and non-religion as equally valid, to be an infringement of their beliefs.\textsuperscript{1619} They may not wish for their children to be taught about other religions which contradict what they believe to be the exclusive truth. For example, certain learning outcomes require the learners to relate different religions to broader social issues such as abortion, euthanasia, suicide, capital punishment and gender relations.\textsuperscript{1620} This may be the type of subject matter that parents would prefer to guide their children on in accordance with their own religious beliefs. If this is so, one could argue that the parent should have the right of withdrawal. The curriculum is not drawn up in conjunction with parents to allow them to

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  \item Roux states: “It is also true that religions are not the only source of spirituality, value and morals for society”. See Roux “Religion in Education: Who is Responsible?” special edition 3 2009 \textit{Alternation} 3 16.
  \item See Niewenhuis (n606)17.
  \item van der Walt 2012 \textit{Koers} (n1606) 330.
  \item Article 18(4) of ICCPR, Article 5(2) of the Declaration and Article 14(2) of the CRC; As mentioned above, respect for the rights of parents are also recognised in Articles 3(2) and 5 of the CRC.
  \item van der Walt submits that: “the proponents of mainstream religions reject this secular view by arguing that since their own religion has the only true god and hence operates with revealed truth, it would be good for society to be guided by it.” See van der Walt 2011 \textit{SAJE} (n1606) 382.
  \item Learning Outcome 3.1 for Grade 10 (NCS/LPG 2008b: 39); In this regard Prinsloo states: “It is often in exploring a specific belief system’s view on such topics that learners, teachers and the communities surrounding the leaner are ‘defamiliarised’ to what they thought they knew or expected.” See Prinsloo (n1057) 404.
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monitor the type of information being transferred to their children. The parent cannot ensure that information is “neutral” or how in depth into religion it delves. Neither do SGBs have a say in the curriculum content on behalf of parents. As a result, parents could argue that it is their duty to educate children about religion (or other belief systems) as they see fit until such time as the child is sufficiently mature to explore the subject on their own.

However, from the state’s perspective, it could be argued that the inclusion of religion education in the school curriculum is justified as it allows the state to fulfill its goals of celebrating diversity and nation-building. Although the state recognises the need for religious instruction in the home – it evidently believes that there are certain state goals that cannot or are not being achieved through religious instruction at home. Religious instruction in the home may be negative or prejudicial towards other faiths or may ignore other faiths completely. Without religion in education in schools, children may grow up to fear or reject religious differences. The National Policy envisages a society in which children grow up to respect and be tolerant of each other’s religions and beliefs. It aims to cater to the social reality which the child will inevitably encounter outside of school. This is an important consideration.

Nevertheless, the fact remains that parents are the primary educators of children in matters of religion and the National Policy creates an inevitable conflict between the role of the parent and the role of the state as educators about religion. This means that children may have to contend with a situation where religious instruction by parents and the “neutral” information selected for religion education (in accordance with the state’s goals), may contradict each other. It may be disturbing and unconstitutional for learners to see their own religion being depicted in unfamiliar ways.

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1621 Prinsloo states: “While satisfaction was expressed with the final policy, there was a number of voices who stated that the implementation of the policy should be monitored by parents, teachers and school governing bodies. Some of these remarks indicate that the government should not be completely trusted to abide by the policy.” See Prinsloo (n1057) 303 and 350.

1622 One could counter-argue that by a certain age the “damage” of not receiving religion education, is already done. For example, prejudices may already be set in.

1623 Para 10 of the National Policy states: “This policy for the role of religion in education is driven by the dual mandate of celebrating diversity and building national unity.”

1624 This is consistent with Article 5(3) of the Declaration which protects the right of the child to be brought up in the “spirit of understanding, tolerance, friendship among peoples;” and “respect for freedom of religion or belief of others.”

1625 In terms of section 28(1)(d) and 28(2).

parents in the home contradicts what is taught in the classroom.\textsuperscript{1627} Prinsloo indicates that: “The educational study of religion may then lead to a confessional crisis for the learner….\textsuperscript{1628} This is particularly true for very young learners, who may lack sufficient maturity to grapple with this contradiction. This will affect children in the very lower grades. Consequently, the appropriateness of the grade level at which religion education is commenced is a matter for concern.

There has also been criticism that teaching religion from an academic/objective\textsuperscript{1629} standpoint is virtually impossible. One reason put forward is that “neutral” teaching takes away from the very essence of the religions being taught.\textsuperscript{1630} It can be argued that religion is by nature devotional\textsuperscript{1631} and therefore cannot necessarily be reduced to a set of “objective facts”. In fact, it can be argued that reducing religion to an academic subject, gives rise to a situation where there is no room for genuine inter-faith dialogue in the classroom (which the National Policy aims to achieve). It is true that the National Policy was drawn up in consultation with representatives from major religious groups.\textsuperscript{1632} This means that religious leaders eventually (after much criticism and debate) accepted the position of a multi-faith approach.\textsuperscript{1633} One can

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\item Adhar & Leigh point out that some parents object to the multi-faith approach because: “at best it would be confusing for their children, and at worst it may involve participation in [matters] that are opposed to their religion.” See Adhar & Leigh (n26) 237.
\item See Prinsloo (n1057) 404.
\item There are those who embark on religious studies at University level as a so-called “academic” subject - but the difference is at that level the subject is being taught by person who has achieved a certain level of expertise in that field; the learner is in adult and mature enough to grapple with the complexities of the subject matter and the learner is studying the subject by choice therefore the question of whether the information is neutral or religious becomes irrelevant- the learner has consented to attending the class.
\item Potgieter writes: “Because the Policy also does not attempt to level out all of the divisive intrinsic differences among the various religions in the country, moral relativists, favouring a \textit{Nurturant Parent} approach to morality, may rightly criticise the Policy because of the reductionism it implies.” He states further: “Put differently: open, inter-religious dialogue between the adherents of the different faiths and religions represented in a school or a classroom becomes a virtual impossibility in a situation….” See Potgieter “Morality as the substructure of social justice: religion in education as a case in point” 2011 31(3) \textit{SAJE} 394 400 and 402; Grayling states: “They may rightly complain that the rich and complex variety [of religions] is far too great for a brain-only attempt to explain them.” See Grayling \textit{Thinking of answers} (2010) 10; Snyman states: “This misunderstanding of the nature of true religion is characteristic of the whole policy.” This comment was made in respect of the Draft Policy but the same holds true for the final Policy. See Snyman “The Draft Policy on Religion in Education: A Clear example of Stare Interference” 2003 \textit{Tydskrif vir Christelike Wetenskap} 43 51.
\item Alluded to in Prince at para 42.
\item Prinsloo indicates that: “Between 15 August and 11 December 2001, Minister Asmal held nine extensive consultations with leaders from various religious organisations, as reported on in an \textit{Analytical resumé of discussions between Minister Asmal and religious leaders on the matter of religion in education} (Dated 13 December 2001).” See Prinsloo “The South African Policy on Religion and Education (2003): A Contradiction in a Secular State and Age?” 2009 (special edition 3) \textit{Alternation} 31 45.
\item Prinsloo asserts: “The formulation of the Policy was deeply controversial and various stakeholders from various faith communities contested the different drafts…Though the final Policy was supported by all
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presume that their acceptance was partly out of wanting to keep religion in public schools in some form (since the single-faith approach was not an option). But one can argue that what has been kept is not “religion” in the true sense of the word (meaning a devotional subject) but the state’s version of religion (a “neutral” curriculum that the state wishes to instil in children).

Another significant issue affecting “neutrality” of religion education is that every educator has his or her own view on religion. The National Policy entails that teachers put their personal religious beliefs aside in order to teach about other faiths. The situation at present is that teachers who belong to a particular faith may be unwilling or reluctant to educate learners about different religions. In fact, teachers may express their own personal religious sentiments in the classroom and may influence or even pressure learners into adopting a specific religious viewpoint. This would be illegal- but also difficult (or impossible) to monitor. In this regard, Waddington contends as follows:

“For teachers to remain totally neutral and objective is an almost impossible task, even if one does try to bracket out one’s feelings, preferences and prejudices. It is not surprising, then, that many practitioners in education maintain that there is no such thing as neutrality…[I]ndoctrination goes far beyond what a teacher might say or not say in a classroom…, but includes attitudes and methodology which is employed in the lesson. One can add to this the nonverbal communication, such as body language, which may influence students to accept a particular standpoint which is not their own, but that of the teacher.”

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1634 Section 7(1) of the Schools Act states that: “every learner and every member of staff of a public school shall have freedom of religion.”

1635 This impacts upon the religious freedom of teachers. This lack of concern for the religious identities of teachers has been subject to criticism by religious groups. Dreyer states: “On the basis of practical theological research we do, however, challenge the multi-tradition approach as an appropriate model for achieving the educational aim of enhancing the capacities for mutual recognition and tolerance due to the relative neglect of the religious identities of teachers and learners.” See Dreyer (n283) 57; Nevertheless, if these reluctant teachers are given the option to refuse to teach the curriculum based on their religious beliefs, in the same way, they could refuse to teach the science curriculum, for example, which teaches about evolution (if this is contrary to the religious beliefs). This would lead to impractical situations for the Department of Education.

1636 See Summers & Waddington (n115) 201-202; Chizelu states: “it is important to note that it is very easy to take advantage of pupils’ emotions in order to influence them toward the teacher’s convictions. RE teachers should avoid taking advantage of pupils’ emotions to induce pupils to accept their convictions; to do so is to abuse of the teacher’s profession.” See Chizelu Teaching Religious Education in Zambian Multireligious Secondary Schools (2006) 117.
This current situation puts parents in the position to simply trust that teachers are teaching in an objective and pluralistic manner with no religious bias.\textsuperscript{1637} This is a difficult expectation for parents in light of the history of religious discrimination that took place in schools under the old system. As a result, there is concern that teaching about religion may leave room for religious indoctrination (even in subtle forms)\textsuperscript{1638} in schools.

Furthermore, there are contentions that the National Policy allows for a situation in which one religion may be privileged above others. The argument is that by teaching about religion at all, there is room for promoting one religion over the others. This is contrary to the objective of the National Policy and the Constitution. In recent times the debate has been re-opened by individuals contending that despite the new approach, Christianity is still promoted and privileged in the classrooms of some public schools.\textsuperscript{1639} Some may argue that the majority of the country belongs to the Christian faith and therefore it is not unfair for schools to reflect the religious expectations of the majority. In other words, it is fair for public schools to show due respect to the majority faith. However, one could counter-argue that too much acknowledgment of the majority faith may be a disguised continuance of preference for the majority faith, which is contrary to section 9 of the Constitution. State schools should not be engaged in religious favouritism. This would undermine attempts at creating multi-faith

\textsuperscript{1637} Jensen “Religious Education in Public school- a must for a secular state: a Danish perspective” 2002 The Council of Societies for the Study of Religion (CSSR) Bulletin 83 87.

\textsuperscript{1638} In the case of Lawrence at para 90, Chaskalson P, admitted that constraints on freedom of religion could be imposed in subtle way. See discussion in Chapter 6.

\textsuperscript{1639} van der Walt observes: “Although the debate seemed to have died down somewhat after the promulgation of the Policy in 2003, a visit to schools, particularly schools that used to be based on a Christian ethos, will show that it has been business as usual. Many schools continue marketing themselves as having a Christian ethos, and in some of them, confessional or sectarian Christian religious education is still being offered.” See van der Walt 2011 SAJE (n1606) 381; See also Prinsloo (n1632) 35; De Vos writes: “This story came back to me when I read in the Afrikaans media that Prof George Claassen of Stellenbosch University has launched a campaign to try and prevent public schools from using teaching time to conduct religious instruction at schools. Claassen is also upset that some schools describe themselves as having a ‘Christian character’ and as institutions where ‘Christian values’ (whatever that may mean) are taught. He is also upset that some schools organise something called a ‘Jesus week’ during which children are encouraged to pin yellow ribbons to their uniforms to show that they are Christians.” He states further “I would say a school breaches the provisions of section 15 if it states that it has a ‘Christian character’ and teaches ‘Christian values’ or where it endorses a ‘Jesus week’ but fails to endorse other religious activities of minority religious groups or non-believers. Such actions would make it very difficult for non-believers or believers of non-majority faiths from opting out of the religious activities at schools and the non-believers or believers of other faiths will be indirectly coerced into a specific Christian religious observance – something prohibited by the Constitution.” See De Vos “Do we have freedom of conscience and religion at public schools?” 22 September 2009 at http://constitutionallyspeaking.co.za/do-we-have-freedom-of-concience-and-religion-at-public-schools/ (Date accessed: 3 July 2012); Rousseau states: “The place where this freedom is threatened is in schools, where despite official policy which insists on religious neutrality, many schools continue to abuse their captive and impressionable audiences by proselytizing for one specific religious viewpoint or another.” See Rousseau (n1012).
understanding (which is the Policy’s purported objective). In this regard, Van der Schyff contends that the true advancement of religious freedom must take into account all religions represented in South Africa equally.1640

Also, it must be noted there are different denominations and differing practices within one religion and therefore is difficult to teach about a particular religion from one standpoint.1641 For example, even within Christianity, there are different denominations and therefore different expectations as to what religion education about Christianity should entail. It has been stated that:

“A basic premise of religious studies is that religions are not internally homogeneous but diverse. In schools and in popular culture, faith traditions are often presented as a single set of beliefs, practices, and representations without internal variation.”1642

This means that people within the same religion may not agree on the correctness of the “objective” information supplied in the curriculum. Much of the manner in which religion is understood and practised is based on personal interpretation. Teaching about one interpretation shows favouritism towards a particular brand of a particular religion and sidelines others. In other words, if the curriculum is based on the most popular brand of beliefs within a religion – it amounts to religious favouritism of that one brand.

A further problem with the National Policy is that it does not take into account the widespread “religion illiteracy”1643 amongst teachers, which may lead to perpetuation of stereotypes, caricaturing and disparagement of faiths.1644 For example, if a teacher who is of the Christian faith is required to teach aspects of Hinduism such as reincarnation and the worship of different deities, concepts that he or she knows little about or strongly disagrees with, he or she may present the information as being fictional/not truthful. This means that all religions may not be portrayed as being equally valid. This may impact upon the religious freedom, equality rights, and dignity of the child whose religion is being questioned or ridiculed. Furthermore, what is taught in the classroom may be also affected by the teacher’s

1640 Van der Schyff (n34) 153.
1641 Mitchell (n25) 5.
1642 American Academy of Religion (n1626) 17.
1643 National Policy para 37.
1644 National Policy Para 35.
(mis)interpretation of the curriculum. This indicates that the inadequate teacher training for this subject area may hamper the objectives of the National Policy. As mentioned in Chapter 6, the problems with religion education lie not only in the provisions of the National Policy but also in the manner in which the subject is taught.

Furthermore, the National Policy refers to the fact that pupils will be exposed to “a variety of religious and secular belief systems.” Some religious conservatives have interpreted “secular” and “secularisation” to mean anti-religious or atheist. It is thereby perceived as reflecting a state of false neutrality which is unacceptable to them. In other words- some

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1645 Jansen states: “There is evidence from curriculum research to show that even when teachers in the same national context are provided with the same curriculum specifications, they translate them into very different meanings based on who they are and also where they are in a specific school locale.” Jansen “The Politics of Salvation: Pushing the Limits of the Rainbow Curriculum” in Mangayi (ed) *On becoming a democracy* (2004) 67.

1646 Jacobs states: “It also appears that teachers do not feel they have been sufficiently trained and, given the fact that often teachers have to teach LO without receiving any, or very little, training, effectiveness becomes questionable.” See Jacobs “Life Orientation as experienced by learners: a qualitative study in North-West Province” 2011 31 *SAJE* 212 213; Pillay states: “Subject knowledge and experience are important factors to consider with regard to LO teachers, but could become a problem if they are not trained to teach LO. This was confirmed by Rooth who found that 30% of all teachers in her national study were not specifically trained in teaching LO (footnotes omitted).” “LO teachers, firstly, need to be effective counsellors so that they could help learners with the multitude of social problems that exist in society. However, the problem is that most LO teachers have not been trained in basic counselling skills. (footnotes omitted)” See Pillay “Keystone Life Orientation (LO) teachers: implications for educational, social, and cultural contexts” 2012 32 *SAJE* 167-168, 174-175; Van Deventer states: “Irrespective of what the situation is, it seems that LO is taught by a broad spectrum of teachers that are not specialists in this field, insufficient support from the Department of Education (DoE) does not improve the situation. The fact that LO is taught by teachers that are not LO specialists is an important aspect, since the epistemology and skills of the teachers who teach a learning area/subject determine the status and practice of that learning area/subject (footnotes omitted)” See van Deventer “Perspectives of teachers on the implementation of Life Orientation in Grades R–11 from selected Western Cape schools” 2009 29 *SAJE* 127 128; Mosia states: “In this study teachers acknowledged that they resist curriculum implementation for various reasons, for example they are not learning area specialists, and they are allocated the learning area without their consent or any inservice training.” See Mosia *How secondary school teachers understand, respond to and implement life orientation* (2011) 124.

1647 Venter states: “Grasping the intent reflected by the document demands interpretative skills that are normally not required of school teachers. This is not to say that the members of the teaching profession are generally incapable of dealing with complex documents. It is merely stating the obvious fact that no one called upon to teach about religion in terms of the Policy will be able to conform to its demands.” See Venter (n873) 451-452.

1648 For example, paragraph 19 discussed above.

1649 The National Policy undertakes to teach about “secular values” in paragraph 30.

1650 Prinsloo (n1632) 31; Examples of headlines in response to the Draft Policy include “Asmal Braak Gal oor Christene” (*Beeld*, 22 March2001);“Christelike Toorn Ontvlam teen Asmal” (*Beeld*, 23 March 2001) and “Groot Grief oor Asmal en die Christene” (*Rapport*, 25 March 2001). These articles show the dismay by the majority faith at an inter-religious approach; Potgieter states that because of government’s refusal to adopt a model of model of confessional pluralism, the National Policy can also be interpreted as the “establishment of a (state) religion in the form of secularism and neutralism.” See Potgieter (n1630) 400. See also Colditz *Comment on the Draft Policy ‘Religion in Education’* (2003) 32-37; Chidester states: “The new policy, Christian critics argued, violated the provisions of both the Bible and the new South African Constitution.” See Chidester (n1604) 272-293.

1651 In this regard, Benson states: “Where there is a realm of competing belief systems (including atheism and agnosticism alongside religions), the removal of religious expression or practice leaves agnosticism and
religious conservatives view neutral religious teachings as anti-religious. It does not recognise the particular religious identities of teachers, learners or their parents. According to this perspective, the purely academic study of religion is not congruent with freedom of religion as contained in section 15 of the Constitution.  

Although the National Policy envisions that all religions can be afforded equal respect in the school curriculum in a manner that does not infringe upon the religious freedom of any child, the successful translation of the National Policy into practice is questionable. Recognition must be given to the fact that the theoretical principles of the National Policy may not be the lived experience of school-children.  

It is submitted that the abovementioned problems should be given considerable attention by the state; since it impacts upon the daily lives of learners and their best interests should be paramount.

4.4 RECOMMENDATIONS

The major problems with the current position on religion education are as follows: 1) In practice, there is no definitive and objectively determinable line between religious instruction and religion education; 2) the National Policy makes it the duty of each school to teach about religion on a compulsory basis, meaning there is no option for a conscientious objector to withdraw from attendance and 3) inadequately trained teachers may teach about religion in a manner which is contrary to the objectives of the National Policy.

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1652 Snyman states: “Neutrality is also not equivalent to freedom of religion.” See Snyman (n1630) 49. Religious conservatives may regard religion education as the removal of “true” religion from public schools- which to them is anti-religious. In a society which reveres religion in general - religious majority may find it offensive to be compelled to learn about secularism as an equally valid belief system to religion. Potgieter asserts that the religious majority quietly submitted to the National Policy despite the fact that they find it unsatisfactory. He states: “Can the fact that most South Africans silently acquiesced with the Policy be construed to indicate that they are satisfied with it, or should it rather be ascribed to the fact that they feel intimidated by the power of the ruling party?” See Potgieter (n1630)398.

1653 de Waal et al state: “However, despite South Africa’s fundamental constitutional values of human dignity, equality and freedom, as well as the express constitutional protection of religious beliefs, whether the National Policy has been implemented as designed is another matter ....” “No serious research has been undertaken to date to determine how South African public schools are implementing the National Policy.” See de Waal et al (n1027) 62.
As a result of these problems, an argument could be made for the provisions of the National Policy on compulsory religion education to be reconsidered, with a view to only permitting religion education in schools as an *optional/elective* subject in secondary schools and not a *compulsory* school subject in the public school curriculum. Hypothetically speaking, if this were to happen, it would alleviate the problems with regards to neutrality of information since those attending the classes would be doing so voluntarily. In other words, religion education or religious studies would still be available, but those who do not wish to attend would have the choice of an alternative class or alternative constructive activity to attend in that time period. In this way, those who are interested in the subject and do not find it offensive or an encroachment on their religious freedom (by their own individual assessment), are free to attend. But those who find the subject to be an encroachment on their religious freedom- are free to decline. The assessment would be a subjective one and not an objective one. After all, it is exceedingly difficult to find a solution which satisfies everyone.

This hypothetical solution would coincide with the court’s ruling in *Kotze v Kotze* - that failure to recognise a person’s “freedom of choice” to learn about religion may be damaging to that person’s development. If sectarian religious instruction is no longer acceptable and compulsory religion education in different faiths leaves room for the potential infringement of numerous fundamental rights of school-children, then perhaps this option of non-compulsory religion education in school is the best solution in the interests of learners of all faiths. This solution would be in accordance with section 15 of the Constitution.

However, there is a problem with arguing in favour of a child's freedom of choice when it comes to school subjects. Religion education is not the only subject that is connected to a learner’s individual rights. What about subjects related to language and culture? It is submitted that language and culture are as integrally linked to a person’s identity as religion. As previously mentioned, the current South African school curriculum encompasses learning about various cultures and compels learners to learn more than one language- a home language and an additional language. Furthermore, the state intends on incorporating the compulsory learning of an African language into the public school curriculum as early as next

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1654 For the reason that secondary school learners who choose to learn about religion are more mentally and emotionally mature to be able to cope with the complex subject matter and to handle the complicated issues or contradictions that may arise from learning about religion at school. This will also respect the rights of parents to be the primary educators of very young children on matters of religion.

1655 Para 631E G.
Importantly, the rationale behind the impending change in the school language policy is purported to be the “changing profile of learner population” and the need to foster “social cohesion”.\textsuperscript{1657} It is submitted that it would be unthinkable and to the detriment of children to exclude language or culture from schools based on the freedom of choice of the child.\textsuperscript{1658} It is clear that the social context in which South African children live, has triggered the need for certain subjects (such as languages and Arts and Culture) to be compulsory. The same argument can be made with regards to the inclusion of religion education in the curriculum. Without religion education, the school system would produce young citizens who have not grappled with issues of diversity - and will be unprepared to deal with diversity in the outside world.

It stands to reason therefore that if learners are given the freedom of choice with regards to learning about different religions, the argument could be made for them to exercise freedom of choice with regards to learning languages or learning about different cultures in school. This could lead to a situation where each learner could refuse to learn about any subject that is not in accordance with their religion or other beliefs. For example, a child could refuse to attend Natural Science classes if the subject teaches about evolution – a concept which goes against the child’s religious beliefs. The state would then be put in a position to create individualised curriculums that are dependent on the freedom of choice of each child- a situation which is practically impossible for public schools to manage.

All in all, the inclusion of diverse religions, cultures and languages in the school curriculum, mirrors the social reality of a diverse South African population. Despite the problems associated with compulsory religion education, it is submitted that freedom of choice has to be limited by the society in which one lives. Inevitably, all South African children will encounter a culturally, linguistically and religiously diverse society outside of the school walls and it is to their benefit that they are prepared for this reality while in school. Clearly, religion education in different faiths is the state’s attempt at a compromise between the two unacceptable extremes of completely removing the teaching of religion from public schools

\textsuperscript{1656} Discusses in Chapter 5 at paragraph 4.3.
\textsuperscript{1657} The Department of basic education spokesperson Panyaza Lisufi stated that: “Social cohesion is the reason we have started the programme. You can’t have South Africans having a translator between them when speaking.” See eNCA “New language policy on the cards for schools” at http://www.enca.com/south-africa/indigenous-african-languages-sa-schools (Date accessed: 9 July 2013).
\textsuperscript{1658} The benefits of learning more than one language and learning about different cultures in the school environment are already mentioned in Chapter 5 at paragraph 4.3.
and allowing devotional religious instruction in public schools. In other words, if it does encroach upon the religious freedom of learners and/or their parents, it is a reasonable and justifiable limitation of the right in furtherance of a legitimate state goal, namely nation-building through the celebration of diversity.

It is therefore recommended that the current position should be maintained. It gives due respect to religion in general – which the majority of the public expects - and at the same time is far more inclusive and respectful of minority religions and non-religion than previous policies. Furthermore, the National Policy acknowledges the history of religious discrimination in schools and is careful to protect those who are identified as “different”.1659 This is a vast improvement in the protection of minority religious rights and the promotion of diversity in South African schools. However, it is recommended that the National Policy and corresponding curriculum be revisited in order to ensure that all provisions and learning outcomes are aligned with the objectives of nation-building and not any other purely religious/spiritual objectives.1660 In accordance with freedom of religion, all provisions with purely spiritual goals need to be amended or removed.

Lastly, it is submitted that National Policy will only be beneficial to school-children if it is implemented properly by highly trained and specialised teachers.1661 It stands to reason that an improvement in teacher training for this subject is essential to achieving the aims of the National Policy. Many of the problems mentioned above can be improved or alleviated if the curriculum is taught in the manner envisaged by the National Policy. It is therefore recommended that the state make a concerted effort to improve teacher training in the area. However, with the National Policy already being ten years into implementation and with standard of teacher training in South Africa gradually declining (both in general and particularly with regards to this subject),1662 it is questionable whether this is even possible.

1659 National Policy para 62.
1660 For example, paragraph 19 of the National Policy (mentioned above) contains spiritual goals that are not only concerned with nation-building.
1661 See Jacobs (n1646) 213; Pillay states: “the many social issues in the country warrant the need for highly trained and specialized LO teachers, especially when they are expected to contribute to the holistic development of learners….” See Pillay (n1646) 167-168.
1662 Roux “We need to be honest about RiE’s current academic stance in SA. Initiatives taken and built up over many years seem not to be sustainable in teacher training.” See Roux (n1615) 7; Modisaotsile states: “Other challenges include: poor teacher training; unskilled teachers; lack of commitment to teach by teachers; poor support for learners at home; and a shortage of resources in education….” See Africa Institute of South Africa “The Failing Standard of Basic Education in South Africa” March 2012 Policy Brief 1 2; Clarke “What happened to teacher training?” at http://mg.co.za/article/2010-10-05-what-happened-to-teacher-
1 INTRODUCTION

This study recognised and examined the integral connection between children’s rights, education rights and freedom of religion when dealing with legal issues pertaining to religion in South African schools.

Chapter 1 of this thesis placed the topic in perspective by providing a general overview of the study which included: a statement of the research problem; the importance and purpose of the thesis; the scope of the study; a summary of the issues to be addressed in the remaining chapters as well as the structure of the thesis.

Chapter 2 discussed the historical development of religion in South African schools spanning from 1652 to 1996. It illustrated that South Africa’s history was tainted by the unequal treatment of religions. It revealed that historically, one brand of Christianity, namely Calvinism, was promoted in many aspects of the law, including in education. Religious favouritism in schools was displayed most vigorously through the implementation of Christian National Education in schools, with little or no regard for minority religions. It was the adoption of the interim Constitution is 1993, and later the Constitution in 1996, that made it necessary for the South African government to transform educational laws and policies to being more inclusive of minority religions and respectful of religious diversity in schools.

Significantly, the new constitutional dispensation afforded special recognition to children’s rights, which had been overlooked in the past.

Chapter 3 focussed on South Africa’s obligations to protect children’s rights, education rights and freedom of religion, at world and regional levels through customary international law and various human rights instruments. It was noted that South Africa has adopted specific constitutional provisions regarding the status of international law in South African law and by doing so has committed to giving effect to them. These international provisions are relevant to issues pertaining to religion in schools and impact directly and indirectly on the protection of children’s rights, education rights and freedom of religion rights at state level. The influence of the relevant international human rights instruments on South African law was revealed throughout the remaining chapters.

Chapter 4 acknowledged and discussed the connection between children’s rights and issues pertaining to religion in schools. It aimed to show that the issues pertaining to religion in schools cannot be considered without children’s rights in mind. It contained evidence of a significant improvement in children’s rights in the context of education. For one, the Constitution contains a section specifically dedicated to children’s rights, namely section 28. This section recognises the particularly vulnerable position of children. In addition to these specific children’s rights, children are also afforded other rights in the Bill of Rights, most notably the rights to dignity and equality. Significantly, section 28(2) of the Constitution includes the provision that in all matters pertaining to children, the best interests of the child should be a primary consideration. Significantly, recent, prominent case law emphasises the importance of this principle in matters pertaining to religion and education. Furthermore, this Chapter indicated that children’s rights in the Constitution are supplemented by comprehensive child-care legislation in the form of the Children’s Act, which recognises the rights of children to participate in matters that affect them. Importantly, the Children’s Act places a duty of care on schools and educators over all learners within the school environment. Overall, Chapter 4 formed the theoretical foundation for the discussion in Chapter 7 on the role that children’s rights should play in the legal issues around religion in South African schools.

Chapter 5 recognised the link between the right to education and matters pertaining to religion in schools. It dealt with education rights as contained in section 29 of the Constitution as well as other inter-related constitutional rights- such as freedom of association. It also discussed the
education legislation and policies relevant to the role of religion in schools, including the *National Policy on Religion and Education*. In this regard, the Chapter raised concerns about whether the provision of compulsory religion education in public schools is in accordance with freedom of religion- a matter which was addressed in detail in Chapter 7. In addition, this Chapter illustrated that the right to education should be a key consideration in matters pertaining to freedom of religion in schools. Furthermore, it emphasised the connection between the best interests of the child and matters pertaining to education and recognised that in light of the past, one of the state’s primary educational duties is equalising access to education. Most importantly, this Chapter discussed the right to establish private schools based on religious grounds in terms of section 29(3) of the Constitution. It alluded to concerns about the impact of this right on the freedom of religion of non-adherent children- a matter that was comprehensively addressed in Chapter 7.

Chapter 6 discussed freedom of religion as contained in section 15 of the Constitution as well as other inter-related rights such as cultural rights and freedom of expression. It emphasised that the Constitution does not endorse a particular religion, but instead guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion. This means that non-religious beliefs are equally protected alongside religion. However, the South African social context\(^{1663}\) requires that the religious majority be acknowledged by the law. This means that schools can create rules which acknowledge the majority faith. However, in doing so, they may not unfairly discriminate against minority faiths. In this regard, schools must be aware of seemingly neutral rules that apply to all, but have the effect of discriminating against some on the basis of religion- in other words indirect discrimination. Importantly, the decision in *Pillay* indicated that the courts recognition of the impact of indirect discrimination on minority faiths has evolved significantly since the decision of *Lawrence*; however, the effect of this decision on a practical level remains to be seen. Chapter 6 also discussed the impact of the reasonable accommodation principle in the school environment. In this regard, the *Pillay* case required that sincerely held religious and cultural practices must not only be accommodated- but celebrated. This set a precedent for the generous accommodation of religious and cultural practices in schools. However, *Pillay* made it clear that if accommodation of the religious practice imposes an unreasonable burden on the school, the practice should be disallowed.

\(^{1663}\) It was mentioned in Chapter 1 that the majority of South Africans are religious.
impact of this decision on the freedom of religion of children in private schools was explored further in Chapter 7.

Chapter 7 addressed some of the major concerns pertaining to the issue of religion in schools that have been identified in the study, namely: 1) the role of children’s rights in issues pertaining to religion in schools; 2) the religious rights of children in private schools and 3) the teaching of religion in public schools. It contains summaries and findings on these issues as well as recommendations for improvement.

Lastly, this concluding chapter makes a summary of the findings and recommendations contained in Chapter 7 and brings the thesis to a general conclusion.

2 SUMMARY OF FINDINGS AND RECOMMENDATIONS

This thesis found that there is inadequate recognition and application of children’s rights in matters pertaining to religion in schools. Policy makers have not at all times made the express link between children’s rights and issues pertaining to religion in schools. For example, at present there is no express mention of children’s rights or the best interests of the child in the National Policy, nor in the Schools Act.\textsuperscript{1664} Furthermore, there are no specific national guidelines on religious/cultural exemptions to assist schools in developing their own procedures. As a matter of compliance with section 28 of the Constitution, it is submitted that children’s rights must be incorporated as an integral component in codes of conduct, polices and religious exemption procedures in schools. Accordingly, it is recommended that the National Policy and Schools Act be amended so as to recognise the key role of children’s rights in issues pertaining to religion in school. This inclusion of children’s rights will create legal obligations for schools in respect of the inclusion of children’s rights in religious/cultural exemption procedures.

It is recommended further that “National Guidelines on Religious/cultural Exemptions” in schools be developed in order to foster a child-friendly and child-centred approach to dealing with religious/cultural exemptions. Ultimately, these guidelines will illustrate how children’s rights can be incorporated on a practical level in the school environment. Such guidelines will

\textsuperscript{1664} Aside from section 8(5).
set specific legal parameters within which schools can develop religious/cultural exemption procedures that best suit each school. It is submitted that the application of children’s rights in matters relating to freedom of religion in schools will strengthen the state’s commitment to “realise the best possible education for our children.”

It has been argued that the right to establish private schools includes the right to require religious conformity from non-adherent learners by way of a complete waiver of their religious freedom. This means that a private school can compel a non-adherent child to attend religious observances and religious instruction (in accordance with the religious ethos of the school) and restrict the child from manifesting their own religious beliefs within the school. This interpretation essentially allows private schools to operate with complete disregard for the freedom of religion of non-adherent children. At present if, for example, a Hindu parent who wants to enrol his or her child in a private school with a Christian religious ethos (for the reason that the school offers the best quality education/best facilitates available in the area) and the school requires a waiver of the freedom of religion of the child as an admission requirement - the parent must choose to either waive the Hindu child’s religious freedom, or find an alternative school for the child. If the parent chooses to waive the freedom of religion of the child, the child can be compelled to attend Christian religious instruction and religious observances and can be restricted from manifesting Hindu beliefs. It is submitted that this approach is contrary to public policy and fails to take due cognisance of the dignity, equality and best interests of school-children. Furthermore, it undermines the states goals of nation-building and celebrating diversity in that it allows for the creation of exclusive groups of young children who never interact with people of different faiths.

This abovementioned interpretation of section 29(3), presumes that the waiver of the freedom of religion of non-adherents is necessary in order to preserve the religious ethos of the private school. However, it is submitted that there is a way for the rights of private schools and the rights of the non-adherent child to co-exist in harmony through the application of the reasonable accommodation principle in private schools. Consequently, it is recommended that reasonable accommodation in private schools should be enforced in order to protect the freedom of religion of the non-adherent child while at the same time respecting the religious/associational rights of the school. This will ensure that children of all faiths will be

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able to access a private school of their parent’s choice without having to forsake their religious freedom. Also, it will prepare adherent learners for the social reality of a religiously diverse South Africa which exists outside of the school environment. If a private school does not require a waiver and instead reasonable accommodates the learner, he or she can be exempted from religious instruction and religious observances and given constructive activities during those times; whilst the adherent learners can continue to conform to the religious ethos of the school. The non-adherent child’s manifestations of their own faith can be limited in terms of the school’s code of conduct in order to protect the safety and rights of others and the educational goals of the school. It is submitted that this approach would be in accordance with constitutional values and would benefit South African society as a whole.

This thesis addressed concerns about the current legal position on teaching religion in South African public schools. It found that the removal of sectarian religious instruction from public schools is correct. However, it is questioned whether or not the provision of religion education on a compulsory basis (as per the National Policy) is consistent with freedom of religion. It was found that although the provision of compulsory religion education in public schools impacts upon the freedom of religion of learners and their parents, (if taught correctly) it is a reasonable and justifiable limitation of the right in that it pursues a legitimate state goal – namely- nation-building through the celebration of diversity. It was therefore recommended that the current position should be maintained since it provides a compromise between the two unacceptable extremes of removing the teaching of religion from public schools and allowing religious instruction in public schools.

It was also found that although the objectives of the National Policy may be praiseworthy, the successful translation of its objectives into practice is problematic. The implementation of the objectives of the National Policy may, in particular, be hampered by inadequately trained teachers. As a result, it is submitted that a vast improvement of teacher training in the area, is imperative. The further problem addressed is that there is no definitive and objectively determinable line (in law or in practice) between religious instruction and religion education. In some instances the provisions of the National Policy and the learning outcomes of the corresponding religion education curriculum contain purely spiritual objectives as opposed to objectives that are in line with nation-building. In accordance with freedom of religion, this thesis recommended that any provisions that have purely religious/spiritual objectives must be amended or removed.
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