

CHAPTER 10: RIGHT TO FREEDOM OF RELIGION, BELIEF AND OPINION

Emily Cooper

1. INTRODUCTION

The right to freedom of religion, belief and opinion has resulted in a proliferation of constitutional law cases questioning the appropriateness of adopting religious beliefs in various contexts. At the heart of the right is the celebration, and not mere tolerance, of diversity in South Africa.¹ Respect for freedom of religion in turn upholds both the right and the value of human dignity, which has been referred to as the cornerstone of our democracy.² Section 15 of the Constitution reads as follows:

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

¹ Sachs J speech to Human Rights Commission September 12, 2016.

² *S v Makwanyane and Another* 1995 (3) SA 391 at para 330.

An important corresponding right to the right to freedom of religion is found in section 31 – the rights of cultural, religious and linguistic communities. It 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 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.

2. SCOPE AND APPLICATION OF SECTION 15 OF THE CONSTITUTION

Whilst colloquially referred to as ‘the right to freedom of religion’, it is clear that section 15 protects much more than the beliefs of historically recognised religions. Smith describes religious freedom to be *inter alia*, ‘the right to hold religious beliefs, to propagate religious doctrine and to manifest religious belief in worship and practice’.³ He describes freedom of conscience as, ‘a parallel right to hold and to act upon personal moral beliefs not grounded in religion and to act on those beliefs’.⁴ It is further submitted that section 15 contains both a positive and negative element. The positive element provides that people are allowed to hold and practise the beliefs of their choosing, whilst the negative element prohibits state coercion of individuals into accepting or denying a certain faith.⁵

Critically, the Constitution does not require a strict separation between state and faith, as evidenced by section 15(2). In the United States, religious observances may be conducted at state institutions provided that attendance at them is free and voluntary and that they are conducted on an equitable basis. This means that attendance must be free from both direct and indirect coercion. Indirect coercion would be present if people were made to feel isolated or judged in their decision not

³ Nicholas Smith ‘Freedom of Religion under the Final Constitution’ (1997) 114 SALJ 217 at 219.

⁴ Ibid.

⁵ Ibid.

to attend the religious observance, perhaps so much so that they consider attending just to prevent the feeling of otherness. As Smith says: 'The provisions made for those who do not wish to participate must not be so unattractive as to constitute a disincentive to the exercise of the right.'⁶

a) Freedom of religion versus equality

Conflict often arises between freedom of religion and equality. For example, some religions prohibit women from leading religious organisations. A woman could argue that this infringes her right not to be discriminated against on the grounds of sex and gender. The religious organisation would respond that the right to freedom of religion includes the right to practise that religion as per its dictates. It is argued that freedom of religion allows religious communities to organise themselves according to their beliefs, one of which is the belief that only men can lead.⁷ The issue then becomes whether we protect the right of religious communities to practise the tenets of their faith, or if we protect women from the indignity of being told that they cannot become religious leaders on account of a characteristic which they cannot control.⁸

Bilchitz argues for a middle-ground approach based on egalitarianism. Freedom of religion should be protected only to the extent that it does not 'undermine the capacity of other individuals to do likewise'.⁹ He submits that respect for diversity underlies both freedom of religion and the prohibition against unfair discrimination. Further, the prohibition against discrimination protects the equal freedom of people.¹⁰ If a religious organisation wants the protection of section 15 to practise its beliefs on the basis of respect for diversity, freedom and equality then Bilchitz argues that the same religious organisation needs to uphold those values when dealing with others.¹¹ To do otherwise would be to negate the very values upon which the freedom that they claim rests. To quote Bilchitz, 'To claim a freedom

⁶ Ibid at 221.

⁷ David Bilchitz 'The Tension Between Freedom of Religion and Equality in Liberal Constitutionalism' (2011) *The Journal of the Helen Suzman Foundation* at 11.

⁸ Ibid at 12.

⁹ Ibid.

¹⁰ Ibid at 13.

¹¹ Ibid.

based on respect for diversity where one fails to respect that very diversity demonstrates a lack of reciprocity and a desire to gain the benefits of liberal societies without subscribing to its basic foundational norms'.¹² Bilchitz submits that religious organisations must be kept to the same standard of non-discrimination as everyone else.

A further argument in this respect is that it is commonly accepted that a right can be limited when its exercise brings harm to other people.¹³ Discrimination is a form of harm. It brings with it an immeasurable loss of dignity to the person being discriminated against. Further, discrimination can result in other forms of harm, such as loss of income.¹⁴ Therefore, it would be justified to limit a religious organisation's freedom to structure itself as it wishes, in order to protect women from being discriminated against.

Smith, on the other hand, submits that equality is actually a justification for freedom of religion, because the equality clause prohibits a state from unfairly discriminating against others on the ground of religion.¹⁵ He argues that freedom of religion would be undermined if the state was able to intervene in the organisational structures of religious organisations, because the boundaries up to which it could intervene would not be clear. He uses the example of the Roman Catholic Church which requires their priests to be unmarried. Marital status is also a prohibited ground upon which one cannot be unfairly discriminated in the Constitution. Therefore, Smith argues against state interference because it has the potential to greatly undermine freedom of religion.¹⁶

Ultimately, the exact scope of freedom of religion, belief and opinion is unclear. However, it definitely goes beyond historically accepted forms of belief and religion, and even extends to the belief of atheists who do not want to adopt a religion or faith at all. Examining case law helps to further understand the section 15 right and the court's opinion on its scope and content.

¹² Ibid.

¹³ Ibid at 14.

¹⁴ Ibid.

¹⁵ Op cit. note 3 at 224.

¹⁶ Ibid at 225.

3. FREEDOM OF RELIGION CASE SUMMARIES

a) *Case summary: S v Lawrence; S v Negal; S v Solberg 1997*¹⁷

Lawrence, Negal and Solberg were each independently convicted of contraventions to the Liquor Act in the magistrates' court. In each case there was a contravention of the grocer's wine licence which restricted the sale of liquor. All three appealed against their convictions on the grounds that the prohibitions found in the Liquor Act against trading violated their constitutional rights to economic activity (section 22) and freedom of religion (section 15).

Solberg's case is particularly relevant. She was convicted of selling wine at a 7-Eleven store on a Sunday. The Liquor Act prohibited the selling of liquor on a 'closed day'. In terms of the Act, closed days were Sundays, Good Friday and Christmas Day. Given the fact that these days are largely associated with the Christian religion, she argued that the prohibition against selling wine on these days was inconsistent with her right to freedom of religion under section 14 of the interim Constitution. She also submitted that it violated her right to free economic activity found in section 26 of the interim Constitution.

i. Solberg's argument

Solberg submitted that the purpose behind the prohibition against the selling of liquor on closed days was to coerce people to observe the Christian sabbath and Christian holidays, and in so doing was in violation of the freedom of religion of people who do not hold Christian beliefs.

ii. Attorney General's argument

The Attorney General for the state argued that if the restrictions on the sale of liquor were to be lifted, there would be an increase in the consumption of liquor which would lead to a proliferation of violent crime.

¹⁷ *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC).

iii. Majority decision of Chaskalson P

Chaskalson P approved the definition of freedom of religion by the Supreme Court of Canada, formulated as follows:¹⁸

- The right to entertain such religious beliefs as a person chooses;
- The right to declare religious beliefs openly and without fear of hindrance or reprisal;
- The right to manifest religious belief by worship and practice or by teaching and dissemination.

Added to this, Chaskalson P included 'an absence of coercion or constraint'.¹⁹

The court acknowledged that coercion or constraint could happen subtly and that the public could have perceived the choice of Christian holy days as closed days to be an endorsement by the state of Christian values to the exclusion of other religions.²⁰ This could lead non-Christians to believe that they were less worthy in the eyes of the state. However, Chaskalson P stated that the Liquor Act did not prohibit grocery stores from doing all business on Sundays, nor did it force people to act or refrain from acting in a manner contrary to their religious beliefs.²¹ Furthermore, he concluded that Sunday had become a general day of rest for most of the population of South Africa, and thus no longer had a complete connection to Christianity.²²

Chaskalson P emphasised that section 14 of the interim Constitution was not coupled with an 'establishment clause', such as in the United States Constitution. The First Amendment to the US Constitution states: 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' Chaskalson P reasoned that there was no requirement in section 14 that the state abstain from all action that might advance or inhibit religion.²³ However, freedom of religion would be violated if an endorsement of a religious practice by the state had the effect of coercing people to follow that religion, or constraining observance of

¹⁸ Supra note 17 at para 92.

¹⁹ Ibid.

²⁰ Ibid at para 93.

²¹ Ibid at para 94.

²² Ibid at para 96.

²³ Ibid at para 103.

their own religion.²⁴ This meant that the South African Constitution, unlike the Constitution of the United States, did not require a complete separation between church and state. Chaskalson P found that Solberg had neither established coercion nor constraint. Furthermore, the majority believed the connection between Christianity and the prohibitions against selling liquor on closed days to be too tenuous to be characterised as a violation of freedom of religion.²⁵ Her appeal was dismissed.

iv. Minority judgment of O'Regan J

O'Regan J agreed with Chaskalson P that the South African Constitution did not require a strict separation between state and religion. However, she concluded that the right to religious freedom also protected the beliefs of non-believers and people whose beliefs differed from the beliefs of the current practice being observed.²⁶ Therefore, religious observances in state institutions need to be completely free from direct and indirect coercion. Furthermore, she highlighted the requirement in section 14(2) of fairness, by which the state was permitted to allow religious observances but was not permitted to act inequitably.²⁷

O'Regan J held that 'the requirement of equity demands the state act even-handedly in relation to different religions'.²⁸ This was a response to and a rejection of a past South Africa in which the government strongly favoured Christianity.²⁹ Therefore, in the new constitutional order the state may not endorse one religion to the exclusion of others. This would not only indirectly coerce the population to adopt that religion but would threaten the exercise of other religions and greatly undermine our commitment to celebrating diversity and human dignity. O'Regan J concluded that a court must be satisfied that there is neither direct nor indirect coercion of a religious practice.³⁰

²⁴ Ibid at para 104.

²⁵ Ibid at para 105.

²⁶ Ibid at para 120.

²⁷ Ibid at para 121.

²⁸ Ibid at para 122.

²⁹ Ibid at para 123.

³⁰ Ibid.

On the facts of the case, O'Regan J said that the definition of 'closed day' in the Act had to be interpreted in context.³¹ Not only did the prohibition apply to the sale of liquor on Sundays, but also on Christmas Day and Good Friday – undoubtedly important days in the Christian year. Therefore, O'Regan J concluded that closed days were chosen because of their significance to Christians.³² Furthermore, O'Regan J disagreed with Chaskalson P that there was no infringement to section 14 because there was no constraint imposed on individuals to practice their religion of choice by the provisions of the Liquor Act. O'Regan J argued that section 14 went further than merely requiring the state to refrain from coercion – it required the state not to favour one religion over another.³³ Therefore, O'Regan J concluded that the impugned provisions in the Liquor Act violated the section 14 right to freedom of religion.³⁴

In considering whether the limitation was justifiable under section 33 of the Interim Constitution – the general limitation clause – O'Regan J criticised the lack of evidence as to the governmental purpose behind the prohibition but accepted that one of the reasons was to restrict the consumption of liquor on closed days. However, she found flaws in this argument – the restriction of liquor sales did not apply to non-religious public holidays such as New Year's Day when, she submitted, the roads would be extremely busy and restriction of liquor consumption would be appropriate.³⁵ Furthermore, the Liquor Act did not ban all consumption of liquor on closed days. Therefore, O'Regan J said that the purpose of the legislation could not weigh heavily in the proportionality exercise required by section 33, because its purpose was not effectively achieved.³⁶ Added to this, the provisions in the Liquor Act evidenced an endorsement of Christianity by the state, albeit a minor one. O'Regan J concluded that the infringement to section 14 could not be justified by section 33.³⁷

³¹ Ibid at para 125.

³² Ibid.

³³ Ibid at para 128.

³⁴ Ibid at para 129.

³⁵ Ibid at para 132.

³⁶ Ibid.

³⁷ Ibid.

v. Minority judgment by Sachs J

Sachs J also found that there had been an infringement of section 14 but held that it was justifiable under section 33. Sachs J spoke to the importance of celebrating diversity in South Africa, especially given the fact that Christianity was so favoured by the state in the past. He said that any endorsement of Christianity by the state in the new democratic era would cause painful memories to resurface in the minds of non-Christians who had lived under apartheid rule.³⁸ By selecting Sundays, Christmas Day and Good Friday as closed days, the state to some extent endorsed Christianity in violation of section 14.³⁹

Undertaking the justification analysis, Sachs J found it significant to look at the degree of infringement of section 14 by the provisions in the Liquor Act.⁴⁰ Sachs J submitted that whilst closed days had Christian significance, they have come to be seen by the whole population as days of rest. Therefore, state endorsement in these days did not send as powerful a message as it did in the apartheid era.⁴¹ He also found that the provisions in the Liquor law did not directly affect religious observance. Therefore, the infringement of section 14 was minor. Sachs J also spoke to the importance of controlling alcohol abuse to protect society, especially on the roads.⁴²

Ultimately, he concluded that there had been a limitation of section 14, but that limitation was justified due to the importance of protecting society against excessive alcohol consumption, coupled with the fact that the infringement was only a minor one.⁴³

³⁸ Ibid at para 152.

³⁹ Ibid at para 160.

⁴⁰ Ibid at para 165.

⁴¹ Ibid at para 173.

⁴² Ibid at para 175.

⁴³ Ibid at para 178.

b) Case summary: Pillay 2007

The case of *MEC for Education: KwaZulu-Natal and Others v Pillay*⁴⁴ concerned religious and cultural expression in public schools.⁴⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁴⁶, otherwise referred to as the 'Equality Act', is the guiding statute which gives effect to the right to equality in the Constitution. As per the principle of subsidiarity, all claims of unfair discrimination must be brought as a breach of the Equality Act (PEPUDA) rather than as a direct invocation of the Constitution itself.

Ms Sunali Pillay (who was represented by her mother) was a student at Durban Girls' High School. Upon registering at the school, Ms Pillay undertook to ensure that Sunali would comply with the school's code of conduct. During the school holiday, Ms Pillay gave Sunali permission to pierce her nose in accordance with Hindi tradition. When Sunali returned to school, she was told that the stud violated the code of conduct. The Equality Court held that the impugned provisions of the code of conduct were discriminatory, but that this discrimination was not unfair. This conclusion was based on evidence by an expert in the Hindi religion that the practice was an expression of Hindi culture but was not obligatory nor a religious rite. The High Court, on the other hand, declared the school's decision to prohibit the wearing of a nose stud in school by Hindu learners to be null and void. Whilst this case was brought as a discrimination matter and not under freedom of religion, it 'raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond'.⁴⁷ Despite being a claim of unfair discrimination, the case highlighted the need for a discussion as to the extent to which freedom of religion must either be respected or limited in organisations (in this case the organisation was a school but the debate could possibly extend to other organisations, such as the workplace).

⁴⁴ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

⁴⁵ Note, this case came before *Randhart* where it was held that it is unconstitutional for a public school to promote one religion over another.

⁴⁶ Act 4 of 2000.

⁴⁷ *Supra* note 44 at para 35.

i. Discrimination

The court held that the applicable ground of discrimination was religion or culture, inasmuch as the code allowed for historically accepted jewellery such as ear piercings, but prohibited minority and historically excluded forms of adornment.⁴⁸ The section 15 and section 31 rights which protected religion and culture were distinct from the section 9 prohibition of discrimination on the grounds of religion or culture. However, the court said that they often overlapped.⁴⁹ In order to prove discrimination, Ms Pillay needed to show that the school interfered with Sunali's practice or expression of her religion or culture.

First, the court asked whether Sunali was part of an identifiable religion or culture.⁵⁰ Whilst it was common cause that Hinduism is a religion and that Sunali was Hindu, the Governing Body Foundation (GBF) argued that Sunali had not shown that she was part of an identifiable culture. The court noted that whilst 'religion' and 'culture' were different, they often overlapped. Thus, it was not desirable to attempt to define the two concepts too strictly.⁵¹ The most important consideration was whether the applicant held the religious or cultural belief sincerely.⁵² Therefore, the court held that 'even on the most restrictive understanding of culture, Sunali was part of the South Indian, Tamil and Hindu groups which were defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition'.⁵³

Next, the court questioned the religious and cultural significance of a nose stud. Importantly, the court said that cultural convictions or practices may be as important to the holder of those convictions as religious beliefs are to people who find greater strength in a higher power rather than a community.⁵⁴ The court referenced the African phrase *umuntu ngumuntu ngabantu* – the idea that individuals in a shared community are all interconnected and interdependent. They also linked this to human dignity, saying that cultural identity was one of the most important

⁴⁸ Ibid at para 44.

⁴⁹ Ibid at para 46.

⁵⁰ Ibid at para 48.

⁵¹ Ibid at para 47.

⁵² Ibid at para 52.

⁵³ Ibid at para 50.

⁵⁴ Ibid at para 53.

parts of a person's identity, and that one's dignity and one's identity are inseparably linked.⁵⁵ Lastly on this point, the court held that holding a cultural identity included participation and expression of cultural traditions, and that this expression might differ from person to person.⁵⁶

The cultural significance of the nose stud to Sunali was evident in her actions. She persistently defied strict instructions from the school to remove it, despite much chastisement from the school and her peers. The court concluded that this was evidence of Sunali's sincere belief that the stud was part of her religion and culture.⁵⁷ The court accepted the expert testimony that wearing the nose stud was not a compulsory part of Hindi religion or culture, but the evidence also confirmed that it was a voluntary expression of religion and culture.⁵⁸ The court refrained from categorising the nose stud as being part of either Hindi religion or Hindi culture, saying that often religion and culture are malleable and should not be forced into separate boxes.⁵⁹

Further, the court held that voluntary religious or cultural practices must be afforded protection under the Constitution equal to mandatory practices in order to uphold the Constitution's commitment to celebrating diversity.⁶⁰ The court acknowledged that unlike religions, many cultures did not have an authoritative text to dictate the cultural practices of the group. As such, to only protect mandatory cultural practices would often render that protection meaningless.⁶¹ The court found that Sunali was discriminated against on the basis of both religion and culture.⁶²

ii. Unfairness

The principle of reasonable accommodation was stressed by the court, especially in the context of religion. Reasonable accommodation is the idea that 'the community, whether it is the State, an employer or a school, must take positive

⁵⁵ Ibid.

⁵⁶ Ibid at para 54.

⁵⁷ Ibid at para 58.

⁵⁸ Ibid at para 60.

⁵⁹ Ibid.

⁶⁰ Ibid at para 65.

⁶¹ Ibid at para 66.

⁶² Ibid at para 68.

measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.⁶³ In a society that values dignity and celebrates diversity, reasonable accommodation is critical. In the context of the Equality Act in question, taking reasonable steps to accommodate diversity was a factor for determining the fairness of the discrimination.⁶⁴ Reasonable accommodation was important where the discrimination arose from a rule that was supposedly neutral, such as the school code, but which in reality had a marginalising effect.⁶⁵ It was also held to be particularly appropriate in localised contexts, such as a school. The court concluded that fairness required reasonable accommodation.⁶⁶ To this end, a proportionality exercise was appropriate to determine how far the school needed to go to accommodate Sunali. Again, the court affirmed that Sunali's actions evidenced how significant the nose stud was to her Hindi identity.

Looking at the effect that reasonable accommodation would have had on the school, the court stated that 'even the most vital practice of a religion or culture can be limited for the greater good'.⁶⁷ The school argued that granting an exemption to Sunali would open the floodgates for similar exceptions to be made for other students, and would undermine the school's ability to enforce discipline. The court noted that discipline and good education were legitimate goals, but that the school's interest was in refusing Sunali an exemption, not the wearing of uniforms in general.⁶⁸ The case was not about the constitutionality of wearing a uniform, but about granting religious and cultural exemptions to uniforms.⁶⁹ Granting a religious or cultural exemption would not undermine the purpose that uniforms served. Therefore, the court concluded that refusing Sunali an exemption did not achieve the purpose of greater school discipline.⁷⁰ Furthermore, the court stressed that catering for religious and cultural expression was not inviting a '*parade of horrors*', but would

⁶³ Ibid at para 73.

⁶⁴ Ibid at para 77.

⁶⁵ Ibid at para 78.

⁶⁶ Ibid at para 79.

⁶⁷ Ibid at para 95.

⁶⁸ Ibid at para 98.

⁶⁹ Ibid at para 101.

⁷⁰ Ibid at para 102.

in fact enrich schools by celebrating diversity.⁷¹ Therefore, the floodgates argument was without merit.

iii. Conclusion and the Order

The court confirmed the High Court's finding of unfair discrimination. This was because the discrimination had a severe impact on Sunali and the purpose of uniforms in maintaining discipline was not advanced by refusing Sunali an exemption.⁷² The school should have made reasonable accommodation for Sunali. The court emphasised that the decision did not entail the entire scrapping of school uniforms, but required that 'schools make exemptions for sincerely held religious and cultural beliefs and practices'.⁷³ The court declared that the decision of the school to refuse Sunali an exemption from the code discriminated unfairly against her. Further, the school governing body was ordered to effect amendments to the code to provide for reasonable accommodation on religious or cultural grounds.⁷⁴

c) Case summary: Randhart 2014⁷⁵

This case challenged the constitutionality of public schools promoting one religion to the exclusion of others. Six public schools were cited as respondents, all of which solely promoted the Christian faith. The applicants sought *inter alia* interdicts preventing the specific conduct of handing out Bibles and opening the day with prayer to a particular God to the more general invocation of an ethos in which learners strive towards faith.

i. The issues

The applicants contended that the conduct complained of violated their right to freedom of religion and offended the National Religion Policy. In particular, they argued that section 15(1) of the Constitution prevented a public school from adopting any religion at all. Furthermore, the window provided by section 15(2), which allows

⁷¹ Ibid at para 107.

⁷² Ibid at para 112.

⁷³ Ibid at para 114.

⁷⁴ Ibid at para 119.

⁷⁵ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ).

free and voluntary religious observances to be conducted at a public institution, was argued to only be applicable to an outsider who conducted a religious observance at the school and did not allow the school to conduct religious observances itself.⁷⁶

The schools contended that they too had the right to freedom of religion and were entitled to adopt a particular religious ethos⁷⁷ decided upon by the school governing bodies in accordance with the religious make-up of the community that the school served.⁷⁸ The schools conceded that under section 15(2) of the Constitution their religious observances were required to be 'free and voluntary', but argued that they were so in any event.

The applicants replied that under the Constitution indirect coercion to adopt a particular faith was also prohibited. By requiring the students to disclose their faith or to opt-out of school-wide religious observances, students were being indirectly pressured to subscribe to the practices of the majority of the school body.⁷⁹

Essentially, there were three issues:⁸⁰

1. Whether a public school may hold itself out as a Christian school, and to what extent;
2. Whether a public school itself may conduct religious observances and the extent to which these may be religion-specific;
3. Whether a learner may be asked to convey whether or not she adheres to a particular faith.

ii. The Constitution and religion

The court began by stating that sections 15 and 31 were relevant to the case. It also acknowledged that the court adopted a neutral approach on the premise that the state should not take sides in matters of religion.⁸¹ The court quoted important

⁷⁶ Ibid at para 17.

⁷⁷ Ibid at para 12.

⁷⁸ Ibid.

⁷⁹ Ibid at para 16.

⁸⁰ Ibid at para 18.

⁸¹ Ibid at para 22.

obiter dicta in *Solberg*⁸²: (note, the court in *Solberg* referred to section 14 which was the section 15 right under the interim Constitution), summarised as:

- Compulsory attendance at school prayers would infringe freedom of religion. Voluntary prayer could amount to coercion of pupils to participate in the favoured religion
- Section 14(2) attempts to prevent either direct or indirect coercion. Religious observances at public institutions will not violate the Constitution as long as they meet three requirements:
 1. The observances must be established under rules made by an appropriate authority;
 2. They must be equitable; and
 3. Attendance must be free and voluntary.
- In consequence, section 14(1) does not require the state to abstain from any action that might advance religion. A strict separation between religious institutions and the state is not required.
- The explicit endorsement of one religion over others is not permitted.

iii. Legislation

The court referred to at section 7 of the Schools Act which said:

'Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary.'

Thus, the court noted that as section 7 of the Schools Act mirrored section 15(2) of the Constitution, the applicants should have challenged the schools' conduct through the applicable legislation instead of using the Constitution directly, in accordance with the principle of subsidiarity.⁸³

The court also acknowledged that if there is a conflict between national and provincial legislation regarding a functional area in Schedule 4 of the Constitution,

⁸² *Solberg* supra note 17 at para 103.

⁸³ Supra note 72 at para 29.

the provincial legislation must prevail.⁸⁴ The court decided to observe both the Gauteng Act and the Western Cape Act. The Gauteng Act regulated both 'religious practices' (which the court held to be the same as religious observances) and 'religious policy'. The court held that the inclusion of religious policy meant that the Gauteng Act extended beyond section 15(2) of the Constitution and also regulated aspects of section 15(1).⁸⁵ However, as the applicants did not allege that the Gauteng Act was unconstitutional, this comment by the court was merely *obiter*. Lastly, the court noted that the National Religion Policy was not enforceable law, and conduct based solely on the policy could not be challenged as unlawful.⁸⁶

iv. Principle of subsidiarity

It was held that the principle of subsidiarity applied, and that the applicants erred in basing their case directly on section 15 of the Constitution. In consequence the interdictory relief was denied.⁸⁷

v. However. . .

Despite the finding of subsidiarity, the court expressed 'concern' about the issue of a public school promoting one religion to the exclusion of others.⁸⁸ The Constitution recognised that South Africa was a diverse society, and public schools functioned within that society.⁸⁹ Further, the Constitutional Court had held that this diversity needed to be celebrated and that everyone needed to be treated equally before the law.⁹⁰ 'In this country, our diversity is celebrated, not tolerated'.⁹¹ In this context, the court answered issue (1) by holding that a public school may not hold out that it has adopted one religion to the exclusion of others.⁹² Given non-compliance with the principle of subsidiarity, this was the only issue on which the court made a definitive finding, refusing the other relief sought. However, as stated above, the court did approve the *obiter dictum in Solberg* to the effect that state

⁸⁴ Ibid at para 34.

⁸⁵ Ibid at para 44.

⁸⁶ Ibid at para 54.

⁸⁷ Ibid at para 77.

⁸⁸ Ibid at para 78.

⁸⁹ Ibid at para 82.

⁹⁰ Ibid.

⁹¹ Ibid at para 95.

⁹² Ibid at para 92.

institutions may conduct religious observances but that these must be established under rules made by an appropriate authority, and they must be equitable and attendance must be free and voluntary (without direct or indirect coercion).

4. THE PRINCE CASES

Mr Prince was a practicing Rastafarian who challenged the constitutionality of the prohibition of the possession or use of marijuana in South Africa. Prince had completed a law degree and wanted to become an attorney. When registering with the Law Society of the Cape of Good Hope, Prince not only admitted that he had previous convictions for possession of marijuana but also that he intended to continue using the drug for religious purposes. As a result of this, the Law Society refused his registration on the ground that he did not fulfil the requirement of being a 'fit and proper person'⁹³.

In *Prince II*⁹⁴ he argued that the prohibition infringed his constitutionally protected right to freedom of religion.⁹⁵ The court held against him. In *Prince III*⁹⁶, he again challenged the constitutionality of the prohibition of marijuana, but this time it was on the ground that it infringed his right to privacy.⁹⁷ This time he was successful, and the *Prince III* judgment changed the marijuana laws in South Africa significantly.

(a) Prince II and freedom of religion

In *Prince II*, Mr Prince sought the legalisation of marijuana on the ground that its prohibition infringed his right to freedom of religion.

i. Rastafarianism

The majority of the court accepted the understanding of the content of Rastafarianism as elucidated by Ngcobo J in his minority judgment. He held that

⁹³ This requirement is found in s15 of the Attorneys Act 53 of 1979.

⁹⁴ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC).

⁹⁵ S 15 of the Constitution of the Republic of South Africa, 1996.

⁹⁶ *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening)* 2018 (6) SA 393 (CC).

⁹⁷ S 14 of the Constitution.

Rastafarianism was without contention a protected religion under the Constitution,⁹⁸ and that a central part of the religion's teachings of love and peace was the use of marijuana.⁹⁹ For followers of the Rastafari religion, the consumption of marijuana in its various forms brought them closer to God and enabled them to praise their God in the purest way.¹⁰⁰ Thus, he acknowledged that the consumption of marijuana for Rastafarians was a 'most sacred act'.¹⁰¹

ii. Contentions of the parties

Mr Prince's contention was that the prohibition of the use of marijuana was unconstitutional because it failed to provide an exemption for Rastafarians using the herb for legitimate religious purposes.¹⁰² The Attorney-General and the Minister of Health conceded that the outright prohibition of marijuana did limit Mr Prince's right to freedom of religion, but submitted that it was a justifiable limitation under section 36 of the Constitution.¹⁰³ Their main argument for justification was that an exemption would be challenging to administer, and that the prohibition was critical in upholding South Africa's commitment to waging a war on drug abuse.¹⁰⁴

iii. Applicable legislation

The impugned provisions were section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act. The court accepted that the legislation was not aimed at Rastafarians in particular but had the important purpose of protecting the public from drug use and abuse.¹⁰⁵ The issue therefore was whether this law was inconsistent with the Constitution.

iv. Discussion of freedom of religion and the criminal law

The court noted that the section 15 right to freedom of religion and the section 31(1)(a) right went hand in hand. Section 31(1)(a) states:

⁹⁸ Supra note 90 at para 15.

⁹⁹ Ibid at para 17.

¹⁰⁰ Ibid at para 18.

¹⁰¹ Ibid at para 20.

¹⁰² Ibid at para 27.

¹⁰³ Ibid at para 28.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at para 104.

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community . . . to enjoy their culture, practise their religion and use their language.

Therefore, section 31(1)(a) of the Constitution clearly protected the right of members belonging to a particular religion to practise that religion.¹⁰⁶ Ngcobo J in his minority judgment acknowledged that the prohibition of marijuana forced genuine Rastafarians to choose between practising their religion or abiding by the law.¹⁰⁷ He concluded that this clearly limited their right to freedom of religion.¹⁰⁸ Whilst the majority judgment agreed with Ngcobo J that the criminalisation of marijuana limited the right to freedom of religion for Rastafarians, they ultimately held that the state was not obliged to create an exemption for them.¹⁰⁹ Ngcobo J, on the other hand, felt that because the criminalisation of marijuana prevented Rastafarians from consuming the herb for *bona fide* religious purposes, the limitation on the right to freedom of religion was unjustifiable.¹¹⁰ Therefore, Ngcobo J would have upheld the appeal and declared the impugned provisions invalid.¹¹¹

v. Section 36 analysis

Once a finding has been made that there has been a limitation to a right, the only way to escape constitutional invalidity is if the limitation is justifiable in terms of section 36 of the Constitution. This is essentially a proportionality inquiry and requires the court to balance the competing interests involved.¹¹² The court placed great emphasis on the state interest in curing the rampant drug abuse in South Africa. It noted that for a true Rastafari, the casual use of marijuana for anything other than religious purposes was condemned.¹¹³ However, there was no regulation on the amount of marijuana consumed or possessed by adherents to the religion, making abuse possible.¹¹⁴ Essentially, the court concluded that the difference between using the drug for religious purposes and abusing it was the self-discipline

¹⁰⁶ Ibid at para 39.

¹⁰⁷ Ibid at para 44.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid at para 111.

¹¹⁰ Ibid at para 90.

¹¹¹ Ibid.

¹¹² Ibid at para 45.

¹¹³ Ibid at para 99.

¹¹⁴ Ibid at para 101.

of the individual,¹¹⁵ and an exemption would make Rastafari vulnerable to the harm of the drug.¹¹⁶

Further, the court found that it would be impossible for law enforcement to distinguish between the legitimate religious use of marijuana and recreational use;¹¹⁷ and between valid possession of the drug and possession with the intention to traffic the drug.¹¹⁸ The court concluded that an exemption would substantially impair the ability of the state to enforce drug legislation, thus undermining its purpose of curbing drug abuse and trafficking.¹¹⁹

Mr Prince proposed solutions to the problem of identification, one of them being a permit system. The majority of the court, however, did not accept his proposals as viable. This was based on the fact that at least 10% of Rastafarians in South Africa do not belong to an identifiable grouping, thus, the structure of the religion was too loose to implement a permit system.¹²⁰ The court concluded that whilst the prohibition of the use of marijuana limited Rastafarians' right to freedom of religion, it was a justifiable limitation and there was no obligation on the state to create an exemption for genuine adherents to the religion.¹²¹

vi. Important remarks from the minority judgments of Ngcobo J and Sachs J

Ngcobo J referred to the right to freedom of religion as 'one of the most important of all human rights'.¹²² He held further that the right was especially important in South Africa, whose population was diverse and comprised of so many different faiths.¹²³ By protecting the diversity of the population, the inherent dignity of all human beings is also upheld.¹²⁴ Because the prohibition on the use of marijuana was all-encompassing, and the religious significance of the use of the herb for

¹¹⁵ Ibid at para 129.

¹¹⁶ Ibid at para 138.

¹¹⁷ Ibid at para 130.

¹¹⁸ Ibid.

¹¹⁹ Ibid at para 132.

¹²⁰ Ibid at para 137.

¹²¹ Ibid at para 139.

¹²² Ibid at para 48.

¹²³ Ibid at para 49.

¹²⁴ Ibid.

Rastafarians was irrelevant to the prohibition, the consequence was that all Rastafarians were criminals.¹²⁵ Ngcobo J acknowledged that this status was highly degrading and made Rastafarians vulnerable not only to criminal persecution but also stigmatisation, which resulted in a serious violation of their dignity.¹²⁶

In his minority judgment, Sachs J characteristically points to the context from which this debate stemmed, noting that marijuana grows naturally in Africa, and that its use was uninhibited in pre-colonial times. In his words:

*... its use in the diaspora today is seen as re-establishing a ruptured Afro-centred mystical communion with the universe ... prohibit the use of dagga, and the mystical connection is destroyed.*¹²⁷

Thus, Sachs emphasises the fact that the outlawing of marijuana was part of the colonial project. He agrees that whilst the war on drugs is legitimate, it would be better served if resources were put towards preventing abuse of harmful drugs such as heroin and cocaine, rather than the prosecution of harmless and peaceful Rastafarians.¹²⁸ Sachs acknowledged the stigmatisation experienced by Rastafarians in daily life. Due to their religion being seen as somewhat provocative given their characteristic wearing of dreadlocks and use of marijuana, they typically do not receive the support of other major religions such as Christianity and Islam.¹²⁹ In this sense they lack the political power to lobby for acceptance and are forced to go through the court system.¹³⁰ Therefore, even though Rastafarianism is a protected religion under the Constitution, they are still marginalised.

Sachs concludes that such a contextual approach revealed the necessity for reasonable accommodation of diversity¹³¹ as the Constitution was founded on tolerance and respect for the dignity of everyone.

¹²⁵ Ibid at para 50.

¹²⁶ Ibid at para 51.

¹²⁷ Ibid at para 152.

¹²⁸ Ibid at para 154.

¹²⁹ Ibid at para 160.

¹³⁰ Ibid.

¹³¹ Ibid at para 170.

(b) Prince III and privacy

After unsuccessfully challenging the prohibition of marijuana on the ground that it violated his right to freedom of religion, Mr Prince challenged it on the ground that it violated his right to privacy. In this case, the Constitutional Court unanimously held in his favour.

i. Court a quo

This case required the Constitutional Court to either confirm or reject the decision of the court *a quo* that the prohibition of marijuana unjustifiably limited an individual's right to privacy and declared the impugned provisions invalid 'only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult'.¹³²

Interestingly, the High Court did not declare any provision relating to the *sale* of marijuana to be invalid but did declare provisions relating to the *purchasing* of marijuana to be invalid (author's emphasis). As the Constitutional Court noted, there cannot be a purchase without a sale.¹³³ Of further interest is the fact that the High Court judgment echoed Sachs J in *Prince II* by acknowledging that the criminalisation of marijuana 'is certainly characterised by the racist footprints of a disgraceful past'.¹³⁴

ii. Discussion of the right to privacy

The right to privacy is enshrined in section 14 of the Constitution and includes the right of everyone not to have:

- a. Their person or home searched;
- b. Their property searched;
- c. Their possessions seized; or
- d. The privacy of their communications infringed.

¹³² Supra note 92 at para 18.

¹³³ Ibid at para 26.

¹³⁴ Ibid at para 24.

Essentially, the right to privacy is the ‘right to live one’s own life with a minimum of interference’.¹³⁵ As such, a person’s intimate sphere of life is aggressively protected from interference by the state.¹³⁶ It is also accepted that the protection of privacy upholds human dignity.¹³⁷

iii. Is the right to privacy limited?

The court stated that the right to privacy entitles an adult person to use, grow or possess marijuana in private for personal consumption. Therefore, the criminalisation of the use, cultivation or possession of the herb by adults in private for personal use limits the right to privacy.¹³⁸

iv. Is the limitation justified in terms of section 36?

Once a limitation has been discovered, the state must satisfy the court that such a limitation is reasonable and justifiable in an open and democratic society.¹³⁹ The court noted that the purpose of the prohibition was to protect society from marijuana abuse and dependence – thus fighting the war on drugs.¹⁴⁰ The court acknowledged that *Prince II* had held that this purpose was legitimate.¹⁴¹ In examining the extent of the limitation, the court found that it was ‘quite invasive’ given the fact that private use by an adult in private was criminalised.¹⁴² This was strengthened by evidence that there was a level of marijuana consumption that was not harmful.¹⁴³ The court also referred to local and international studies which suggested that alcohol is more harmful than marijuana use, and that alcohol actually causes the most harm both individually and at a societal level.¹⁴⁴ Further, the court acknowledged that many democratic countries had decriminalised private use of marijuana.¹⁴⁵

¹³⁵ Ibid at para 44.

¹³⁶ Ibid at para 48.

¹³⁷ Ibid at para 50.

¹³⁸ Ibid at para 58.

¹³⁹ Ibid at para 59.

¹⁴⁰ Ibid at para 63.

¹⁴¹ Ibid at para 64.

¹⁴² Ibid at para 66.

¹⁴³ Ibid.

¹⁴⁴ Ibid at para 70.

¹⁴⁵ Ibid at para 79.

In the context of cultivation, the court held that the focus should not be on the fact that cultivation had to be in a private *dwelling*; instead, cultivation of marijuana must be in a private *place* and the marijuana must be for that adult's personal, private use (author's emphasis).¹⁴⁶ An individual did not have to grow the marijuana in her house; it could be in her garden or even in some other place as long as it can be deemed private.

Thus, the court concluded that the limitation was not justifiable in terms of section 36.

v. 'Purchase'

As already mentioned, the High Court's order of invalidity included provisions that prohibited the purchase of marijuana. If the Constitutional Court were to declare this part of the order valid, then it would be sanctioning the dealing in marijuana.¹⁴⁷ The court declined on account of drug trafficking being a widespread problem in South Africa. They held that the prohibition of dealing in marijuana was a justifiable limitation of the right to privacy.¹⁴⁸

vi. 'Private dwelling'

The High Court's legalisation of the use of marijuana by an adult in a private dwelling had a bizarre result – an adult could legally use marijuana in a private dwelling, but if that adult walked into the street whilst in possession of marijuana (for example, in her pocket), she would be committing a criminal offence.¹⁴⁹ Mr Prince argued that in effect the judgment respected the right to privacy of the home but disregarded the right to privacy of the person.¹⁵⁰ The Constitutional Court could find no legitimate reason for the use of the term 'private dwelling' and found that as long as use or possession was in private, and that use or possession was for personal consumption of an adult, it was protected by section 14 of the Constitution.¹⁵¹

¹⁴⁶ Ibid at para 85.

¹⁴⁷ Ibid at para 88.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid at para 98.

¹⁵⁰ Ibid at para 99.

¹⁵¹ Ibid at para 100.

vii. Remedy

The court used the constitutional rule of interpretation of 'reading in' to remedy the impugned provisions.

5. MARIJUANA IN SOUTH AFRICA: THE CURRENT LEGAL POSITION

The *Prince III* judgment significantly changed the law regarding marijuana use and possession in South Africa. Now, the use or possession of marijuana is legal provided:

- The user/possessor is an adult (over 18 years of age); and
- The marijuana is used and possessed for personal consumption; and
- The use or possession is in private (but this does not mean that use or possession is confined to a home or private dwelling)

Critically, the judgment does not legalise dealing in marijuana.

6. QUESTIONS

(a) MCQs

1. Choose the CORRECT answer. Section 15 of the Constitution:
 - a. Requires a strict separation between the state and religion.
 - b. Allows the state to adopt one religion to the exclusion of others.
 - c. Allows for religious observances to be conducted at state institutions provided attendance at them is voluntary and equitable.
 - d. Never permits the state to limit the expression of religious beliefs.

2. Following the judgment in *Prince III*, it is now legal for:
 - a. Minors to smoke marijuana provided they have the consent of a parent or guardian.
 - b. Majors to consume marijuana in private.
 - c. Majors to consume marijuana provided it is in the privacy of their own home.
 - d. Majors to consume and distribute marijuana provided it is done in private.

3. Choose the INCORRECT answer: In *Randhart*:
 - a. The principle of subsidiarity was correctly adhered to.
 - b. The court held that a public school cannot endorse one religion to the exclusion of others.
 - c. The court stated that indirect coercion in matters of religion at state institutions was also prohibited under the Constitution.
 - d. The court decided the matter despite the fact that the correct law was not relied on (the Constitution was relied on as opposed to the Schools Act).

4. According to the court in *Pillay*:
 - a. It is important to distinguish between cultural practices and religious practices.
 - b. The right to freedom of religion can never be justifiably limited in a school setting.

- c. Religious adornments should only be accommodated at schools if they are part of a mandatory religious practice
- d. Mandatory religious/cultural practices and voluntary expressions should be treated with equal respect and protection.

(b) Short questions

1. How did Chaskalson P define Freedom of Religion in *S v Lawrence*? (5 marks)
2. Define and discuss the principle of reasonable accommodation. (7 marks)
3. In bullet point form, illustrate the similarities and differences between the majority and minority judgments in *Lawrence*. (8 marks)

(c) True/False with reason:

- (a) The current South African law recognises and endorses Muslim marriages.
- (b) In terms of section 15 read with section 31 of the Constitution persons are free to practise their religious beliefs and use languages associated with their beliefs and cultures even if it constitutes hate speech.
- (c) There is no difference between direct and indirect coercion.
- (d) In *Lawrence* the court held that the right to freedom of religion was infringed, relying on US law to reach this conclusion.

(d) Long questions

1. Mary is a devout Christian student who attends a government school called Phoenix High School in Manenberg in the Cape Flats. Last year her grandmother passed away and left Mary a gold necklace with a cross attached to it, symbolising adherence to Christianity. Mary cherishes the necklace and feels bound to wear it as she is a devout Christian. (Importantly, the Christian faith does not make it compulsory for any member of the faith to wear a cross).

After a spate of robberies at the school during school hours and immediately after school end, the principal Mr. Stag sent out a newsletter stating that 'No student whomsoever may wear jewellery of any form at school'. This decision was taken in terms of the Regulation of School Uniforms Act (a fictional act that is of general application to all public schools in South Africa).

Mary is distraught after hearing the announcement and feels it infringes her right to freedom of religion in the Constitution. She comes to see you, her cousin, a recently admitted attorney and asks you to assist her (*pro bono* of course).

Advise Mary whether her right to freedom of religion or any other right has been infringed, and her prospects of success should the matter go to court? (20 marks)

2. Amirah is a final-year student at Mowbray Islamic College and is studying towards a degree in Islamic studies. She is the top student in her class. Her dream is to lead the Friday mass prayer session. However, Islamic Law strictly prohibits women from leading ANY prayer sessions where men are present. Amirah graduated with her degree in 2018.

The leader of the Mowbray mosque, Mr Solomon, has just retired from his position and the mosque has placed an advert in the local newspaper for the vacancy. Amirah is the only applicant. However, she does not even get an interview.

Advise Amirah if any of her constitutional rights have been infringed and whether she has any remedy? There is no need to do a section 36 limitations analysis for this question. (20 marks)

3. Critically discuss the following statement: "Since the decision of the Constitutional Court in *Prince III*, anyone may smoke and distribute dagga as long as they operate from their own home" – Anonymous. (15 marks).

4. Draw a table illustrating the differences and similarities between *Prince II* and *III*. (10 marks)

7. MEMO

(a) MCQs

1. c
2. b
3. a
4. d

(b) Short questions

1. In *Lawrence*, Chaskalson P endorsed the Canadian definition of freedom of religion which includes:
 - The right to entertain such religious beliefs as a person chooses;
 - The right to declare religious beliefs openly and without fear of hindrance or reprisal;
 - The right to manifest religious belief by worship and practice or by teaching and dissemination;Chaskalson P added the further requirement of 'an absence of coercion or constraint'.
2. Reasonable accommodation is the idea that a community of people must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally (*Pillay*). Therefore, reasonable accommodation requires that communities of people (in the workplace or in a school, for example) not only respect diversity amongst themselves but also that they foster an environment where that diversity can be outwardly expressed even if it means that there is some hardship or expense. In the context of a discrimination dispute, the Equality Act specifically lists taking reasonable steps to accommodate diversity as a factor to be looked at when assessing the fairness of the discrimination. In the *Pillay* case, the court found that reasonable accommodation of Sunali's religious adornments had not been given. The school could have granted her an exemption even if it created a hardship for them in that the nose piercing

would have been in contravention of the school uniform policy. The failure to take reasonable steps to accommodate Sunali's diversity meant that the school had unfairly discriminated against her.

3. SIMILARITIES:

- Majority and minority agreed that the South African Constitution does not have an establishment clause that requires a strict separation between state and religion.
- They also agreed that any coercion by the state to practise any particular religion would be a violation of freedom of religion.

DIFFERENCES

- The majority held that there had been no infringement of the right to freedom of religion whilst the minority held that there had been such an infringement. O'Regan J found this infringement to be unjustifiable, whilst Sachs J held that it was justifiable in terms of section 36.
- O'Regan J in her minority judgment stressed that any religious practice by the state had to be free from both direct and indirect coercion, which she held to be present in this case.
- The majority found that the state had a legitimate purpose in the restriction – it was intended to prevent drunken driving. O'Regan J for the minority found that whilst the purpose was legitimate, the means to achieve that purpose were not based on logical grounds as not all public holidays were considered closed days – only the Christian-based holidays. Sachs J in his minority judgment held that the infringement of the right to freedom of religion was only minor as it did not restrict the practising of religious observances, and that the reduction of drunken driving was an important purpose. Therefore, the infringement was justifiable.

4. True/false

- (a) False.** Currently there is no specific legislation regulating Muslim marriages. However, a person in a Muslim marriage (monogamous or polygamous) is considered a 'spouse' for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act (*Daniels v Campbell*¹⁵²; *Hassam v Jacobs*¹⁵³).
- (b) False.** People are free to practise their religion and use language associated with that religion to the extent that it does not constitute hate speech.
- (c) False.** Direct coercion is when one is expressly required to do something. Indirect coercion is when something is supposedly voluntary but surrounding circumstances make it challenging to abstain. However, both are prohibited in terms of religious observances in state institutions.
- (d) False.** In the US Constitution there is what is called an 'establishment clause'. This requires strict separation between religion and the state. The court in *Lawrence* said that the South African Constitution does not require the state to as strictly abstain from religious observances.

(c) Long questions

1. The issue in this set of facts is whether Mary's right to freedom of religion (or any other right) has been infringed, and what her prospects of success would be should she decide to take the matter to court.

Section 15 of the Constitution enshrines the right to freedom of religion, belief and opinion. Section 31 of the Constitution enshrines the right of persons belonging to a religious community to practise their religion and enjoy their culture. There is no doubt that Christianity is a recognised religion in South African law. If it can be successfully argued that wearing the cross is part of the practising of Christianity, then Mary's religious rights would have been violated.

¹⁵² *Daniels v Campbell and Others* 2004 (5) SA 331 (CC). This case expanded the definition of 'spouse' in the Intestate Succession Act to include people in a monogamous Muslim marriage.

¹⁵³ *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC). This case expanded the definition of 'spouse' in the Intestate Succession Act to include people in a polygamous Muslim marriage.

The applicable case in this regard is *Pillay*. This case involved a high school student who wanted to wear a nose stud in contravention of school policy, because she claimed that it was part of her religion as a Hindi woman. Through the testimony of experts in the Hindi religion it was established that the wearing of a nose stud was indeed a cultural and religious expression of Hinduism, but it was not a mandatory requirement.

The majority in *Pillay* declined to decide whether wearing a nose stud was a religious practice or a cultural one, as they said that to try to compartmentalise these things would not be appropriate. The court noted that it is often the case that cultural communities do not have texts with strict rules to rely on, but that their traditions and expressions of their culture are just as important to them as those religions with texts. Furthermore, the court held that voluntary religious or cultural practices must be afforded equal protection under the Constitution to mandatory practices in order to uphold the Constitution's commitment to celebrating diversity. To emphasise this point they spoke about ubuntu and the need to take a communitarian approach where diversity is accommodated with respect.

In Mary's case, the Christian religion does have a holy text which can be relied upon. The Bible includes certain requirements, but wearing a cross is not such a requirement. However, given the fact that the *Pillay* court stressed the importance of respecting both mandatory and voluntary religious practices, it is submitted that Mary's rights in section 15 and section 31 had been infringed.

As with any limitation of a right, it might be saved by a section 36 limitations analysis. Mr Stag took the decision in terms of the Regulation of School Uniforms Act, which is a law of general application. Therefore, a limitations analysis is possible in this case. Section 36 of the Constitution lists five factors that must be taken into account when assessing the justifiability of a limitation to a right. These factors are:

(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.

Nature of the right

Religion and culture can form a great part of a person's identity. As such, freedom of religion is a critical right to protect as an infringement of it can also infringe that person's inherent human dignity by forcing them to deny a part of their identity (*Prince*).

The importance of the purpose of the limitation

The purpose of the limitation is to prevent robberies from occurring at school, thereby protecting students from harm. This is undoubtedly an important purpose.

The nature and extent of the limitation

The extent of the limitation is broad as it prohibits Mary from wearing any form of religious jewellery whilst at school, which is where most students spend most of their weekdays. Therefore, Mary would be unable to express her religion for most of her life whilst she is still a student.

The relation between the limitation and its purpose and other less restrictive means

Mr Stag hoped that by prohibiting jewellery from being worn at school (and thereby limiting the right to freedom of religion) it would stop robberies from occurring. Whilst there seems to be some connection between the means used and the objective sought, Mr Stag's complete banning of all forms of jewellery is arguably excessive. In the first instance, Mr Stag did not appear to consult his students on the effect that a jewellery prohibition would have on them. He also did not seem to consult with anyone on whether a jewellery ban would actually reduce robberies. This suggests that his decision

was taken somewhat arbitrarily. He could have used less restrictive means to achieve his purpose. First, he could have allowed for a religious exception to the jewellery ban. In the *Pillay* case, prohibiting the wearing of a nose stud was held to be unfair because there had been no reasonable accommodation made for people wanting to wear one for religious significance. Secondly, he could have asked the students to wear jewellery under their uniforms, hidden from plain sight. Lastly, he could have asked them not to wear expensive religious jewellery. It is further submitted that if there were robberies occurring at school then the governing body should implement better security instead of infringing on students' rights to religious freedom.

In conclusion, by prohibiting students from wearing all forms of jewellery (including religious jewellery) at school Mary's religious freedom rights in sections 15 and 31 have been infringed. Given the importance of these rights and the severity of the infringement, together with the fact that less restrictive means were available to Mr Stag, it is submitted that this is an unjustifiable limitation of the rights. Therefore, Mr Stag's conduct is unconstitutional and invalid.

2. Amirah's scenario illustrates the conflict that often arises between freedom of religion and equality.

In terms of freedom of religion and its concurrent right afforded to cultural, religious and linguistic communities, people who are a part of the Islamic faith have the freedom to structure their organisations according to the tenets of that faith. Therefore, if the Quran mandates that women are not allowed to lead prayer when men are present, then sections 15 and 31 of the Constitution give the followers of Islam the right to enforce that mandate.

However, section 9 of the Constitution also gives people the right to equality (the right not to be unfairly discriminated against). Sex and gender are listed grounds in the Constitution against which discrimination will always be unfair. As a woman, Amirah has the right not to be unfairly discriminated against. However, the prohibition on women leading prayers when men are

present constitutes discrimination against her on listed grounds. Therefore, there is a clash between the rights to freedom of religion of cultural, religious and linguistic communities and the right to equality.

There are differing opinions on what should be done in this scenario. Bilchitz argues that religious organisations should be held to the same standard of non-discrimination as any other person or entity. This is because freedom of religion and the right to equality are both rooted in respect for diversity. Therefore, a religious community cannot ask others to respect their diversity but not respect diversity themselves. Bilchitz further submits that it is common cause that a right can be enforced to the extent that it does not harm others. In this case, harm is being done to Amirah as she is unable to express her religion in the way in which she desires. This would have a tangible impact on her as she would not be able to obtain a job nor earn a living. This would also serve to degrade her human dignity and sense of identity, when human dignity is a fundamental right in our constitutional dispensation. Therefore, Bilchitz would argue that the actions of the Mowbray Mosque be declared unlawful as their expression of their rights is having a harmful effect on Amirah and is resulting in her equality and dignity being infringed.

Smith argues the opposite. He believes that the state should not interfere with religious or cultural communities because there are no clear guidelines within which the state could operate, and state interference could be taken too far. Smith says that if the state declares the prohibition on women leading a religious organisation unlawful then similarly the state could declare unlawful the requirement that priests in the Catholic church be unmarried (because marital status is also a prohibited ground of discrimination in section 9 of the Constitution). If the state had an unfettered ability to declare unlawful or invalid certain acts of a religion which are mandated by the religion itself, then it would essentially render the rights in sections 15 and 31 redundant.

It is submitted that Bilchitz's argument is the correct one. Whilst there is a need to ensure that the state does not interfere too far in any use of a right in the Bill of Rights, there are quite clearly examples in which state

interference would be entirely justified. For example, if a religion in its holy text required the sacrifice of every firstborn daughter, it is highly doubtful that freedom of religion should triumph over state interference. Respect for and accommodation of different religions and cultures is crucial in South Africa's democracy which is founded on human dignity. However, religious practices should only be protected as long as they do not grossly interfere with other people's rights, especially if the interference has the effect of undermining others' dignity. Therefore, Amirah's section 9 right to equality has been infringed.

3. *Prince III* was a 2018 Constitutional Court case in which the criminalisation of the use of dagga in private places was challenged as being in conflict with the right to privacy as found in section 14 of the Constitution.

The right to privacy typically includes the rights of someone not to have:

- Their person or home searched;
- Their property searched;
- Their possessions seized; or
- The privacy of their communications infringed.

At its core the right to privacy protects people from undue state interference into the inner sanctum of their lives. As such, the court in *Prince* stated that respect for the right to privacy also upholds a person's right to dignity.

The court in *Prince III* found that state intrusion on a person growing and consuming marijuana in private was an infringement of the right to privacy. When it came to the limitations analysis, the court looked at the purpose of the criminalisation of marijuana. The supposed purpose was to fight the war on drugs in South Africa, which the court found to be a legitimate purpose. However, evidence was led which suggested that alcohol was in fact a more dangerous substance than marijuana, and that there was a level of marijuana consumption which was perfectly safe. Thus, the limitation on the right to privacy was unjustifiable.

The court stressed that the legalisation of marijuana was confined to use by an adult (over 18 years of age) in private, but that 'private' did not necessarily mean a dwelling or a home. As long as the place in which the marijuana is grown, possessed and consumed could be considered to be private and its user is an adult then it will be legal.

The order of the High Court seemed to legalise the purchase of marijuana as well. This, the Constitutional Court could not confirm. The court said that if it were to legalise dealing in marijuana it would be adding to the already dire drug trafficking problem in South Africa. Thus, the restriction on purchasing the drug was a justifiable limitation on the right to privacy.

Therefore, with regard to the quoted statement, it is not that anyone may smoke dagga; it is only legal for majors. Furthermore, it does not need to be in a home, it must just be in private. Lastly, dealing/distributing of marijuana is still a criminal offence.

4.

<i>Differences and similarities between Prince II and Prince III</i>	
<i>Prince II</i>	<i>Prince III</i>
Similarities	

Involved a challenge to the constitutionality of the criminalisation of marijuana.	Involved a challenge to the constitutionality of the criminalisation of marijuana.
The court found that there was a limitation to the right to freedom of religion.	The court found that there was a limitation to the right to privacy.
The court discussed the importance of the purpose of the limitation, which was to fight the war on drugs.	The court again endorsed the purpose of fighting the war on drugs.
Differences	
The limitation of the right to freedom of religion was found to be justifiable given the supposed harm caused by marijuana and the importance of eliminating drug abuse in South Africa.	The limitation of the right to privacy was found to be unjustifiable.
Mr Prince was unsuccessful in his claim.	Mr Prince was successful in his claim.
This case did not change the law regarding marijuana use.	This case drastically changed the law regarding marijuana use, as it is now legal for majors to consume in private.