

Kongres: Vryheid van godsdiens onder 'n nuwe konstitusionele bedeling in Suid-Afrika

(Congress: Freedom of religion under a new constitutional dispensation in South Africa)

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Some reflections on the Constitutional Court's Freedom of Religion Jurisprudence¹

ABSTRACT

In the conference context my contribution is limited to a brief overview of the Constitutional Court's jurisprudence on freedom and protection of religion guaranteed under the 1996 Constitution and by its predecessor, the interim Constitution. Before turning to the two leading decisions of the Constitutional Court in this regard a few general observations are necessary.

The Constitution, as the supreme law of South Africa, should not be seen exclusively as a technical document regulating state power and protecting the individual against its excesses. At the same time as it performs these important functions it "also embodies, like the German Constitution, an objective, normative value system"³ that influences the interpretation of all legislation and guides the development of the common law.⁴

1 Text of a paper delivered on 25 October 2001 at a conference on Church and State held at the Stellenbosch Faculty of Theology.

2 Section 15(1) of the 1996 Constitution provides:

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

The interim Constitution provided in section 14(1) that –

[e]very person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

Although the italicised words have been omitted from the 1996 Constitution, this does not detract in any substantive way from freedom of religion as protected under the interim Constitution.

3 *Carmichele v The Minister of Safety and Security and Another* CCT 48/00, 16 August 2001, as yet unreported, par 54. As was stated by the German Federal Constitutional Court:

The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.

The same is true of our Constitution.

4 Section 39(2) of the Constitution provides that every court, tribunal or forum must –

Moreover, the Bill of Rights, comprising sections 7 to 39 in chapter 2 of the Constitution, is not a compendium of discrete individual rights, but a comprehensive, coherent, interlocking protective shield. In it the different rights are often mutually sustaining and three of them, dignity, freedom and equality, play a foundational and determining role.⁵

Human dignity has played an important role thus far in the Court's judgments on fundamental rights and freedoms. A strong argument could be advanced that such human dignity is seen by the Court in fundamental Kantian terms. My own point of departure would be the following description of human dignity, given by Prof Günter Dürig in the 1950s, which is regarded as the classic definition in Germany:

All humans are human by virtue of their intellectual capacity ("kraft seine Geistes") which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature.⁶

While the Constitution is a secular one, and must be a secular one, if it is to accord equal respect and protection to non-believers and believers alike and to the different religious denominations, it does not erect a wall between church and state. Thus section 15(2) of the Constitution provides that –

... [r]eligious observances may be conducted at state or state-aided institutions, provided that –

- (a) those observances follow rules made by the appropriate authorities;
- (b) they are conducted on an equitable basis;
- (c) attendance at them is free and voluntary.

The Constitution also recognises, both directly and indirectly, the importance of the communal aspects of the free practice of religion. It does so indirectly in section 18 where it guarantees the right to "freedom of association" to everyone and directly in section 31(1) where the following is provided:

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, practice their religion and use their language; and,
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

While some commentators have referred to these, and similar rights, as group rights, they are more correctly characterised, as the Constitutional Court has done, as "associational individual rights".⁷

[w]hen interpreting any legislation, and when developing the common law and customary law ... promote the spirit, purport and objects of the Bill of Rights.

5 See, eg, sections 1(a), 74(1) and 36(1).

6 "Jeder Mensch ist Mensch kraft seines Geistes, der ihn abhet von der unpersönlichen Natur und ihn aus eigener Entscheidung dazu befähigt, seiner selbst bewußt zu werden, sich selbst zu bestimmen und sich und die Umwelt zu gestalten." Dürig, *Der Grundrechtssatz von der Menschenwürde*, in *AöR* 81 (1956) 117, 125. For a discussion hereon see Enders, *Die Menschenwürde in der Verfassungsordnung*, *Jus Publicum* Band 27 (Mohr Siebeck 1997), 10-13.

7 *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997* (1) BCLR 1 (CC) par 24.

The Constitutional Court explained that the “[c]ollective rights of self-determination” mentioned in Constitutional Principle XII of the interim Constitution were in fact –

Associational individual rights, namely, those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition.⁸

Before dealing with its decisions, it is necessary to explain the two-stage approach that the Court is obliged to adopt under the Constitution before it can declare an Act of Parliament, a provincial statute, any other law to be constitutionally invalid because it is inconsistent with the Constitution.

The first stage involves determining whether the statutory provision being attacked infringes the constitutionally protected right in question. The technical word used for such an infringement is “limitation”, and one speaks of the provision “limiting” the right in question. This first stage in turn involves two inquiries. The first is to establish what the nature of the constitutionally protected right is, what its content is and what its limits are. The first inquiry in this stage aims at defining the right in question. The second inquiry involves determining whether the statutory provision in question infringes or limits the right so defined. Because section 15(1) of the Constitution groups conscience, religion, thought, belief and opinion as specially protected freedoms, it has not been necessary for the Court to embark on the invidious and difficult task of defining religion for purposes of this section nor to attempt to distinguish between a “religious” belief and a belief which is not. Courts generally have been reluctant to perform this task.⁹

The second stage, that commences when a limitation or infringement of a constitutionally protected right has been established, recognises the universally accepted principle that rights, even constitutionally protected ones, are not absolute. There are occasions when they may be limited by the law. This will usually be when it is necessary to do so in order to accommodate, or further or protect a legitimate state interest, which interest could include the protection of other individuals or their rights. Our Constitution recognises that some limitation on rights is inevitable. The second stage accordingly concerns itself with determining whether, in particular circumstances, it is constitutionally permissible for a right to be infringed or limited. Our 1996 Constitution allows the limitation of constitutionally guaranteed rights “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”.¹⁰ Amongst the factors that the Constitution requires to be considered are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose, and less restrictive

8 Id.

9 See, eg, Stone *et al*, *Constitutional Law* (Little, Brown & Co, Boston, 1986), 1361 and following for the position in United States law. “Commentators, drawing on modern theology, have suggested that religion must involve ‘ultimate concern’ or belief in ‘extra-temporal consequences’ or in a ‘transcendent reality’” (1372).

10 Section 36(1) of the Constitution, which provides as follows:

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

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

means to achieve the purpose. This involves a weighing up of conflicting interests and an analysis of the proportionality between them.

I turn now to the few occasions on which the Constitutional Court has been called upon to consider the right to religious freedom. When the Constitutional Court, because of the duties imposed on it by the interim Constitution, had to certify the 1996 Constitution, no serious objections were raised against the adequacy or appropriateness of its protection of religious rights. A number of objections were raised against the preamble to the Constitution.¹¹ Several objectors complained that the words “in humble submission to almighty God” which appeared in the preamble to the interim Constitution were not repeated in the 1996 Constitution. The Court found that this objection was founded on a misunderstanding of the Court’s role in the certification process, which in fact limited the Constitutional Court’s certification function to testing the 1996 Constitution against the Constitutional Principles embodied in the interim Constitution. These Principles did not require any particular religious reference in the preamble. On the other hand, another objector objected to the inclusion of the invocation “[m]ay God protect our people” as discriminatory against non-theists, in violation of Constitutional Principle III, which prohibited all forms of discrimination. The Court decided that the invocation of the deity did not constitute any form of discrimination against non-theists. The invocation did not oblige non-theists to do anything in conflict with their beliefs or opinions, nor did it in any way limit them in the exercise of such beliefs or opinions. The Court held that sections 9 and 15 of the Constitution adequately protected non-theists from discrimination.¹²

The two decisions of the Constitutional Court I focus on may be called the *Lawrence*¹³ and the *Christian Education*¹⁴ cases.

The *Lawrence* case, decided under the interim Constitution, illustrates how important constitutional issues can arise in mundane and unexpected factual settings. I deal only with the religious freedom issues raised in the case. Section 90(1) of the Liquor Act,¹⁵ dealing with a grocer’s wine licence, which permits the selling of wine only, prohibits such sale on Sundays, Good Friday and Christmas Day. Only the prohibition against selling wine on Sundays was subjected to constitutional challenge, as being inconsistent with the freedom of religion guarantee under the interim Constitution. The appellant concerned contended that the purpose and effect of this prohibition was “to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath ... or, perhaps, to compel the observance of the Christian Sabbath”. This, so the argument ran, was inconsistent with the freedom of religion of those persons who do not hold such beliefs and do not wish to adhere to them.

The statute under consideration in the *Lawrence* case must be distinguished from so-called “Lord’s Day” statutes which, in former times, were features of many countries, including our own, where governments sought to enforce the religious observances of certain denominations on all its citizens. The features of such acts, as exemplified by the one that was declared unconstitutional in Canada, is that they prohibited, amongst other things, any work or commercial activity on Sundays, as well as any games or performances for which an admission fee was charged, any transportation for pleasure where a fee was charged and the sale and distribution of foreign

11 *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) par 203 and 204.

12 *Id.*

13 *S v Lawrence; S v Negal; S v Solberg* 1997 (1) BCLR 1348 (CC).

14 *Christian Education South Africa v Minister of Education* 2000 (1) BCLR 1051 (CC).

15 No 27 of 1989.

newspapers. In the *Lawrence* case the Court agreed, that had this been the type of statute before it, it would have had little hesitation in declaring it unconstitutional, because any law that *compels* sabbatical observance of the Christian Sabbath, offends against the religious freedom of those who do not hold that belief. The following definition of the main attributes of freedom of religion was adopted by the Court and confirmed in the subsequent *Christian Education* case:

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 and reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹⁶

Four judges of the Constitutional Court held that the prohibition against selling wine on Sundays did not infringe the religious freedom guarantee. These judges warned against reading into our Constitution a principle that prohibited the state from the advancement of religion, as is the case with the so-called “establishment clause” of the United States Constitution. Our Constitution deals with issues of religion differently to the United States Constitution. These four judges were alive to the dangers that constraints on the exercise of religious freedom could impose –

in subtle ways and that the choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result the adherents of other religions may be made to feel that the State accords less value to their beliefs than it does to Christianity.¹⁷

These judges nevertheless considered that, in South Africa, Sundays had acquired a secular as well as a religious character, it being the most common day of the week on which people do not work. Weekends consisting of Saturdays and Sundays are times at which most South Africans take a rest from work. Work patterns over weekends vary, but very few South Africans work on Sundays. Shops are open in many parts of the country on Sunday mornings and sports stadia and other places of entertainment are open on Sundays. Many who observe Sundays as rest days do so simply because it has become the most convenient day for such purpose, and not because of any desire to observe the Christian Sabbath. The secular nature of Sundays is evident from the way in which many people spend it. It was difficult to see how section 90 of the Liquor Act in any way coerced or constrained the holders of grocery wine licences in the exercise of their religious freedom or that of any other persons. It does not compel any licensee, directly or indirectly to observe the Christian Sabbath, nor does it constrain others to hold different religious beliefs. It is important to bear in mind that section 90 of the Liquor Act was not attacked on the ground that it constituted unfair discrimination in the religious context and the Court did not consider this issue. If the state were to give undue preference to one particular religion, this might well raise issues under the equality clause. But this was not the case here.

Two judges found that the provision in the Liquor Act infringed the right to religious freedom but that such limitation was justified under the provisions of section 33 of the interim Constitution, the predecessor to section 36 of the 1996 Constitution to which I have already referred, and therefore not constitutionally invalid.

¹⁶ *Lawrence* above n 13 par 92, quoting with approval from the judgment of Dixon CJC in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64, a judgment of the Canadian Supreme Court, at 97.

¹⁷ *Id* at par 93.

Three judges found the provision to be constitutionally invalid. They did so on the basis that the provision in question was an infringement of the right to freedom of religion because it “results The Court agreed, in the favouring of one religion over others” and was not justified under the interim Constitution.

The *Christian Education* case dealt with the constitutionality of section 10 (1) of the South African Schools Act¹⁸ (the Schools Act) that provides that “[n]o person may administer corporal punishment at a school to a learner”. The Court held that this did not constitute an unjustifiable infringement of the constitutional right to freedom of religion of parents and children in independent schools who, in line with their religious convictions, had consented to the administration of corporal punishment in their schools. In order to avoid unwarranted conclusions being drawn from this decision, it must be stressed that the Court was at pains to draw a distinction between reasonable corporal punishment of a child at home by a parent, and corporal punishment of a learner at school by a teacher. The Court’s judgment dealt only with the latter.¹⁹

The Court, pointing to the associational element in the right to freedom of religion, to which I have alluded, and to other constitutional provisions that protect the rights of members of communities, evinced a sensitive approach to diversity:

Taken together, [these provisions] affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the “right to be different”. In each case, space has been found for members of communities to depart from a general norm. These provisions, collectively and separately acknowledge the rich tapestry constituted by civil society, indicating that language, culture and religion constitute a strong weave in the overall pattern.²⁰

For purposes of its judgment the Court was prepared to assume that the parents in question themselves practised corporal punishment on their children in a way that was not inconsistent with any provision of the Bill of Rights. It was also prepared to assume, for the same purpose, that section 10 of the Schools Act limits (infringes) the parents’ religious rights both under section 15 and section 31 of the Constitution. The Court’s crucial analysis concerned the question whether such infringement could be justified as being fair and reasonable in an open and democratic society based on freedom, equality and dignity under the provisions of section 36. I have alluded already to the various considerations to be taken into account in answering this question.

In an earlier case the Court had explained the correct approach to weighing up these considerations as follows:

In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected ...

18 Act 84 of 1996.

19 Above n14 par 48-49.

20 Id par 24, footnotes omitted.

Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness.²¹

In the *Christian Education* case the Court commented on the difficulty of proportionality analysis in the area of religious rights:

The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness. To the extent that the two orders can be separated, with the religious being sovereign in its domain and the State sovereign in its domain, the need to balance one interest against the other is avoided. However religion is not always merely a matter of private individual conscience or communal sectarian practice ... Many major religions regard it as part of their spiritual vocation to be active in the broader society ... Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.²²

While recognising that freedom of religion in the open and democratic society contemplated by the Constitution is important, the Court pointed out that the inroad made into the practice of such belief by section 10(1) of the Schools Act was limited. It only prevented the parents from authorising schools to impose corporal punishment on their children. Their general right and capacity to raise their children in accordance with their religious precepts, including administering corporal punishment to them, remained unaffected.

As against that, the state had substantial grounds, in the interests of learners generally to impose a blanket ban on corporal punishment. It was part and parcel of a national programme to transform the education system to bring it into line with the values of the Constitution. The state had an obligation to take steps to diminish the amount of public and private violence in society and in this context the best interests of the child are of paramount importance. There was an even more important interest, namely the protection of pupils from degradation and indignity. In *S v Williams*²³ the Constitutional Court had found that judicially ordered corporate punishment of juveniles was constitutionally invalid. The Court had held in this case that the institutionalised nature of the punishment added to the indignity of the punishment. The trend in other South African countries was strongly in favour of regarding corporal punishment in schools as in itself violatory of the dignity of the child. Corporal punishment administered by a teacher in the institutional environment of a school was quite different from such punishment in the home environment. In conducting the proportionality analysis, the Court placed great emphasis on the difficulty of monitoring the administration of corporal punishment:

It will inevitably be administered with different force at different institutions, or by different teachers, and there is always the possibility that it will be excessive. Children are

21 *S v Manamela and Another (Director-General of Justice Intervening)* 2000(5) BCLR 491 (CC) par 32-33.

22 Above n14 par 33.

23 1995 (7) BCLR 861 (CC).

put in a very vulnerable situation because they (and their parents possibly) can only complain about excessive punishment at the risk of angering the school or the community.

Moreover the parents are not being obliged to make “an absolute and strenuous choice between obeying a law of the land or following their conscience”. They can do both at the same time. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil “what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children”. The Court, weighing all these factors, came to the conclusion that the scales came down firmly in favour of upholding the generality of the law.

In conclusion it can be stated, with a fair measure of confidence, that the comprehensive and nuanced way in which religious freedom is protected in the Constitution, and in particular the protection given to the important associational aspects of religious life, adequately protects the wide variety of religions in our pluralist society against state interference.