Advancing the Protection of the Right to Freedom of Religion in South Africa

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Abstract

Since the inception of South Africa's democracy, the Constitutional Court has been confronted with only a few challenges regarding the protection of the right to freedom of religion (and the same applies to the other courts). Although part of the reason for the sparse jurisprudence on the protection of the right to freedom of religion is South Africa's relatively young democracy when compared to many other democracies around the world, an ideal opportunity is presented for contributing towards the laying of a sturdy foundation conducive to the advancement of inclusivity pertaining to religious freedoms. Consequently, this article critically explores aspects related to what is presented as essential underpinnings to the debate, namely the importance of the right to freedom of religion (and implied in this, non-religious belief as well), the presence of subjective moral convictions (or beliefs) in the practising of law and the accompanying risks related to unnecessary dominance in the practising of law, tolerance, the pretext of neutrality and modes of judicial reasoning. Following on this, and as an extension of the aforementioned, the Constitutional Court's approach in *Prince v President of the Cape Law Society* (hereafter *Prince*) is investigated. Accompanying all of the above is the countering of the strong pull in many democracies towards the marginalisation of religion regarding inclusion in the public sphere and that which is deemed to be rational; something that South Africa's democracy should not be perceived as being immune to.

Keywords

Freedom of religion; freedom of belief; diversity; law and religion; church and state; religion and the public sphere.

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1 Introduction

Included in the human rights jurisprudence since the establishment of a democratic South Africa (nearly three decades ago) are a limited number of judgments by the Constitutional Court[1] the Supreme Court of Appeal[2] and the High Court (including the Equality Court)[3] that essentially relate to the right to freedom of religion. Irrespective of this, it is the Constitutional Court in particular that has been vocal in proclaiming the importance of religion (Justice Albie Sachs especially being resolute in *Minister of Home Affairs v Fourie* hereafter *Fourie*).[4] Referring to the commencement of the new democratic era in South Africa, Justice Sachs explained that it had made sense to invoke the recognition of a deity in the South African *Constitution*.[5] Not to do so, said Justice Sachs, would make of the *Constitution* yet another document that is bereft of a "special and deep connection".[6] The

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1 See *S v Lawrence, S v Negal, S v Solberg* 1997 4 SA 1176 (CC) (hereafter *Lawrence*); *Prince v President of the Cape Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) (hereafter *Prince*); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) (hereafter *Christian Education*); *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) (hereafter *Pillay*).

2 See *Mohamed v Jassiem* 1996 1 SA 673 (SCA); *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 1 SA 585 (SCA); *Department of Correctional Services v POPCRU* 2013 4 SA 176 (SCA); *Nkosi v Bührmann* 2002 1 SA 372 (SCA); *Hendricks v The Church of the Province of Southern Africa, Diocese of Free State* (108/2021) 2022 ZASCA 95 (20 June 2022); *De Lange v Presiding Bishop, Methodist Church of Southern Africa* 2015 1 SA 106 (SCA).

3 See *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C); *Crossley v National Commissioner of South African Police Service* 2004 3 All SA 436 (T); *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 2 SA 268 (C); *Gaum v Van Rensburg* 2019 2 All SA 722 (GP); *Kotze v Kotze* 2003 3 SA 628 (T); *Radebe v Principal of Leseding Technical School* (1821/2013) 2013 ZAFSHC 111 (30 May 2013); *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 6 SA 129 (GJ); *Ryland v Edros* 1997 2 SA 690 (C); *Singh v Ramparsad* 2007 3 SA 445 (D); *Strydom v Nederduitse Gereformeerde Gemeente, Moreletta Park* 2009 4 SA 510 (EqC); *Taylor v Kurtstag* 2005 1 SA 362 (W); *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T). Then there are judgments from the Labour Court and Labour Court of Appeal for example, *Dlamini v Green Four Security* 2006 27 ILJ 2098 (LC); *FAWU v Rainbow Chicken Farms* 2000 1 BLLR 70 (LC); *Lewis v Media24 Ltd* 2010 31 ILJ 2416 (LC); *TDF Network Africa (Pty) Ltd v Deidre Beverley Faris* 2018 CA 4/17 (LCA).

4 See for example, *Christian Education* para 36; *Prince* paras 48-49; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC) (hereafter *Fourie*) 389.

5 *The Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

6 In the words of Justice Sachs, "We … open our meetings with a hymn, Nkosi Sikelel'i Afrika … Let the *Constitution* contain the phrase 'Nkosi Sikelel'I Afrika, God Seën Suid-Afrika, God Bless Africa' in all the eleven official languages. The idea was

Constitutional Court's confirmation of the importance of freedom of religion is bolstered by the Constitutional Court's expressed endorsement of the *Constitution* as supportive of the protection and promotion of diversity.[7] In the Preamble to the *Constitution* it is stated that:

> [w]e, the people of South Africa … [b]elieve that South Africa belongs to all who live in it, united in our diversity …

That diversity should also be understood, as the inclusion of religious beliefs in addition to non-religious beliefs stands to reason. Religious believers are represented by a significant segment of South African society,[8] and the importance of religion is also confirmed in South Africa's *National Policy on Religion and Education* (2003)[9] as well as the *South African Charter of Religious Rights and Freedoms*.[10] Besides the broad category created for the protection of the right to freedom of religion in the *Constitution*,[11] there are references to more specific forms of religious freedoms in the *Constitution*.[12] The *Constitution* also allows for the establishment of the

accepted, and far from the invocation serving to divide our population, it became an element that united us." Sachs *Strange Alchemy of Life and Law* 236.

7 See *Pillay* paras 64-65, 75-76, 104, 107; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 107, 134-135; *Lawrence* paras 146-147; *Christian Education* paras 24-25; *Prince* paras 49, 79, 147, 170; *Fourie* para 95.

8 See, for example, Schoeman 2017 *HTS Teologiese Studies/Theological Studies* 1-7.

9 This policy emphasises the "cooperative" model, which supports the separate spheres for religion and the state but which allows for interaction between the two. This cooperative model "encourages an ongoing dialogue between religious groups and the state in areas of common interests and where the religious must be assured of their freedom from any state interference." Para 3 in GN 1307 in GG 25459 of 12 September 2003 (*National Policy on Religion and Education*).

10 The first charter of its kind in the world, which was unveiled over a decade ago (South African Council for Religious Rights and Freedoms 2010 https://classic.iclrs.org/content/blurb/files/South%20African%20Charter.pdf 11-15). Section 234 of the *Constitution* allows for the drafting of additional Charters of Rights to supplement the *Constitution*. The Charter was officially presented and discussed during 2008 and representatives from the Jewish, Muslim and Christian religions as well as from African Independent churches were present. For more on this see especially, Benson 2011 *IJRF* 125-134 and Malherbe 2011 *BYU L Rev* 613.

11 Section 15(1) of the *Constitution* states: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

12 Section 15(2) of the *Constitution* 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. (3) (a) This section does not prevent legislation recognising: (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." There is also the protection of the right to establish and maintain independent educational

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,[13] the primary objects of this Commission being, amongst others, to promote respect for the rights of cultural, religious and linguistic communities.[14] In addition, the *Constitution* caters for the protection of freedom of association for the religious.[15]

Religious freedoms continue to be challenged in many democracies (and non-democracies) around the world, and included in this challenge is the substantive relegation of religion to the private sphere.[16] South Africa's democracy should not be perceived as being immune to such marginalisation of religion. South Africa's rather young democracy provides an ideal opportunity for the carving of a path progressively conducive to an inclusive society pertaining to the protection of religious freedoms.

Consequently, this article presents essential insights directed at the promotion of the protection of the right to freedom of religion in South Africa against the background mainly of the limits of law, concerns regarding neutrality-talk and the furtherance of diversity. Bearing this in mind, this article is comprised of the following: a reminder of the importance of religious belief (and implied in this, non-religious belief as well) as well as concerns related to the application of law in a manner that unnecessarily limits the normative frameworks adhered to by the religious. Also, neutrality as a questionable measure pertaining to claims of religious rights is imputed as well as critical pointers involving extracts from selected Constitutional Court judgments which contribute to the discussion on ways in which the protection of freedom of religion can be advanced. This is followed by some thoughts on the advancement of diversity,[17] together with modes of reasoning related to the judiciary that are conducive to such advancement. In conclusion, the

institutions (albeit at one's own expense, although state subsidies for independent educational institutions are not precluded); see s 29(3)-(4).

13 Section 181 of the *Constitution*.

14 Section 185 of the *Constitution*.

15 Section 31 of the *Constitution* states: "(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", and s 18 states: "Everyone has the right to freedom of association."

16 This is evident from, for example, the daily challenges confronting religious civil society institutions, not even to mention the innumerable sources of scholarship by experts in law, education, sociology, philosophy, politics and theology, for example, critiquing the anti-religious sentiment that is rife in liberal democracies around the world. In this regard, see for example, Carter *Culture of Disbelief*; Deneen, *Why Liberalism Failed*; and Smith *Disintegrating Conscience.*

17 By diversity, for the purposes of this article, is meant a practical arrangement towards the furtherance of inclusion in society, rather than an essential or moral principle.

minority judgments (by Ngcobo J and Sachs J)[18] in *Prince*[19] are investigated and aligned with insights imparted earlier in the article related to the advancement of freedom of religion and, consequently, of diversity.

2 Underpinnings for the advancement of the protection of religious freedoms

In what follows are insights related to what is suggested as being essential aspects for the advancement of religious freedoms in South Africa. Roger Scruton, in his commentary on the poet TS Eliot, states that if you remove "faith", you do not eradicate a body of doctrine only, nor do you leave a clear picture reflecting, at last, what the individual really is. Rather, says Scruton, you remove the power to notice more important truths:

> [t]ruths about our condition which cannot, without the benefit of faith, be properly confronted – such as the truth of our mortality.[20]

Melissa Moschella reminds us of the "human good of religion", which lies in the acknowledgement that questions related to ultimate meaning in life are questions regarding that which is:

> [p]eculiarly important to have thought reasonably … whatever the answer to those questions turns out to be, and even if the answers have to be agnostic or negative …[21]

with Moschella adding that the importance of these questions for those who believe in a God is:

> [g]rasped by practical reason as first principles without the need (or possibility) of a rational demonstration in much the same way as practical reason grasps the values of friendship and sociability (living in harmony with other human beings), of being in good health, of attaining knowledge, of developing one's talents and skills, and of achieving an inner harmony among the reasoning and desiring aspects of oneself.[22]

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18 Sachs J delivered a supplementary minority judgment and was joined by Mokgoro J as well as Madlanga AJ in concurring with the minority judgment of Ngcobo J.

19 *Prince v President of the Cape Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

20 Scruton 2008 *Intercoll Rev* 8. Also see Nussbaum 1985 *Cumb L Rev* 56-57.

21 Moschella 2017 *J L & Relig* 127. Scruton is of the view that "religion is the life-blood of a culture, and it provides the symbols, stories, and doctrines that enable us to communicate about our destiny"; Scruton 2008 *Intercoll Rev* 9.

22 Moschella 2017 *J L & Relig* 127. Moschella is here reminding us of what is reflected in views going as far back as the classical Greeks and Romans and which also overlaps with natural law theory (including the views of eminent modern-day scholars such as John Finnis and George Grant). Added to this are the many records of ancient cultures around the world that attest to the importance of belief in God.

This also confirms the inextricable relationship between human dignity and the protection of religious interests, Robert George saying that:

> [r]espect for the person – that is to say, respect for his or her dignity as a free and rational creature – requires respect for his or her religious liberty …[23]

These comments in support of the substantive relevance of religious belief point to religious beliefs also meriting inclusion in the arena of truthfulness and the resultant competitiveness of religion to other non-religious foundational beliefs that occupy (and in many instances rule over) the public sphere (and that also have claims to truth). It is sensible for Paul Horwitz to argue that in a pluralistic society that genuinely acknowledges the possibility of religious truth the state should accord significant weight to the possibility that some religious claimants' understanding of the truth is true. The "constitutional agnostic" (Horwitz' term) makes an extreme effort to understand religious truth from the perspective of the religious believer, acting under the assumption that the religious believer views this world and its mysteries accurately.[24]

Bearing in mind the inherency and importance of religious belief, the question arises as to why many religious believers find it challenging in many instances to be included in the public sphere in a number of societies labelled as democratic? Harold Berman refers to the current climate of viewing the law as an end in itself; a climate in which the Constitution is understood as being an end in itself and in which any higher sense of normative importance is discarded. This Berman refers to as a form of secular religion.[25] Underlying this is the peril that where there may be substantive differences in views on what morality requires, the views held by the civil authorities (as reflected in law), reign supreme. Zachary Calo reminds us of the fact that:

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23 George 2012 *IJRF* 39. Also see Ahdar and Leigh *Religious Freedom* 1-2.

24 Horwitz *The Agnostic Age* 277-278. Horwitz also warns against the settling of conflicts related to freedom of religion by calling upon some view of the public good, which, says Horwitz, is often a decidedly secular and statist one, and adds that our very understanding of what the "public good" requires "is itself a deeply contestable question … for the 'public good' to mean anything in our own age, it must incorporate the possibility and importance of religious truth"; Horwitz *The Agnostic Age* 278. Also see Hitchcock *Supreme Court and Religion Vol 2* 144.

25 Berman 1979 *Cap U L Rev* 354. Although Berman is here referring to the context of the American Constitution, this should serve as a word of caution regarding the South African legal context.

> [w]e continue to talk of law as if it refers to an objective ontological reality, a tendency that belies the deeper scepticism of the modern condition. This is the same problem confronting human rights talk.[26]

Iain Benson comments that:

> Authoritarian regimes have always sought to make all matters subject to law – to make law, in fact, 'comprehensive' in the way that theocratic regimes in times past viewed the state – with all of its aspects framed by religion. Now that we have, in the West, moved beyond theocracy, we are in danger of the law extending its ambit beyond where it should go to a kind of juristic theocracy if we are not careful…risk of 'comprehensive law' that fails to understand its competence and its jurisdiction and that would, thus, threaten the various plural goods that a richly federated state needs to nurture.[27]

True tolerance should point towards tolerating that which is viewed, by the powers that be, to be illogical, non-sensible, bizarre or foreign, for example; provided of course that intolerable and substantive violations of fundamental rights not be tolerated. For true diversity to be protected and developed, the civil authorities in democratic societies must make a concerted effort when dealing with the law in the context of matters of religious conviction to detach themselves from their own world or culture of meanings or at least not impose those on lived associations such as religions that view matters differently. This is where the challenge rests regarding the advancement of diversity; the challenge for the governing authorities to avoid as far as is possible the highly attractive temptation to tread the easy path of excluding religion due to differences in meaning, conviction, and even of what is perceived as sensible. There is a variation of ultimate meanings related to legal matters and these meanings emanate from individuals, also in their being part of societal structures such as the family, schools, universities, churches, mosques, temples and business entities. These societal structures exist alongside the state and each, says Gordon Spykman, must be provided with the right of existence:

> [t]he state is the balance wheel that safeguards, regulates, and coordinates the work of the other wheels, ensuring a proper intermeshing of functions and, thus, facilitating cooperation in partnership.[28]

In this regard law plays an essential role for the harmonisation as well as the advancement of interests, the maintenance of peace and the preservation of all within a society.[29] Bearing this in mind, and as alluded to

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26 Calo 2011 *St John's L Rev* 517. Also see Berman *Law and Revolution* 557.

27 Benson "Foreword" xxxviii.

28 Spykman "The Principled Pluralist Position" 97.

29 As stated in Art 18(3) of the *International Covenant on Civil and Political Rights* (1966): "Freedom to manifest one's religion or beliefs may be subject only to such

earlier, it is also important that law should not be approached from only one perspective pertaining to substantial moral matters, namely that of the State, rather than from the perspective of associations, for example, the members of which share the same fundamental interests. This relates especially to what the law shows to be right or wrong, moral or immoral; the following serving as a brief illustration (there are of course hundreds of other examples): the legal prohibition against the burial right of the parents of a dead foetus; the law's definition of marriage that includes polyamorous relationships; legislation that promotes the use of taxes for the protection of public parks but not for the maintenance (even partly) of private religious schools; depression as a ground for the legalisation of euthanasia; and the legal prohibition against the smoking of cannabis as part of a religious practice. All these constitute moral views of which, rightly or wrongly, a legal position has been afforded. It is, therefore, imperative that the protection of religious rights and freedoms is allowed to be freely exercised in accordance with the normative frameworks accompanying such religious activities; normative frameworks that are not always aligned with normative frameworks emanating from the civil authorities. In this regard, Justice Van der Westhuizen, in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being,*[30] states that the *Constitution* guarantees space for the exercise of the diversity of religions and cultures in South Africa.[31] Also, as Iain Benson aptly states:

> Law recognizes rights, it does not create them as such. If this were not so there would be no standard 'outside' law with which to evaluate the justice of law itself … Therefore the cultural grounds that generate the moral and spiritual resources for the recognition of 'right and wrong' must be carefully respected …[32]

Then there is the popular reliance by the authorities on "neutrality-talk" when confronted with claims for the protection of religious interests.[33] Public life is understood to represent objectivity and reason, whilst private life is viewed as harbouring subjectivity, passions and tastes, as well as

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."

30 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2016 2 SA 1 (CC).

31 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* 2016 2 SA 1 (CC) para 83.

32 Benson "Foreword" xxix.

33 See for example, Horwitz *The Agnostic Age* 41-47 and Smith 2013 *Notre Dame L Rev* 1440-1443. For case law that is reflective of different approaches taken regarding neutrality see, for example, Curtis 2018 *Harv J L & Pub Pol'y* 935-971. Curtis also brings to the fore how arguments rested on neutrality in fact introduce partialities that do not always serve the interests of the religious.

preferences (as long as such subjectivities, passions, tastes and preferences do not harm others).[34] As a result, the governing authorities, in the balancing of the public and private spheres, have striven to become ideologically neutral in the sense of the prioritisation to be awarded to so-called objective facts,[35] and implied in this is law's obligation towards such prioritisation. There is also the view that leanings towards neutrality stem from the liberal endeavour towards consensus in which political decisions are to be separated from particular views on what the good life should entail; peace should be maintained by remaining neutral on the fundamental questions that divide them.[36] The concern in this regard is that views on the good life (or on the meaning and purpose of life) are in many instances not separable from political considerations, as decisions made regarding any of these sprout from moral views, and agreement on these views remains a fiction. Where there is no agreement there can be no "neutrality". Such a claim might be convenient for politicians or judges but it lacks sound reasoning. Political considerations on numerous occasions exclude some or other view on what should be viewed as right or wrong and, therefore, can never be neutral.[37] Gary Peller reminds us of the fact that law itself rests on ungrounded assumptions about the proper manner to categorise the world, consequently also ascribing to law the ideological and cultural dimension.[38] "Neutrality-talk" as part of the debate on the protection of the right to freedom of religion in South Africa, therefore, needs to be approached with caution, and the absence of such talk in *Prince* (which is elaborated upon below) signifies a positive development in South African jurisprudence on the right to freedom of religion.

Some extracts from judgments by the Constitutional Court also require critical analysis against the background of the advancement of religious rights and freedoms. Sachs J comments in *Christian Education* that:

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34 Gedicks 1992 *Va L Rev* 674-675. The realm of public life has become known also as the realm of secularism; Gedicks 1992 *Va L Rev* 695-696. Some have argued that this is itself a moral vision of one sort being forced upon the differing and legitimate (legal) beliefs of others: see Benson "Considering Secularism" 83-98.

35 Kelman *Guide to Critical Legal Studies* in Gedicks 1992 *Va L Rev* 676.

36 Horwitz *The Agnostic Age* 10-11.

37 Ahdar argues that it is difficult to perceive a state that operates on merely a minimalist consensus of the type that agrees for example on the wrongness of theft, the importance of clean water, that green means go and that 3+3 = 6 (citing Fish 1996 *First Things*). "The prevailing worldview of the powers-that-be may be hard to label, and it might be a hybrid of various philosophical and religious strands. But it will exist. No state is neutral in this sense." Ahdar 2013 *Ratio Juris* 421. The same applies to the non-neutrality of the judiciary.

38 Peller 1985 *CLR* 1181.

> 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.[39]

In this, the view that religion is aligned with faith whilst countervailing public and private concerns are (usually) not, and that the measure of reason exclusively applies to the latter is present and should not be. Even though Sachs J is not stating here that religious belief is unreasonable, note how he points to what the general parameters of "faith" as well as the general application of "reasonableness" should be. The question here is: What does the judiciary rely on to qualify such an understanding? Implied in this is an assumption that religion is exclusively the holder of faith and that the measure of rationality is to be applied mainly or generally to matters "outside" of religion and faith. But the concern arising from this understanding is that faith finds application beyond the religious (call it) belief, (if you like), bearing in mind Steven Smith's comments that:

> [m]odern constitutional interpretation … is a religious enterprise in the sense that it depends on the (usually tacit) assumption of transcendent authority.[40]

Reasonableness can inextricably be related to matters of faith, whether religious or non-religious, and therefore the reasonableness accompanying private and public concerns does not guarantee the exclusion of loyalty to belief. Consequently, the judiciary should caution against prioritising arguments believed to be reasonable emanating from non-religious convictions over arguments believed to be reasonable emanating from religious faith.

In *Fourie* Justice Sachs said:

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39 *Christian Education* para 33.

40 Smith "Idolatry in Constitutional interpretation" 159. Also see 162-163, 170 regarding the inextricable connection between the interpretation of a text and the sense of a mind or higher source that transcends the tangible or empirical. Michael Perry refers to the competing concepts of rationality, namely categories of criteria applied for determining what beliefs to accept and what not to; Perry 1986 *Wm & Mary L Rev* 1067. According to Perry, "No privileged standpoint exists from which to adjudicate among competing conceptions of rationality – no standpoint that does not itself presuppose a particular conception of rationality"; Perry 1986 *Wm & Mary L Rev* 1067-1068. Perry also refers to "the pretensions to a universal language and tradition that are delusions" and that every language finds itself within a very particular tradition of interpretation, Perry 1986 *Wm & Mary L Rev* 1071-1072. The distancing of religion from notions of reason is nothing new regarding the judiciary in liberal democracies for example, for the American context, see Hitchcock *Supreme Court and Religion Vol 2* 125-128.

> Their arguments raise important issues concerning the relationship foreshadowed by the *Constitution* between the sacred and the secular.[41]

But what does this "between the sacred and the secular" specifically denote? This may imply that "the secular" typifies exclusion from the transcendental; from any sense of belief or faith.[42] However, "the secular", as viewed in the sense of that which denotes non-religious thought is also comprised of fundamental belief or convictions of faith (which are also accompanied by veneration and reverence), just as is the case with the sacred. Another concern that may arise from the formulation "between the sacred and the secular" is that it implies that "the secular" denotes a neutral space belonging to reason that all of us can agree on, whilst "the sacred" does not.[43] Here again, "the secular", in whatever manner it is understood to mean in the context of it being separate from "the religious", cannot be neutral regarding questions related to the meaning of life, the purpose of government, what should be understood as right or wrong, moral or immoral, and what the parameters should be for freedom of expression, public education, ownership of land, and taxes, as well as privacy. Reason itself is moulded in accordance with faith commitments, whether religious or non-religious, and consequently there can be no neutral sphere harbouring an encompassing consensus on matters of justice and the purpose of existence, for example.

Patrick Neal refers to the meta-theory of liberalism that harbours the view that concepts of the good reflect individually defined and possessed ends which separate selves pursue, and that such a meta-theory is non-neutral. The reason for this, says Neal, is that such an understanding excludes any alternative meta-theory:

> [w]hich denies that a 'conception of the good' can be properly understood as the ends which separate selves define and pursue.[44]

Also, "the secular", understood as representing reason as such, rests on the faith in autonomous (or pure) reason,[45] and "the secular" does not reflect

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41 *Fourie* para 89.

42 Ahdar points to the dictionary meaning of "secular" as denoting that which is not connected to religious or spiritual matters; Ahdar 2013 *Ratio Juris* 405.

43 The label of neutrality accompanies references to "the secular"; this neutrality more specifically aimed at distinguishing between a public sphere which is home to reason and a private sphere where faith should reside; Asad *Formations of the Secular* in Deagon 2017 *Western Australian Jurist* 40. For an informative explanation on "the secular" as also denoting foundational beliefs see Benson 2000 *UBC L Rev* 519-549.

44 Neal 1978 *Can J Philos* 578.

45 Deagon 2017 *Western Australian Jurist* 73; also see 71.

a universal view on specified moral matters. Regarding the latter, Larry Alexander comments that self-proclaimed liberals differ on various matters such as:

> [t]he meaning and scope of freedom of speech, economic freedom, privacy, free exercise of religion, equal treatment, community self-determination, the justification of punishment, procedural rights, and so on …[46]

In *Prince*, Ngcobo J professed that:

> Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion.[47]

Here Ngcobo J implies that only religion belongs to the category of faith and belief and that the non-religious are not saddled with the challenge of having to prove their beliefs and that the beliefs of the non-religious are exempted from that which is, perhaps to others, bizarre or irrational. From the cosmological perspective undergirding the longest consistent theory of natural law, the idea that humans exist in a purposeless universe in which there is no necessary connection between *techne* and *telos* is equally bizarre and unreasonable.

Also note Ngcobo J's reference to "believers" and "non-believers", which is assumed to not have been intended to categorise the religious as believers and the non-religious as non-believers.[48] Why? Simply because we are all believers, whether religious or non-religious. Also, by suggesting that the non-religious are exempted from that which is bizarre or irrational runs the risk of inferring from this that the law, which is popularly deemed to be separate from religious belief, is an autonomous body of norms that are immune to that which may be viewed as bizarre or irrational.

Aligned with this are some helpful insights arising from South Africa's own context associated with modes of reasoning to be followed by especially the judiciary that can further the protection of religious freedoms. In this regard, Johan Froneman[49] refers to formal reasoning which prioritises the

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46 Alexander 1993 *San Diego L Rev* 773.

47 *Prince* para 42.

48 In the majority decision in *Prince*, reference is also made to "believers" and "non-believers"; *Prince* para 112.

49 Who served as judge on the Constitutional Court for eleven years and also as judge in various other courts in South Africa.

authoritative origin of a legal rule (such as legislation or judicial precedent) whilst substantive reasoning focusses on the underlying justification for the rule and asks questions such as: Is it just? Does it serve a good goal for society?[50] Froneman maintains that the *Constitution* strongly obliges the courts to make substantive choices "that are of the kind that a formal vision of the law would not countenance as 'real' law".[51] Having said this, Froneman explains that a formal legal rule is usually the result of substantive reasoning and cautions against understanding the law in an exclusively formal manner.[52] Therefore, to transform from a context in which religion in many instances is not welcome in the public sphere (and where religion is viewed as being subservient or contrary to reason), to a context that views the religious to be as much part of the public sphere as is the case with many non-religious beliefs (and that reason emanates from religious circles as well), the emphasis on substantive reasoning by the civil authorities (including the courts) will bode well for the advancement of diversity.[53] This responsibility placed on the shoulders of the judiciary should be accompanied by the judiciary's continuously having to remind itself of the natural bias it has when dealing with matters related to the protection of the right to freedom of religion.[54]

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50 Froneman 2005 *Stell LR* 4. Froneman elaborates by explaining that substantive reasoning acknowledges the inevitability of the interplay of law with moral, political, social, economic and institutional reasons, and where considerations related to equity and good faith reign supreme. With formal reasoning, once it has been confirmed that the rule or decision has resulted from a competent authority such as the legislature or a court, it becomes compulsory to follow suit and no further reasoning is accepted. The aforementioned should not imply that substantive reasoning is to reign exclusively as this would run the risk of distorting; no legal system says Froneman, can exclusively rely on substantive reasoning, Froneman 2005 *Stell LR* 16.

51 Froneman 2005 *Stell LR* 17. Here ss 39(1)(a), 39(2), 8(3)(a) and 173 of the *Constitution* are especially relevant; Froneman 2005 *Stell LR* 17.

52 Froneman 2005 *Stell LR* 6-7.

53 Aligned with these views by Justice Froneman, there are two scholarly works that substantially contribute to the debate on the protection of religious freedoms and the consequent advancement of diversity, the first being Inazu's *Confident Pluralism*. In this work Inazu argues that freedom should be allowed insofar as it does not become markedly hurtful. According to Inazu the awarding of freedom should take place even where there are major differences; where the freedom called for does not make sense, is not in accordance with popular thought and may result in discomfort or even some levels of harm. Then there is Horwitz's *The Agnostic Age*, in which Horwitz argues that in a pluralistic society that genuinely acknowledges the possibility of religious truth, the state should accord significant weight to the possibility that some religious claimants' understanding of the truth is true. Horwitz claims that for the "public good" to mean anything, it must include the possibility and importance of religious truth.

54 For more on this see Carter *God's Name in Vain* 166-168. Although not a subject that many like to talk about, says Carter, the judiciary is a part of government, which

Having remembered the importance of the right to freedom of religion, the law as denoting some or other presuppositional point of departure (hereby resting on faith) together with some critical delving into excerpts from selected Constitutional Court judgments as well as proposals regarding the mode of reasoning to be followed by the judiciary, the *Prince* judgment will be discussed in what follows as indicative of a missed opportunity for the advancement of the right to freedom of religion. More specifically, by focussing on the minority judgments in *Prince* this article argues for the advancement of religious rights and freedoms (and, consequently, of diversity), thereby giving further expression to the aforementioned arguments in support of the protection of religious interests.

3 *Prince v President, Cape Law Society*

Although the Constitutional Court in *Lawrence, S v Negal* and *S v Solberg* contributed to the protection of freedom of religion,[55] it is especially *MEC for Education KwaZulu-Natal v Pillay*[56] (hereafter *Pillay*), that has received considerable applause.[57] *Pillay* is also of importance regarding the bolstering of diversity.[58] Taking due cognisance of the contribution of *Pillay* to jurisprudence directed at the protection of the right to freedom of religion in the South African context, the question needs to be asked as to whether the Court was truly challenged. Looking at case law pertaining to religious rights and freedoms in general, there are themes that are inherently more morally contentious and challenging regarding the awarding of protection when compared to the theme of the mere wearing of a nose stud when going to a public school. The wearing of a nose stud in a public school is distanced from that which comprises substantive discomfort and sacrifice on the part of the governing authorities. However, *Prince* presents a significant challenge to the Constitutional Court. As argued below, in *Prince* the Constitutional Court missed a golden opportunity to push the boundaries for the sake of the protection of freedom of religion and the consequent progression of tolerance and diversity.

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has implications for the judiciary's check on government; Carter *Dissent of the Governed* 105, 136. Also see Carter *God's Name in Vain* 121.

55 1997 4 SA 1176 (CC)". Here the Court allowed for the continuation of Christian founded public holidays even though they might come into conflict with those of other religious believers and offend non-religious beliefs.

56 *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

57 The Court decided against the prohibition, by a public school, against the wearing of a nose stud by a pupil who claimed that the wearing of a nose was in line with her cultural identity. For an illuminating confirmation of the importance of *Pillay*, see Du Plessis 2008 *AHRLJ* 396-406.

58 See *Pillay* paras 75-76, 104, 107, 147, 170.

Prince supported[59] specified legislation that prohibited the possession and use of a hallucinogenic substance (save for specified medical and research-related purposes)[60] and, as a result, placed a restriction on certain religious practices by adherents to the Rastafarian religion. But what is the background to this judgment?

Mr Prince (the appellant), who satisfied all the required academic qualifications but who still required the registration of his contract for community service so as to qualify to practise law, informed the Law Society of the Cape of Good Hope (Cape Law Society) that he was a Rastafari and was therefore required to use cannabis. The appellant was adamant that, notwithstanding the legislation that prohibited the use of cannabis,[61] he would continue to use it for religious purposes. The Cape Law Society refused to register his articles, taking the view that attorneys, as officers of the court, must obey the law. In essence the appeal brought before the Constitutional Court by the appellant, as argued by the appellant, comprised of a practice of the Rastafari religion that requires of its adherents to consume cannabis. The appellant argued that the disputed provisions in the relevant legislation were unconstitutional in that they failed to provide an exemption applicable to the use or possession of cannabis by Rastafari for *bona fide* religious purposes. The challenge brought before the Court by the appellant did not oppose the criminalisation of the possession and use of cannabis and the appellant agreed that the prohibition against the possession and use of cannabis served a legitimate government interest.[62] Irrespective of this, the appellant was of the view that the failure to provide an exception in respect of the use of cannabis for religious purposes by Rastafari infringed the right to the freedom of religion of the Rastafari and that the legitimate government purpose aimed at by the aforementioned prohibition could be attained through less restrictive means.[63]

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59 With a narrow majority decision of 5-4.

60 *Drugs and Drug Trafficking Act* 140 of 1992; *Medicines and Related Substances Control Act* 101 of 1965.

61 *Drugs and Drug Trafficking Act* 140 of 1992; *Medicines and Related Substances Control Act* 101 of 1965.

62 Ngcobo J makes it clear that this case "is not concerned with a broad challenge to the constitutionality of the prohibition on the use or possession of cannabis … We are not therefore called upon to decide whether the Legislature's general prohibition on the use and possession of cannabis is consistent with the *Constitution* or not. Equally, we are not called upon to decide whether the use and possession of cannabis should be legalised. Finally, we are not called upon to determine what exemption should be granted to the appellant or to fashion any exemption. What we are called upon to decide is whether the impugned provisions are overbroad." *Prince* para 31 and also *see* para 35.

63 *Prince* paras 33, 36.

The views expressed in the majority judgment[64] prohibiting the Rastafarians' possession and use of cannabis are essentially as follows: The civil authorities would be greatly challenged in having to distinguish between the use of cannabis for religious purposes and the use of cannabis for recreational purposes. Even more challenging than this was the determination of whether the possession of cannabis was earmarked for either religious or recreational purposes.[65]

According to the majority of the judges, authorising the use of cannabis by the Rastafari would weaken the State's ability to enforce its legislation in the interests of the public at large,[66] and policing of the use of cannabis by the Rastafari would be impossible,[67] also bearing in mind concerns related to expenditures and practical implementation, hereby also implying interference with the ability of the State to enforce its legislation.[68] There was the concern that the informality of the structures of the Rastafarian religion in South Africa would pose difficulties for the formal identification of Rastafarians against the background of a proposal for the introduction of a permit system.[69] The majority judgment further pointed out that allowing Rastafarians to possess and use cannabis would curtail South Africa's international obligations, especially against the background of an extensive trade of cannabis in South Africa.[70] There was also the view that a proposal to allow the use of cannabis in ways other than the smoking of it for the Rastafarians' religious practices was absent, also taking into cognisance that according to the Rastafarian religion, "only smoking and drinking cannabis leads to sudden illumination".[71] Consequently, Ngcobo J's proposal of a limited exemption was viewed as unconvincing.[72] It was also argued that the Rastafarian Houses (formal structures) were not parties to the litigation, neither did the Appellant assert or establish authority to act on behalf of any other person save for himself.[73]

64 Goldstone J and Yacoob J concurred in the majority judgment of Chaskalson CJ, Ackermann J and Kriegler J.
65 *Prince* paras 130,132,142.
66 *Prince* para 139.
67 *Prince* para 142.
68 *Prince* paras 132, 134, 142. In response to the appellant's proposal of introducing a permit system, the majority of the Court was of the view that there would be challenges related to practicalities, which included financial, administrative and policing impediments.
69 *Prince* para 137. Also see para 135.
70 *Prince* para 139. Also see para 131.
71 *Prince* para 140. Also see para 142.
72 *Prince* para 140.
73 *Prince* para 142.

In his minority judgment Ngcobo J referred to the limitation test in accordance with section 36[74] of the *Constitution* to assist in determining whether a limitation of a right is justifiable.[75] Against this background Ngcobo J explained that the three elements comprising government interest (the importance of the limitation; the relationship between the limitation and the underlying purpose of the limitation; and the impact that an exemption for religious reasons would have on the overall purpose of the limitation) must be balanced against the appellant's claim to the right to freedom of religion (the nature and importance of that right in an open and democratic society based on human dignity, equality and freedom); the importance of the use of cannabis in the Rastafari religion; and the impact of the limitation on the right to practice the religion. More specifically Ngcobo J was of the view that the proportionality exercise must relate to:

> [w]hether the failure to accommodate the appellant's religious belief and practice by means of the exemption … can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.[76]

Accompanying this is the question whether the granting of the religious exemption would undermine the objectives of the prohibition.[77]According to Ngcobo J:

> In weighing the competing interests and in the evaluation of proportionality, it is necessary to examine closely the relation between the complete ban on the sacramental use or possession of cannabis by the Rastafari and the purpose of the limitation as well as the existence of the less restrictive means to achieve this purpose.[78]

Looking at the nature of the right limited, namely the right to freedom of religion, as well as the scope of the limitation, Ngcobo J began by emphasising the importance of this right:

> The right to freedom of religion is probably one of the most important of all human rights. Religious issues are matters of the heart and faith. Religion forms the basis of a relationship between the believer and God or Creator and

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74 Section 36(1) states: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

75 In this case the focus was on the right to freedom of religion, which also implicates the right to human dignity.

76 *Prince* para 46.

77 *Prince* para 47.

78 *Prince* para 77.

> informs such relationship. It is a means of communicating with God or the Creator. Religious practices are therefore held sacred.[79]

Ngcobo J then referred to diversity "as the hallmark of a free and open society" as well as the inextricable relationship between the protection of diversity and the right, amongst others, to freedom of religion.[80] According to Ngcobo J, the relevant provisions prohibiting the possession and use of cannabis did not distinguish between Rastafarians who use cannabis for religious purposes and drug abusers. As a result, Rastafarians were stigmatised as being criminals in the eyes of the law, hereby being "degraded and devalued", consequently, resulting in a violation of the Rastafarian's human dignity.[81] Regarding the importance of the limitation, Ngcobo J opined that the governmental purpose in prohibiting the possession and use of cannabis was based on the view that the abuse of cannabis might result in psychological and physical harm (which is cumulative and dose-related) and consequently that the prevention of the abuse of cannabis and the suppression of trafficking therein comprise legitimate government goals.[82] Bearing this in mind, Ngcobo J posed the question:

> [w]hether the achievement of these goals require[s] a complete ban on even purely religious uses of cannabis by Rastafari, regardless of how and where it is used?[83]

According to Ngcobo J, the government did not support an absolute ban on the possession or use of drugs in order to achieve its goals, nor was it contended that all use of cannabis constituted harmful practices where, for example, the use of cannabis was allowed for research, analytical and medicinal purposes.[84]

Ngcobo J commented that no facts were presented to convince him that all religious uses of cannabis by the Rastafari posed a risk of harm and that therefore a religious exemption would thwart the aim of the relevant laws.

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79 *Prince* para 48. Ngcobo J adds, "The right to freedom of religion is especially important for our constitutional democracy which is based on human dignity, equality and freedom"; *Prince* para 49. These are profound words.

80 *Prince* para 49. This also relates to an emphasis on tolerance and in this regard Ngcobo J refers to "… the constitutional commitment to tolerance which calls for the accommodation of different religious faiths if this can be done without frustrating the objectives of the government"; *Prince* paras 57, 79. This idea on the importance of tolerance and diversity also enjoys emphasis by Sachs J, who elaborates on this (see below).

81 *Prince* para 51.

82 *Prince* para 53.

83 *Prince* para 53.

84 *Prince* para 54.

The constitutional requirement that in limiting a constitutional right regard must be given to less restrictive means to achieve the purpose of the original or overall limitation required attention as well as the constitutional commitment to tolerance,[85] which included the accommodation of different religious faiths (if this could be accomplished without frustrating the objectives of government).[86] Cannabis as incense posed no harm,[87] and the same applied to the smoking of a few joints of cannabis.[88] Irrespective of the difficulties that would accompany the regulation of the possession and use of cannabis, it should be the responsibility of government to strictly regulate such possession and use.[89] Ngcobo J was adamant that it was for the legislature to determine what the parameters and measures should be for the regulation of the Rastafarians' religious use of cannabis.[90] Ngcobo J concluded by stating that:

> I accept that the goal of the impugned provisions is to prevent the abuse of dependence-producing drugs and trafficking in those drugs. I also accept that it is a legitimate goal. The question is whether the means employed to achieve that goal are reasonable. In my view, they are not. The fundamental reason why they are not, is because they are overbroad. They are ostensibly aimed at the use of dependence-producing drugs that are inherently harmful and trafficking in those drugs. But they are unreasonable in that they also target uses that have not been shown to pose a risk of harm or to be incapable of being subjected to strict regulation and control. The net they cast is so wide that uses that pose no risk of harm and that can effectively be regulated and subjected to government control, like other dangerous drugs, are hit by the prohibition.[91]

In his minority judgment Sachs J emphasised the State's responsibility to approach challenging matters with a spirit of inclusion as far as is possible. In the words of Sachs J:

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85 Regarding Ngcobo J's emphasis on tolerance, also see *Prince* para 57 (which also enjoys emphasis by Sachs J, see below).

86 *Prince* para 57.

87 *Prince* para 58. Also see the rest of *Prince* para 58 and paras 26, 28, 59.

88 *Prince* para 59. Also see paras 25, 61-62, 74, 77.

89 *Prince* para 63. Also see para 64.

90 *Prince* para 63. Also see para 84. Ngcobo J adds that neither the Minister of Health nor the Attorney-General suggested that it would be impossible to address challenges related to the appropriate legislation and administrative infrastructure required to properly regulate the Rastafarians' religious use of cannabis and emphasised that government never even considered measures to all for such religious practices (para 68).

91 *Prince* para 81.

> Exemptions from general laws always impose some cost on the State, yet practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government.[92]

According to Sachs J, that the Rastafarians cannot be given unlimited freedom pertaining to the use of cannabis does not mean that no freedom at all regarding the use of cannabis should be awarded to Rastafarians.[93] Sachs J then proceeded by sketching an "imaginary continuum" with, at the one end, an "easily controllable and manifestly religious use" and at the other a "difficult-to-police utilisation that is barely distinguishable from ordinary recreational use".[94] As an example of an easily controllable use of cannabis that holds a distinctly religious element, Sachs J refers to Ngcobo J's proposal of officially recognised Rastafari dignitaries receiving dagga from State officials for the burning of incense at tabernacles on sacramental occasions.[95] Sachs J then imagined going a step further (from this easily controllable point along this continuum) to where, for example, designated priests would be allowed to receive cannabis for sacramental use, including the smoking of a handed-around chalice, at designated places on designated occasions; a practice that could also be easily supervised by the civil authorities, "and be readily appreciated by the public as being analogous to religion as widely practiced".[96]

At the other end of the continuum, explained Sachs J, would be the awarding of all that the appellant asked for, including the free use of dagga in the privacy of Rastafari homes. This, however, according to Sachs J, would be substantively challenging to address:

> [a]nd would completely blur the distinction in the public mind between smoking for purposes of religion and recreational smoking.[97]

Like Ngcobo J, Sachs J emphasised that it would be the responsibility of Parliament to determine the most optimal means of securing the operational

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92 *Prince* para 147. Sachs J asserted that: "The *Constitution* obliges the State to walk the extra mile"; *Prince* para 149.

93 *Prince* para 148.

94 Above.

95 *Prince* para 148. Ngcobo J provided examples of conditions that can be prescribed for the possession and use of cannabis, namely the requirement of registration with the relevant authorities; recording the amount purchased and the date of such purchase; and where and how it may be used. Any permit to possess and use cannabis for the purposes of the exemption may have to be issued subject to revocation if the conditions of its issue are violated, such as using cannabis otherwise than for the purpose of burning it as an incense or trafficking in cannabis or having in possession more in amount than the permit allows." *Prince* para 64. Also see paras 69-70, 73.

96 *Prince* para 148.

97 Above.

exemption to which the Rastafari were constitutionally entitled.[98] According to Sachs J, the fact that the Rastafari could not be awarded full protection was not a reason for providing them with no protection whatsoever.[99] Sachs J then added:

> As I see it, the real difference between the majority judgment and that of Ngcobo J relates to how much trouble each feels it is appropriate to expect the State to go to in order to accommodate the religious convictions and practices of what in this case is a rather small and not very popular religious community. I align myself with the position that where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the *Constitution* obliges the State to walk the extra mile.[100]

The emphasis Sachs J placed on the civil authorities' duty to protect the right to freedom of religion of the Rastafarian faith (even where it will prove most difficult to do so) is inextricably connected to his emphasis on the significance of the protection and progression of tolerance and diversity. Ngcobo J's reference to the importance of diversity[101] is augmented by Sachs J's view that:

> Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct[102] … Exemptions from general laws always impose some cost on the State, yet practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government. In my view the majority judgment puts a thumb on the scales in favour of ease of law enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our *Constitution* demands for and from all in our society.[103]

This succinct exposition on the importance of tolerance and diversity makes for one of the most prominent expressions by the Constitutional Court in cases dealing essentially with the right to freedom of religion, and on an understanding of the *Constitution* as supportive towards a pluralist society.[104] Sachs J also spoke of tolerance as "a constitutional virtue" and

98 *Prince* para 148. Also see para 169.

99 *Prince* para 148. Ngcobo J also alluded to sacrifices having to be made from those seeking protection as well; see *Prince* para 76.

100 *Prince* para 149.

101 *Prince* para 51.

102 *Prince* para 145.

103 *Prince* para 147. Also see para 172. Justice Sachs, in *Fourie* para 60 states that: "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."

104 This emphasis on tolerance and diversity is also included in other Constitutional Court judgments related to the protection of religious rights and freedoms; see for

of diversity (together with openness) as "a constitutional principle".[105] Sachs J also pointed to the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), which allows for respecting traditional uses of certain drugs.[106]

The minority judgment of Ngcobo J as well as Sachs' minority judgment in *Prince* deserve recognition for pushing the boundaries towards the promotion of diversity. Ngcobo J's emphasis on the right to freedom of religion as a fundamental right is salutary, as well as the emphasis placed, especially by Sachs J, on the importance of true tolerance and diversity. Even though the legitimacy of the government's aim in prohibiting the use and possession of cannabis was duly taken cognisance of, the question was posed by Ngcobo J whether a complete ban on the religious use of cannabis would thwart the achievement of the aforementioned governmental aim.[107] Both Ngcobo J and Sachs J, in their minority judgments placed the responsibility on government to make a concerted effort, despite the prospect of it having to experience practical inconvenience along the way, towards some or other inclusion of the use of cannabis for members of the Rastafarian religion. In addition, Parliament was to be tasked with prescribing the boundaries and measures for the regulation of such use by the Rastafari. Of interest is that the majority judgment, in citing Sachs J in the *Christian Education* judgment, confirmed the importance of following a "nuanced and context-sensitive form of balancing" during the application of a section 36 proportionality analysis; and yet (and ironically so) it was the minority judgments in *Prince* that truly reflected a sensible application of a "nuanced and context-sensitive form of balancing"[108] (for reasons explained earlier). During the application of a section 36 proportionality analysis pertaining to a claim for the protection of a religious interest or conviction, the courts should continuously bear in mind aspirations towards the

example, *Pillay* paras 64-65, 75-76, 104, 107; *Christian Education* paras 24-25; and *Lawrence* paras 146-147.

105 *Prince* para 170. Sachs J commented: "in the present case the clarion call of tolerance could resonate with particular force for those of us who may in fact be quite puritan about the use of dagga and who, though respectful of all faiths, might not be adherents of any religion at all, let alone sympathetic to the tenets of Rastafari belief and practice. The call echoes for all who see *reasonable accommodation of difference* not simply as a matter of astute jurisprudential technique which facilitates settlement of disputes, *but as a question of principle central to the whole constitutional enterprise*." *Prince* para 171 (emphasis added).

106 *Prince* para 153. Also see *Prince* para 164 for further confirmation of this. Ngcobo J referred to the provisions in the various relevant international instruments providing State parties with freedom to move within, for example, their "constitutional limitations" or "constitutional principles"; *Prince* para 72.

107 *Prince* para 53.

108 *Prince* para 128.

advancement of inclusion. During the proportionality analysis the pitting of one right against another right, or even the pitting of different meanings stemming from a right against one another, should take place with the attainment of true diversity in mind. This is what was achieved in *Prince* by Ngcobo J's minority judgment as well as that of Sachs J but missed by the majority. There may be the argument that it cannot be expected of societies that are challenged in having an effective infrastructure to regulate exemptions pertaining to the use of cannabis; but the advancement of diversity, even in a context of difficulty, is precisely what the *Constitution* is all about. As is common knowledge, the civil authorities are tasked with a multitude of regulatory activities, many of which require added effort and resources. Therefore, for the civil authorities, there should be no objection to regulating the use of cannabis for religious purposes in the context of an understanding of freedom of religion as a fundamental right.[109]

4 Conclusion

There are many challenging scenarios that have been brought before the courts in other democracies around the world regarding the protection of the right to freedom of religion, something that the South African context has yet to be confronted with. The protection of religious freedom in South Africa is a field conducive to much-needed exploration and sizeable progression. The significant worth borne by the right to freedom of religion, a right that has also been referred to by the Constitutional Court as one of our most important rights, necessitates making efforts at furthering the protection of such a right that goes beyond the approach evidenced by the majority decision in *Prince*. This necessity is bolstered by strong influences in democracies around the world, vying for a distinction between religion and the so-called "secular", between religion and the public sphere, as well as between religion and the rational. Discussion on the nature of law is essential, against the background of the inherent risk that law as applied by the civil authorities may potentially dictate to the religious (and their accompanying "worlds of normative content"). This further implies that the public space should be understood as a space for all beliefs, whether religious or non-religious, and that claims to moral neutrality amount to a façade in support of certain subjective moral views. It has also been

109 It is ironic that the Constitutional Court, many years after *Prince*, decriminalised the private use, possession and cultivation of cannabis by an adult for private consumption. This the Court did on basis of the protection of the right to privacy. In this regard, see *Minister of Justice and Constitutional Development v Prince (Clarke Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 6 SA 393 (CC).

explained that the subtle distinctions made (or implied) by the judiciary between religion and the so-called "secular" or between religion and the rational hold back the advancement of the protection of the right to freedom of religion. As a logical and supportive extension of the arguments preceding the discussion on *Prince*, this article has presented insights included especially in the minority judgment of Ngcobo J as well as that of Sachs J in *Prince*, which in this regard serves as a salutary example of the limitation of the application of law in certain instances, the judiciary's implied refusal to be led by claims to neutrality, as well as the judiciary's affirmation of "the Other", even if this means that awarding protection to "the Other" would introduce some or other degree of hardship. To do so will bolster the ever-present endeavour towards a diverse and tolerant society. Whether the protection of religious freedoms in South Africa will significantly progress (and together with this, diversity) remains to be seen.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
BYU L Rev	Brigham Young University Law Review
CLR	California Law Review
Can J Philos	Canadian Journal of Philosophy
Cap U L Rev	Capital University Law Review
Cumb L Rev	Cumberland Law Review
Harv J L & Pub Pol'y	Harvard Journal of Law and Public Policy
Intercoll Rev	Intercollegiate Review
IJRF	International Journal for Religious Freedom
J L & Relig	Journal of Law and Religion
Notre Dame L Rev	Notre Dame Law Review
San Diego L Rev	San Diego Law Review
Stell LR	Stellenbosch Law Review
St John's L Rev	St John's Law Review
Va L Rev	Virginia Law Review
Wm & Mary L Rev	William and Mary Law Review
UBC L Rev	University of British Columbia Law Review