

Championing equality: Evaluating the relationship between the state and religion in South Africa

G. van der Schyff*

Setting the scene

The relationship between the state and freedom of religion is a topic of constant interest. Modern-day Europe evidences this clearly in its debates on the extent to which state law can regulate religious expression and the extent to which the state can associate or disassociate itself from religion. In this respect, one only has to think about the debates on the regulation of ritual slaughter in the interest of animal welfare and controversies surrounding religious dress and symbols in state schools.¹ The Republic of South Africa is no stranger to questions of this nature. The country's shift from a racially segregated to a multi-racial dispensation in the 1990s has impacted nearly all walks of life. Central to this transformation in South African society have been judicial interpretations, especially by the Constitutional Court, of the country's Constitution of 1996 and its interim predecessor of 1993. The purpose of this contribution is to chart and evaluate the relationship between the state and freedom of religion in the country in order to better understand this process in its own right, but also to serve as comparative material for European and other jurisdictions. In order to achieve this the values of separation, nearness and equality, as developed by Winfried Brugger, will be used as analytical tools.² The political and constitutional context is obviously important to this undertaking and will be integrated in the general analysis. The primary focus will rest on the right to freedom of religion as a constitutional right, the case law of the Constitutional Court and relevant academic opinion. Comparative references will be made where appropriate.

Parameters for state and religion relationships

In characterising the acceptable range of relationships between the state and religion, Brugger excludes a material union between religious

* DOI 10.7590/ntkr_2017_004
Gerhard van der Schyff is Associate Professor in the Department of Public Law, Jurisprudence and Legal History, Tilburg Law School.

¹ E.g. Gerhard van der Schyff, 'Ritual slaughter and religious freedom in a multilevel Europe: The wider importance of the Dutch case', *Oxford Journal of Law and Religion* 3 (2014), 76; Carla M. Zoethout, 'Religious symbols in the public school classroom: A new way to tackle a knotty problem', *Religion and Human Rights* 6 (2011), 285.

² Winfried Brugger, 'Separation, equality, nearness: Three church-state models', *International Journal for the Semiotics of Law* 25 (2012), 263.

authority and worldly authority.³ By this is meant unions that allow no distance between the secular and the spiritual in society when it comes to their respective organisations and messages and that allow the state to enforce its chosen religion, the effect of which would be to negate people's choice and so violate their rights to freedom of religion and equality between religions as basic constitutional guarantees of liberal democracies. Apart from historical examples, modern-day states that come close to or embody absolute unions would for example include the Islamic Republic of Iran or the Federal Republic of Somalia. The 2012 provisional Constitution of the latter declares Islam to be the country's religion in Article 2, while prohibiting the propagation of all other religions and allowing only those laws that accord with Islamic law, thereby casting a dark shadow over the right to practise one's religion in Article 17(1). To Brugger's exclusion of a material union can also be added outright condemnation of religion by the state as a model to be excluded from the range of acceptable relationships between the state and religion.⁴ This is because such a system would negate religious liberty as such and so treat religious thought fundamentally unequal to other types of thought. The best example of such systems belong mainly to the past, such as the efforts of the nascent USSR to eradicate religion altogether.⁵

Taking these exclusions into account the basic point of departure can be said to foresee a system that recognises some separation between the state and religion and that is also respectful of religious liberty and equality. Depending on the emphasis in developing such a system, three broad models can be distinguished, namely those systems that favour a strict separation, those emphasising nearness between state and religion above separation and those choosing equality as a primary value.

Separation

According to the strict separationist model, the state and religion should operate at great distance from each other. The state is to be inhabited by secular values and should avoid contact with religion. Modern-day France and the United States are prime examples in this regard. The French system is based on the 1905 law on the separation of the churches and the state as well

³ Brugger, 'Separation, equality, nearness' 2012 (n. 2), 264.

⁴ Paul Cliteur, 'State and religion against the backdrop of religious radicalism', *International Journal of Constitutional Law* 10 (2012), 127 at 128-130, 132.

⁵ See the account in Paul Gabel, *And God Created Lenin: Marxism v. Religion in Russia, 1917-1929* (New York: Prometheus Books, 2005).

as the 1958 Constitution that declares the republic to be secular.⁶ The separationist model in the United States is anchored in the First Amendment to the Constitution, the relevant part of which reads ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. United States jurisprudence usually turns on how to interpret the ‘wall of separation’ between the state and religion underlying the clause, as identified in the seminal Supreme Court decision in *Everson v. Board of Education* in 1947.⁷

The purpose behind the model of strict separation is to protect the state from religious influence, while guaranteeing religious freedom to all without state interference. The state’s indifference to religion is not to be seen as hostility, but as a necessary precondition for religions to be developed and be practised freely. Separation also means equality as all religions are treated with similar indifference. Even advocates of strict separation will admit though that some contact between the state and religion is inevitable, the state for instance should act to avoid coercion in matters of religion, as failure to do so can lead to religious liberty being violated.⁸

In reviewing South Africa against this model it quickly becomes clear that the country has never known a strict separation of state and religion. Constitutional texts have never insisted on a separation as in the United States or France, and neither has legislation or the courts. Far from aspiring to a strict separation, in the days of apartheid, Christianity and in particular the Dutch Reformed Church (*Nederduitse Gereformeerde Kerk*) enjoyed a very close relationship with the state, as will be explained further below. With the end of apartheid and the dawn of the country’s new constitutional dispensation in 1993 not only was a shift made from parliamentary sovereignty to constitutional supremacy, but the state’s close relationship with the Dutch Reformed Church came to an end. For the first time in its history the country enjoyed a constitutionally entrenched Bill of Rights to be judicially controlled. The right to freedom of religion was contained in Section 14 of the interim Constitution, which with minor alterations later became Section 15 of the final Constitution of 1996. Section 15 reads:

1. ‘Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that
 - a. whose observances follow rules made by the appropriate public authorities;

⁶ See Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003), 208-210.

⁷ *Everson v. Board of Education* 330 US 1 (1947), 16.

⁸ See Brugger, ‘Separation, equality, nearness’ 2012 (n. 2), 267; Koopmans, *Courts and Political Institutions* 2003 (n. 6), 206.

- 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.
- b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.’

Reading the provision it quickly becomes clear that a strict separation is not envisaged, as religious observances may be conducted at state and state-aided institutions.⁹ The effect is not to divorce religion from the state, but to regulate their contact instead.

In the first case on religious liberty under the new dispensation, the Constitutional Court was called upon in 1997 to investigate the relationship between the state and religion. In *S. v. Solberg* the appellant alleged that her conviction for selling wine in a supermarket on a Sunday was unconstitutional.¹⁰ The Liquor Act prohibited the selling of wine on ‘closed days’, which were defined as Sundays, Good Friday and Christmas Day.¹¹ The appellant alleged that the law in question had a religious purpose and compelled her to observe Christian days, thereby violating her right to freedom of religion in Section 14(1) of the interim Constitution.¹² The nine member bench was quite divided on the issue. President (later changed to Chief Justice) Chaskalson, with whom three judges concurred, ruled that the law did not interfere with the appellant’s right to freedom of religion.¹³ Judge Sachs, with whom one other justice concurred, ruled that the right had indeed been interfered with, but that the application of the general limitation provision in the Bill of Rights saved the law.¹⁴ Judge O’Regan, with whom two justices concurred, also ruled that the right had been

⁹ On such observances, see Iain Currie/Johan de Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 2013), 330-333.

¹⁰ *S. v. Lawrence*; *S. v. Negal*; *S. v. Solberg* [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176, para. 2.

¹¹ *S. v. Solberg*, para. 6.

¹² *S. v. Solberg*, para. 85.

¹³ *S. v. Solberg*, para. 105. A note on terminology: Arthur Chaskalson was appointed President of the Constitutional Court in 1994, and became Chief Justice in 2001 when the post of President of the Constitutional Court was converted into Chief Justice, a position in which he served until 2005. The judgments referred to in this discussion were passed by Chaskalson in his capacity as President of the Constitutional Court, hence the reference to him as President and not as Chief Justice, as this latter position was then still held by the senior judge of the Supreme Court of Appeal in Bloemfontein.

¹⁴ *S. v. Solberg*, para. 177.

interfered, but found that the interference could not be justified in terms of the limitation requirements.¹⁵

The effect was that a majority of six judges ruled the law to be constitutional, albeit not on the same grounds, while a minority of three judges ruled it to be unconstitutional. Although the Court was quite divided on a number of issues, the judges were united in ruling that the Constitution did not include a US-style establishment clause, nor could the Constitution be interpreted to include such a provision as it would contradict its nature and history.¹⁶ The effect was clear, South African constitutionalism is not built on a strict separation between the state and religion. Had the drafters of the Constitution therefore intended a strict separation, provisions such as those in other African constitutions should have been expressly included in the Constitution. In this regard, one can think of provisions such as Article 8 of the Constitution of Angola, which proclaims the state to be secular and separate from the churches, or Article 11 of the Constitution of Ethiopia, which calls on the state to refrain from interference in religious matters, followed by the same injunction for religions in their dealings with the state.

Upon evaluation, the Constitutional Court's interpretation on the question of strict separation is probably correct. However, the argument has been made that modern-day religious fundamentalism warrants just such a strict separation in order to protect states from religion.¹⁷ The South African state has however never been the object of such fundamentalism as to merit a strict separation as the prime way to protect the state. Also, although the country's population is overwhelmingly religious with 83.5% professing a faith, of which 79.8% profess Christian belief, believers do not form a monolithic block that can be perceived as a threat to the state either.¹⁸ The largest Christian denominations include the Zionist Christian Church (11.1%), the Pentecostal and Charismatic Churches (7.6%), the Methodist Church (7.4%), the Roman Catholic Church (7.1%) and the various Dutch Reformed Churches (6.7%). Just as diverse as the country's linguistic composition is, with Zulu as the largest language accounting for only 22.7% of South Africans, so the religious landscape is divided too.¹⁹ In addition, viewed historically, the struggle for a new South Africa focused primarily on attaining racial justice, with a particular emphasis on the right to vote for all.²⁰ It is arguably this context that drove the creation of the current

¹⁵ *S. v. Solberg*, paras. 132-133.

¹⁶ *S. v. Solberg*, paras. 100-102 (*per* Chaskalson P.), 116 (*per* O'Regan J.), 148 (*per* Sachs J.).

¹⁷ See Cliteur, 'State and religion' 2012 (n. 4), 133-137, 151-152.

¹⁸ All figures are taken from the 2001 Census, as the 2011 Census did not pose any questions on religion. See also Pieter Coertzen, 'Constitution, Charter and religions in South Africa', *African Human Rights Law Journal* 14 (2014), 126 at 127-128.

¹⁹ This figure is based on the 2011 Census.

²⁰ See *New National Party v. Government of the Republic of South Africa*, ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489, para. 120.

constitutional dispensation, more than a fervour to separate religion from the state in any strict sense.

But what should the relationship between the state and religion in South Africa resemble, if strict separation does not provide a convincing contextual and constitutional fit? The opinions in *S. v. Solberg* were divided though on the exact role of the state in this respect, as will transpire when discussing the questions of nearness and equality.

Nearness

Having excluded strict separation, the attention turns to nearness between the state and religion. Brugger explains that having disqualified distance, nearness focuses on convergence. The purpose of convergence is not to attain material union, the state and religion therefore maintain different purposes and structures. Instead the focus under this model rests on mutual complementation between the state and religion in generating ‘pools of morals’ on which ‘the entire social order is dependent’.²¹ On this view the individual is a product of both the state and non-state environment, the latter encompassing the family and often religion too. Public and religious morality therefore do not need to contradict one another, or be separated for that matter. Religion, as an ingredient of social fibre, can therefore play an important role in infusing the state and its laws.

The concept of nearness also recognises that ‘historical weight’ in certain areas can be accorded to a particular religious tradition, often that of the majority.²² For Brugger, Christianity in the West can serve as an example in this regard, to the extent that this religion has worked itself into many aspects of the relevant states’ morality and ultimately their laws.²³ Not only does this model not deny religious influence, but it may also justify a religious tradition being supported by the state over other traditions of morality that have proved weaker over the course of history. The product is a ‘civil religion’ that is not open to change or manipulation in the course of normal politics. The validity of this model is dependent though on it respecting the ‘core or minimum requirements’ of religions liberty, equality and the prohibition of material union.²⁴ The establishment of the Anglican Church in England, and the Church of Scotland in that part of the United Kingdom can serve as good examples in this

²¹ Brugger, ‘Separation, equality, nearness’ 2012 (n. 2), 274.

²² Brugger, ‘Separation, equality, nearness’ 2012 (n. 2), 276.

²³ Brugger, ‘Separation, equality, nearness’ 2012 (n. 2), 277.

²⁴ Brugger, ‘Separation, equality, nearness’ 2012 (n. 2), 279.

regard.²⁵ To this must be added that this model does not presuppose a state church, but can be found wherever the characteristics of nearness are present.

Applied to the case at hand, South African Republic (*Zuid-Afrikaansche Republiek*) also known as the Transvaal adopted the Dutch Reformed Church as its state church in the nineteenth century, as did the Republic of the Orange Free State (*Republiek van de Oranje-Vrijstaat*).²⁶ In 1910 the Transvaal and the Orange Free State became part of what is now known as South Africa. Since its creation in that year South Africa has never known an established church. But as Wulfsohn noted already in 1964, the Christian religion exercised a considerable influence on the laws of the country.²⁷ This pertained to matters ranging from Sunday observance to the censorship of films and publications, which were conceived from a specifically Christian perspective.²⁸ Many of these laws could not be described as appealing to general sensibilities among those of Christian belief, but as Wulfsohn noted of the Sunday observance laws, attested of a 'puritanical low church attitude'.²⁹ In addition, theological support for apartheid was strongly associated with the Dutch Reformed tradition, while opposition to this policy was often also rooted in religion.³⁰ This warrants the Dutch Reformed Church being described as the civil religion of South Africa in the absence of a state church in the period prior to the interim Constitution of 1993.³¹ This civil religion was essentially borne by a minority of Christians in South Africa, which reinforces the view that the new dispensation did not see the strict separation between the state and the very idea of religion as the

²⁵ Koopmans, *Courts and Political Institutions* 2003 (n. 6), 204.

²⁶ Paul Farlam, 'Freedom of religion, belief and opinion', in Stuart Woolman/Theunis Roux/Michael Bishop (eds.), *Constitutional Law of South Africa* (Cape Town: Juta, 2008), 41-1, footnote 1.

²⁷ Julius G. Wulfsohn, 'Separation of church and state in South African law', *South African Law Journal* 81 (1964), 90 at 92.

²⁸ Wulfsohn, 'Separation of church and state' 1964 (n. 27), 100. For a brief history of South African obscenity law and the influence of religion in this regard, see *Case v. Minister of Safety and Security*, *Curtis v. Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608, paras. 6-12. See also B. v. D. Niekerk, "'Render unto Caesar...": A study of the Sunday observance laws in South Africa', *South African Law Journal* 86 (1969), 27.

²⁹ Wulfsohn, 'Separation of church and state' 1964 (n. 27), 100.

³⁰ Cornel W. du Toit, 'Religious freedom and human rights in South Africa after 1996: Responses and challenges', *Brigham Young University Law Review* (2006), 677 at 678; David Bilchitz/Alis-tair Williams, 'Religion and the public sphere: Towards a model that positively recognises diversity', *South African Journal on Human Rights* 28 (2012), 146 at 160-161. For examples of Christian opposition to apartheid, see Farlam, 'Freedom of religion' 2008 (n. 26), 41-1 - 41-2.

³¹ Lourens M. du Plessis, 'Religious human rights in South Africa', in John Witte, Jr./Johan D. van der Vyver (eds.) *Religious Human Rights in Global Perspective: Legal Perspectives*, (The Hague: Martinus Nijhoff, 1996), 441 at 446 speaks specifically of an 'Afrikaner civil religion' promoting the Dutch Reformed tradition. Farlam, 'Freedom of religion' 2008 (n. 26), 41-1, speaks of Christianity as South Africa's 'unofficial religion' prior to 1994.

primary remedy for the country's ills.³² The new dispensation could not mean business as usual between the state and its civil religion though.

The situation as it had existed at that time overstepped the limits of the nearness model. The state's preference for a particular religious pool spoke more of a cosiness or a political pact than nearness properly considered.³³ Although the old model of nearness might not be constitutionally viable any longer, the question can be put as to whether nearness as such would still be possible under the post 1993 dispensation? On reading the opinion of President Chaskalson in *S. v. Solberg* it would seem that nearness in the sense of Brugger's notion of civil religion would still be possible. The President of the Constitutional Court held that the right to freedom of religion, given the absence of an establishment clause, did not require the state 'to abstain from action that might advance or prohibit religion'.³⁴ Qualifying this general reference to 'religion' he continued:

'There may be circumstances in which endorsement of a religion or a religious belief by the state would contravene the "freedom of religion" provisions of section 14 [section 15 under the 1996 Constitution]. This would be the case if such endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion. The coercion may be direct or indirect, but it must be established to give rise to an infringement of the freedom of religion.'³⁵

And also:

'The Constitution deals with unequal treatment in and discrimination under section 8 [section 9 under the 1996 Constitution]. Unequal treatment of religions might well give rise to issues under section 8(2) [section 9(3) under the 1996 Constitution], but that section was not relied upon by the appellant in the present case. To read "equitable considerations" relating to state action into section 14(1) [section 15(1) under the 1996 Constitution] would give rise to any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion (...).'³⁶

³² See the quote in *Case v. Minister of Safety and Security, Curtis v. Minister of Safety and Security*, para. 11.

³³ See also the discussion of this bias by Sachs J. in *S. v. Solberg* paras. 149-153.

³⁴ *S. v. Solberg*, para. 103.

³⁵ *S. v. Solberg*, para. 104 (footnote omitted from the quote).

³⁶ *S. v. Solberg*, para. 102. See also para. 103.

The effect of these quotes would be to allow the state to endorse a specific religion, or one of its practices, even above other religions as long as coercion was absent. As a result, practices existing at the time such as broadcasting church services on Sunday mornings on public television, a practice that has long since been discontinued it might be added, would probably not have interfered with anyone's right to freedom of religion.³⁷ Clearly, on this reading the right to freedom of religion would only prohibit coercion in matters of religion, and would not mandate the state to treat religions equally. Also, testing whether coercion was present would require a relatively high threshold too, as President Chaskalson noted that the Liquor Act did not require the appellant to observe the Christian faith by prohibiting her from selling wine under a grocer's licence on so-called 'closed days'.³⁸ The fact that all such days had a Christian connotation was found to be too tenuous a link with the Liquor Act for the appellant's conviction to have interfered with her right to freedom of religion, the President also noted the modern-day secular nature of Sundays as well.³⁹ Had the Act's purpose been purely religious and attained by compulsion, the applicant's right would have been violated and her conviction unconstitutional.⁴⁰ But as her right had not even been interfered with, no justification exercise was necessary.

Yet, this interpretation of the right to freedom of religion, which would have reshaped the nearness model for the new South African constitutional reality, did not prevail in *S. v. Solberg*. Five judges disagreed with President Chaskalson and the three other judges who concurred in his opinion on two crucial points. Their disagreement centred on the height of the threshold before finding interference with the right to freedom of religion. For instance, both the opinions of Judges O'Regan and Sachs found that the religious undertones of the Liquor Act's selection of only Christian days had indeed interfered with the appellant's religious liberty, requiring closer inspection.⁴¹ Much more important for present purposes though is the disagreement with President Chaskalson's view that equality was not a value to be protected under the scope of the right to freedom of religion. Whereas the President found that the right only prohibited state coercion, Judges O'Regan and Sachs found that it also required the state to treat religions equally.⁴² This, the latter two judges held, was an inherent part of the right to freedom of religion, and not only the case had the appellant

³⁷ For more such examples, see *S. v. Solberg*, para. 101.

³⁸ *S. v. Solberg*, para. 97.

³⁹ *S. v. Solberg*, paras. 90, 105.

⁴⁰ *S. v. Solberg*, para. 89.

⁴¹ *S. v. Solberg*, paras. 128 (*per* O'Regan J.), 163 (*per* Sachs J.).

⁴² *S. v. Solberg*, paras. 123 (*per* O'Regan J.), 148 (*per* Sachs J.). See Paul Farlam, 'The ambit of the right to freedom of religion: A comment on *S. v. Solberg*', *South African Journal on Human Rights* 14 (1998), 298.

pleaded the right to equality in Section 9 of the Constitution which forbids unfair discrimination on religious grounds, which she had not. By five votes to four, equality now formed part of the scope of the right to freedom of religion in Section 14(1) of the 1993 Constitution, carried through as Section 15(1) of the 1996 Constitution. This brings the discussion to the equality model.⁴³

Equality

Focussing on equality as primary value in shaping the relationship between the state and religion is the third model to be considered. Brugger argues that whereas formal equality lies at the heart of the strict separation model, as all religions are to be treated with equal distance, the equality model focuses on achieving and maintaining material equality.⁴⁴ Equality is a strict command that could very well imply special protection and equal opportunities for smaller religions.⁴⁵ In practice this could mean that if the symbols of one religion, say the majority religion, are displayed in a public schoolroom, the symbols of all religions present among the pupils should be displayed. The equality model would also not prevent the state from subsidising religion as long as all religions, as well as bodies espousing secular thought, were treated equally and the state's intervention does not amount to a material union between itself and religion. This model, as Brugger also argues, is especially beneficial for small religions, as they enjoy minority protection and are integrated into society under the state's watchful eye.⁴⁶

Although *S. v. Solberg* did not concern a minority religion but the position of Christianity, the majority of the judges' concern for the equal treatment of religious and non-religious thought heralded a new beginning for the relationship between the state and religion in South Africa. By emphasising the need for equality as an integral part of freedom of religion, the effect of the judgment was to require more of the state than simply for it to refrain from coercing anyone in matters of faith. The establishment of a civil religion, even one broadly respectful of the Constitution, became impossible after the judgment. The judges did not rule that the state could not endorse religion, but that the state had to be even-handed in its treatment of all religions, as Judge O'Regan

⁴³ In particular sec. 9(3) declares that: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

⁴⁴ Brugger, 'Separation, equality, nearness' 2012 (n. 2), 271.

⁴⁵ Brugger, 'Separation, equality, nearness' 2012 (n. 2), 271.

⁴⁶ Brugger, 'Separation, equality, nearness' 2012 (n. 2), 273.

wrote in her judgment.⁴⁷ The Constitution prohibits the state from favouring one religion to the exclusion of others, the impact of which became clear in subsequent judgments such as *National Coalition for Gay and Lesbian Equality v. Minister of Justice* in 1998, which dealt with the right to equality in Section 9 of the Constitution.⁴⁸ In this matter the Constitutional Court had to rule if the crime of consensual ‘sodomy’ between men was indeed unconstitutional in terms of the prohibition on unfair discrimination in terms of sexual orientation in Section 9(3), as a lower court had ruled. Writing for the majority Judge Ackermann made it clear that although some people might hold particular religious views on matters of sexuality, such views could not influence ‘what the Constitution dictates in regard to discrimination on the grounds of sexual orientation’.⁴⁹ Agreeing with Judge Ackermann, Judge Sachs emphasised that:

‘The fact that the state may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.’⁵⁰

In 2005, this point was affirmed again by Judge Sachs in writing the majority opinion in the well-known case of *Minister of Home Affairs v. Fourie* in which the common law definition of marriage was found to be unconstitutional viewed against the right to equality in Section 9 of the Constitution as it did not allow for same-sex relationships.⁵¹ These cases put pay to the idea that pools of religious morality can be formalised and enforced as state morality, as the model of

⁴⁷ *S. v. Solberg*, paras. 122, 126, 128. Sec. 234 of the Constitution allows Parliament to adopt Charters of Rights to strengthen a culture of democracy in South Africa. Making use of this opportunity, a committee including academics and religious leaders drafted the South African Charter of Religious Rights and Freedoms that was then endorsed by various religious groups in 2010. The Charter has not been adopted by Parliament though. Interestingly clause 3(1) of the Charter reflects the emphasis on equality in the relationship between the state and religion, it reads: ‘The state must create a positive and safe environment for the exercise of religious freedom, but may not promote, favour or prejudice a particular faith, religion or conviction’. On the Charter, see Coertzen, ‘Constitution, Charter and religions’ 2014 (n. 18), 128-130.

⁴⁸ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517.

⁴⁹ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, para. 38.

⁵⁰ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, para. 137 (footnote omitted).

⁵¹ *Minister of Home Affairs v. Fourie* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), para. 92.

nearness would allow. Both cases also point to the importance of the right to human dignity in the application and interpretation of the right to equality.⁵² For instance, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* Judge Ackermann noted that discrimination on the ground of sexual orientation fell foul of Section 9(3) of the Constitution, which meant that such discrimination was unfair in terms of Section 9(5) unless its fairness could be established.⁵³ The latter, the Judge recalled, essentially turned on whether the discrimination impaired the dignity of those who were affected.⁵⁴ Equality is thus not to be enforced only for its own sake, but as a way of allowing difference in society in accordance with the dignity of its members. This means that formal equality is replaced by a conception of material equality aimed at combating prejudice in cases such as *National Coalition for Gay and Lesbian Equality* and *Fourie*. This firmly discounts the idea of equality as meaning the mechanical application of the same rules to everyone.⁵⁵

An equality jurisprudence inspired by human dignity has been developed further in the context of the right to freedom of religion. In this regard it has become clear that a variety of rights would have to be balanced against each other in the context of the general limitation provision in Section 36 of the Constitution. On the one hand this could involve the right to equality in Section 9, as enforced by human dignity in Section 10, and a range of so-called community or collective rights on the other, such as the collective exercise of the right to freedom of religion coupled with the right to freedom of association in Section 18 and the right to associate in cultural, linguistic communities in Section 31 of the Constitution. Illustrative of these tensions is *Christian Education South Africa v. Minister of Education* of 2000, in which an association of independent schools with a specific Christian ethos claimed that a law forbidding all schools from administering corporal punishment to pupils was unconstitutional.⁵⁶ The law, so the association of schools argued, violated the right to freedom of religion in Section 15 of the Constitution of those parents who consented to their children being punished in this way in accordance with their religious beliefs. It was also argued that the ancillary right in Section 31 of the Constitution had been violated, this pertained to the right to practise one's culture, religion or language with other people of the same group.⁵⁷ Writing the unanimous decision, Judge

⁵² *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, paras. 28 (per Ackermann J.), 120 (per Sachs J.); *Minister of Home Affairs v. Fourie*, para. 50 (per Sachs J.).

⁵³ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, para. 18.

⁵⁴ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, para. 19.

⁵⁵ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, para. 121 (per Sachs J.); *Minister of Home Affairs v. Fourie*, para. 60 (equality as allowing difference) (per Sachs J.).

⁵⁶ *Christian Education South Africa v. Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051, paras. 1-2.

⁵⁷ *Christian Education South Africa v. Minister of Education*, para. 7. Sec. 31 of the Constitution reads: '(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

Sachs rejected the association of schools' complaint. The judge explained that Section 31 was engineered to enable and protect pluralism in society.⁵⁸ Although smaller groups in society might be more reliant on constitutional protection than larger groups who could protect their values through the legislative process, the aim of the provision in his words was 'not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity'.⁵⁹ In other words, it does not follow that the smaller the group is, the greater its protection under the Constitution should be as a matter of course. Engineering respect for diversity could not mean that constitutionally offensive practices had to be allowed just because a particular group was affected.⁶⁰ Group autonomy had to be exercised within the confines of the Constitution's norms. For the case at hand, this meant that the importance of the right to human dignity outweighed the religious rights of the parents concerned to have an association of independent schools administer corporal punishment to their children.⁶¹ On analysis, a relationship between the state and religion based on separation and formal equality does not lie at the base of the judgment. This is because pools of private religious morality cannot claim to be treated indifferently by the state, or exactly the same as other such pools simply because their members have chosen to associate themselves as a distinct group.

Viewed from a different angle, the relationship between the state and religion could require the state to protect the rights of particular religious groups in society in order to ensure a material application of equality. This is the tenor of the judgment in *Prince v. President of the Law Society of the Cape of Good Hope* of 2002.⁶² The case before the Constitutional Court was the product of a drawn-out saga that started in the Cape High Court, made its way to the Supreme Court of Appeal before being settled before the constitutional judges.⁶³ The appellant in this matter was a practising member of the Rastafari religion who smoked cannabis as part of his religious observance, a practice which he did not conceal or deny in applying to be registered in the first stage of becoming an attorney. His previous conviction for the possession of cannabis, combined with his stated intention to continue the use of the substance led the Cape Law

associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

⁵⁸ *Christian Education South Africa v. Minister of Education*, para. 26.

⁵⁹ *Christian Education South Africa v. Minister of Education*, para. 26.

⁶⁰ *Christian Education South Africa v. Minister of Education*, para. 27.

⁶¹ *Christian Education South Africa v. Minister of Education*, para. 50.

⁶² *Prince v. President of the Law Society of the Cape of Good Hope*, [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231.

⁶³ For the High Court case, see *Prince v. President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C); for the Supreme Court of Appeal case, see *Prince v. President, Cape Law Society* 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA).

Society to refuse him registration.⁶⁴ The case turned on the Constitutional Court determining whether the criminalisation of cannabis was unconstitutional in the event the substance was used for religious purposes, in which event the Cape Law Society would have had to register the appellant. The bench divided narrowly by five votes to four in finding the appellant's right to freedom of religion had not been violated, which meant that he could not register with the Law Society.

Judge Ngcobo, writing for the minority, stressed the need for the state to accommodate the appellant in the exercise of a central element of his religion where reasonable.⁶⁵ Judge Sachs, who voted with the minority, explained in a separate opinion that the Rastafari religion could be described as an 'insular minority' in need of judicial protection, adding that they were not an established faith able to court the will of parliament.⁶⁶ According to the minority the foreseen accommodation had to take the form of exempting the non-harmful use by the Rastafari of cannabis for religious purposes, such as bathing in it for example.⁶⁷ Guaranteeing material equality between the practice of the various religions in the country was clearly at the forefront of these judges' reading of the Constitution. Any one religion in South Africa could not be left behind where it was possible for the state to take note of its followers' special needs. The majority opinion written jointly by President Chaskalson and Judges Ackermann and Kriegler, and supported by two other judges, did not dispute the principle of accommodating religious observance, but focussed on the practicality of creating a permit system in order to exempt the non-harmful use of cannabis by members of the Rastafari community.⁶⁸ The majority found that the exemption proposed by the minority would overstretch the capacity of the state in controlling substances such as cannabis in the view of the majority, thereby justifying the limitation of the appellant's right to freedom of religion.⁶⁹ The sticking point was therefore not that different religions had to be actively accommodated by the state, but centred on what could reasonably be required from the state in accommodating any specific religion.⁷⁰

If there was any doubt that the principle of reasonable accommodation underlies the approach to equality in Section 9 of the Constitution and its application to religious freedom in Section 15 of the Constitution, the decision in *MEC*

⁶⁴ *Prince v. President of the Law Society of the Cape of Good Hope*, paras. 1-4.

⁶⁵ *Prince v. President of the Law Society of the Cape of Good Hope*, paras. 57, 76, 79-80. This is also the tenor of Sachs J.'s opinion that concurred in the minority judgment, see paras. 148, 170.

⁶⁶ *Prince v. President of the Law Society of the Cape of Good Hope*, paras. 150, 157-159.

⁶⁷ *Prince v. President of the Law Society of the Cape of Good Hope*, paras. 81-82, 59.

⁶⁸ Also, while the minority (para. 72) saw no conflict with the country's international commitments on the war against drugs in granting an exemption, the majority disagreed (paras. 131, 139).

⁶⁹ *Prince v. President of the Law Society of the Cape of Good Hope*, paras. 142-143.

⁷⁰ See also *Prince v. President of the Law Society of the Cape of Good Hope*, para. 149 (*per Sachs J.*).

for *Education: KwaZulu-Natal v. Pillay* of 2007 dispels that doubt.⁷¹ In this matter the Constitutional Court had to decide whether a public school had discriminated unfairly against a pupil who chose to wear a nose stud in expressing her Hindu culture and religion in contravention of the school code forbidding such adornments.⁷² In deciding the matter, the Constitutional Court made it plain that South African law ‘expressed the need for reasonable accommodation when considering matters of religion’.⁷³ Writing for 10 of the 11 judges, with the eleventh judge agreeing on most of the issues too, Chief Justice Langa probed the limits of what such reasonable accommodation entailed:

‘The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson’s choice between observance of their faith and adherence to the law. There is however more to the protection of religious and cultural practices than saving believers from hard choices. As stated above, religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality. Are voluntary practices any less a part of a person’s identity or do they affect human dignity any less seriously because they are not mandatory?’⁷⁴

In other words, does the state’s duty to reasonably accommodate believers extend to practices of their religion whose following are left for the individual believer to decide? This question was important, because as her mother freely admitted, wearing a nose stud was a part of the pupil’s culture and religion although it was not mandatory for her to wear.⁷⁵ Chief Justice Langa soon provided an answer to this question by ruling that allowing the pupil to develop her identity entailed the school having to exempt her from the code on the question of the nose stud, even though her culture and religion considered its wearing as voluntary.⁷⁶ The central importance attached to the practice by the pupil was the guiding factor for the Court in ruling that the prohibition was a serious matter, and not something more trivial as the school had alleged.⁷⁷ The Court was also unmoved by the argument that the pupil could move to a different public school where the school code might be more accommodating of her

⁷¹ *MEC for Education: Kwazulu-Natal v. Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC), para. 72.

⁷² *MEC for Education: Kwazulu-Natal v. Pillay*, paras. 4-8, 112.

⁷³ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 72.

⁷⁴ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 62 (footnotes omitted).

⁷⁵ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 60.

⁷⁶ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 67.

⁷⁷ *MEC for Education: Kwazulu-Natal v. Pillay*, paras. 86-88.

identity.⁷⁸ In addition, the Court rejected the school's concern that other pupils of different cultures might consider it unfair that some pupils were allowed such adornments while they were not.⁷⁹ This point in particular, as does the case in general, affirms the Constitutional Court's line that in structuring their relationship with religion state entities, such as public schools, must apply equality as recognising diversity over equality as sameness.

Equality and its challenges

The relationship between the state and religion in South Africa has made a remarkable journey since the advent of the democratic constitutional era in the 1990s. A system based on selective and at times uncomfortable nearness between the state and its favoured religious denominations was exchanged for a dispensation that closely resembles Brugger's model based on equality. While religion was disentangled from the state as its primary source of inspiration, similar to Kofi Quashigah's arguments that religion should be denied domination over African political and legal systems, the result has not been to establish a strict separation by any means such as in France or the United States.⁸⁰ Instead, the result can be characterised as a constitutionally inspired pursuit of equality that is desirous of reasonable accommodation by the state of the religious diversity present in South Africa.⁸¹ Attaining the Constitution's equality ideal has not always been easy though, or even attainable as the case of *Prince* illustrates. The outcome of this highly contested case confirms Brugger's warning that striving for the equal treatment of all religions can imply implementation problems that 'go beyond the level of administrative expediency'.⁸² Equality cannot always be achieved as easily as amending a school code such as in the case of *Pillay* for instance.

In most cases, a careful bargain will have to be struck between the ideal of equality, especially as an expression of human dignity, and its reasonable attainment. Although the Constitutional Court, supported by the lower courts, can

⁷⁸ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 92.

⁷⁹ *MEC for Education: Kwazulu-Natal v. Pillay*, para. 103.

⁸⁰ Kofi Quashigah, 'Religion and the republican state in Africa: The need for a distanced relationship', *African Human Rights Law Journal* 14 (2014), 78.

⁸¹ See also Bilchitz/Williams, 'Religion and the public sphere' 2012, (n. 30), 169-170. Similarly Lourens M. du Plessis, 'State and religion in South Africa: Open issues and recent developments', in Silvio Ferrari and Rinaldo Cristofori (eds.), *Law and Religion in the 21st Century: Relations Between States and Religious Communities* (Farnham: Ashgate 2010), 17 at 27 who writes of a 'jurisprudence of difference' that 'affirms and, indeed celebrates the Other beyond the confines of mere tolerance or even magnanimous recognition and acceptance'.

⁸² Brugger, 'Separation, equality, nearness' 2012 (n. 2), 272. The remark was made in the specific context of financial support by the state of different religions.

help chart the road to follow, a large responsibility rests on the shoulders of the state and its institutions in realising the Constitution's ideals in practice. In this respect the 2011 decision to no longer allow prayer during official ceremonies at the University of the Free State, a public institution, and to replace the reference to 'God' in the university's motto with 'Truth' deserves some attention.⁸³ Achieving equality does not have to imply ridding the public space of all religious influence, as the University obviously thought in this instance in wanting to achieve an inclusive space. Inclusion does not have to mean a religion-free zone according to the Constitution, as long as the various faiths and worldviews present in public institutions such as universities are all accommodated as reasonably as possible.⁸⁴ Rectifying past dominance of public life by one or more religious denominations does not have to mean that religion as such should disappear, on this the Constitutional Court seems to be quite clear.

In addition, the accommodation of religious diversity has also not been realised to the largest possible degree in the context of the legal recognition of marriages and systems of personal and family law adhered to by persons professing a particular religion. Section 15(3) of the Constitution states expressly that such recognition is not precluded, as long as the provisions of the Constitution are respected. In this regard, the Recognition of Customary Marriages Act of 1998 has extended legal protection to African customary marriages in addition to civil marriages.⁸⁵ The same has not happened yet with regard to Islamic marriages for instance. Although the matter has long been debated, full legislative recognition of such marriages has not yet been achieved, instead the courts extend protection to such marriages where possible.⁸⁶ This is obviously a topic for further political debate and action in order to achieve the best possible outcome that is still respectful of the Constitution. Civil marriages may be conducted by ministers from various religions, in addition to magistrates, thereby allowing for the necessary diversity in solemnising civil unions.⁸⁷

⁸³ See the discussion by Shaun de Freitas, 'Mottos, prayers and the public university', *South African Journal on Human Rights* 28 (2012), 176. See also Bilchitz/Williams, 'Religion and the public sphere' 2012, (n. 30), 173-174, who propose a rotation system with slots for various religions in allowing for religious representation at state ceremonies.

⁸⁴ See also De Freitas, 'Mottos, prayers and the public university' 2012 (n. 83), 191.

⁸⁵ Recognition of Customary Marriages Act no. 120 of 1998. See Currie/de Waal, *The Bill of Rights Handbook* 2013 (n. 9), 334.

⁸⁶ Although the Muslim Marriages Bill was tabled in parliament already in 2010, it has not yet been adopted. As to the role of the courts in recognising Muslim marriages, in *Daniels v. Campbell* ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC), paras. 37, 40 the Constitutional Court held that a spouse in a monogamous Muslim marriage had the right to intestate succession and a claim for maintenance from a deceased partner, and this was extended to polygamous Muslim marriages in *Hassam v. Jacobs NO* [2009] ZACC 19; 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC) (15 July 2009), paras. 43, 57. See Megan Harrington-Johnson, 'Muslim marriages and divorce', *De Rebus* (2015), 40; Currie/de Waal, *The Bill of Rights Handbook* 2013 (n. 9), 335-336.

⁸⁷ See sec. 3(1) of the Marriage Act no. 25 of 1961.

As to the wider impact of the Constitution's emphasis on equality in matters of freedom of religion, the question can be posed as to its role in private relationships. In other words, to what extent can the jurisprudence on the importance of equality in defining the relationship between the state and religion be applied to relationships where the state is not a party. In a recent case between a church minister who was disciplined by her church for entering a same-sex marriage, the Constitutional Court avoided deciding the merits of the case by ruling that there were no convincing grounds to override the parties' initial agreement that the matter had to be settled through arbitration.⁸⁸ As the applicant had also disavowed a claim of unfair discrimination before the High Court, she was precluded from raising the question before the Supreme Court of Appeal and the Constitutional Court.⁸⁹ While the courts involved managed to avoid the difficult issue of the relationship between equality and religious doctrine in this instance, this might not be the case in future. In this regard, the thoughts of Judge Van der Westhuizen of the Constitutional Court might be considered more closely. While agreeing with the majority judgment of Deputy Chief Justice Moseneke that the current matter had to be solved by arbitration, Judge Van der Westhuizen wrote that:

‘The Constitution is more than law (...). It is the legal and moral framework within which we have agreed to live. It also not only leaves, but guarantees space to exercise our diverse cultures and religions and express freely our likes, dislikes and choices, as equals with human dignity. In this sense one could perhaps talk about a “constitutionally permitted free space”. This is quite different from contending that certain areas in a constitutional democracy are beyond the reach of the Constitution, or “constitution-free”.’⁹⁰

In this regard, it stands to reason that a measure of autonomy must be granted religious organisations in giving effect to their doctrine in dealing with their officeholders and members. Otherwise the danger would arise of negating not only the right to freedom of religion in Section 15(1) but also that to forming and joining religious associations in Section 31(1)(b), not to mention the right to freedom of association as such in Section 18 of the Constitution. Where the line is to be drawn though in accommodating diverse religions in society, while also ensuring that such religions respect the equality rights of their adherents will certainly remain a matter of continued debate.

⁸⁸ *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC).

⁸⁹ *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa*, para. 30.

⁹⁰ *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa*, para. 83.

Comparative worth

Describing and analysing a legal relationship, such as that between the state and religion in South Africa, is obviously useful for the system concerned, but the possible impact of such an exercise is potentially even greater from the perspective of comparative law. The comparative worth of an analysis depends on whether the approach followed that can be replicated in other systems, thereby increasing the usefulness of each other's legal findings. Winfried Brugger's analytical framework comprising the values of separation, nearness and equality provides just such a bridge between jurisdictions. Configuring the Constitution of South Africa and its case law in these terms has revealed a pronounced preference for equality over the values of separation and nearness in structuring the relationship between the state and religion, but also the difficulties in effecting equality. These results can help understand and guide similar debates in other jurisdictions, such as in the Netherlands for instance. To name but one Dutch contentious issue, the desirability of prayer spaces at state universities could be understood better and evaluated more effectively when approached in a comparative fashion against the background of separation, nearness and equality.⁹¹ It is in this regard that this contribution hopes to be of modest worth, by not only illustrating the value of Brugger's framework as an analytical tool, but also by providing comparative material in the form of the South African experience.

⁹¹ Consider Dirk Wolthekker's piece 'Het is beter om geen gebedsruimtes te maken in openbare universiteiten' published online on 14 October 2015 regarding the issue of creating prayers space at the University of Amsterdam. See www.folia.nl/actueel/96484/het-is-beter-om-geen-gebedsruimtes-te-maken-in-openbare-universiteiten.