

# A Hindu experience of religious freedom in the South African context

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## **RELIGIOUS FREEDOM**

At this moment in our history, we are poised on the brink of great changes. At one level all political parties are gathered together to work out a combined strategy for future government as well as a new constitution. At another level various parties are working out a future Bill of Rights in a post-apartheid South Africa. In fact a law commission has already produced a draft bill of rights. For academics, the debate is quite easy: to determine what these terms really mean. What does the ordinary man understand when we talk about a constitution, a bill of rights, human rights and their violation and religious freedom? What does the layman understand by these terms and is enough being done to ensure that he has participated in the decision-making? I will try to answer some of these questions in this paper.

## **WHAT IS A BILL OF RIGHTS?**

A bill of rights is a document that describes the fundamental liberties of the people. It also forbids the government to violate these rights. Most bills of rights guarantee everyone freedom of speech, of religion, of the press and of the right of assembly.

## **WHAT ARE HUMAN RIGHTS?**

In its finest sense, the term implies that individuals have rights that are inborn. A government may not deprive them of these rights, which are called human

rights. A government has limited powers delegated by the people. Self-government is considered the best form of government, but a citizen needs fundamental human freedom to vote intelligently, to hold public office and to govern.

## **WHAT DO WE MEAN BY RELIGIOUS FREEDOM?**

I believe, as Albie Sachs (1990) has stated in his book on human rights, that every person is entitled to expect to enjoy the same general, civil, political and legal rights irrespective of his beliefs. In other words, one's rights should not be determined or affected because one is a member of one religion or another, or because one is a nonbeliever.

Historically in South Africa this has not been so. Minority religions have experienced great hardships. The present constitution assumes that there are only Christians living in South Africa and its preamble contains the following statement: 'to uphold Christian values'. There has been an assumption by the Nationalist party that people of other faiths are heathen and are not entitled to any of the rights that citizens enjoy in a normal civil society. In South Africa, the Nationalists have espoused an exclusivist and particularistic image of God to justify the superiority of the white race and in particular the white Afrikaner. They have seen themselves as having been given by God the divine right of power to decide the fate of those who have not been fortunate enough to have been born white, Afrikaner or Christian. In South Africa, God has been used to justify divisions and conflicts.

As a Hindu I was forced to accept Christian education. My son is at primary school and because the curriculum prescribes Bible Education, he is forced to take that subject too. Hindu marriages are not recognised which causes great hardship to surviving spouses who find themselves destitute on the deaths of their husbands. Children of such marriages are regarded as illegitimate and cannot be heirs if their fathers die intestate. All they enjoy is a right of support. In South Africa the Nationalist party coopted the support of the Dutch Reformed churches to justify its illegitimate rule over this country for the last forty-five years. In fact, it is often said that the Dutch Reformed Church is the government at prayer. On the other hand, many of the other mainstream churches were not innocent and, apart from a few individuals, were happy enough to comply. With the advent of the tricameral parliament there were many Hindus and Muslims who benefited from cooption into the system by the government.

With our history, therefore, are we entitled as religious people to ask for religious freedom to be recognised in a future South Africa? *If we say that we are, recognising that this is a pluralistic society, how do we ensure that the rights of minority religions are protected?*

In an article written a few years ago, dr G Lubbe (1988:5) stated that in South Africa there was a low awareness of religious pluralism. He went on to state that the following three factors were responsible for that status:

- 1 'The legacy of Christian triumphalism backed up by colonial expansionism ...'

He states that, in terms of this legacy, Christians enjoyed such a powerful position as the majority that they did not consider it necessary to enter into dialogue or to cooperate with people of other faiths. It is interesting to note that he states that black Christians, while politically powerless, show symptoms of the same syndrome.

- 2 'The fact of religious pluralism has been hidden from most people through the policy of segregation.'

In South Africa, the Group Areas Act and other legislation segregated people. This meant that, by and large, people of different faiths were separated from each other, a situation which has led to intolerance and ignorance. This has also allowed minority religions to prosper in ethnicity.

- 3 'Minority religious groups have become so introverted that religious pluralism has gone largely unnoticed.'

This is certainly true of Hinduism. Hindus, who come from a background of British colonialism in India, were so happy to be allowed to practise their own religion in South Africa that they were willing to comply with and support the many inequities in the system. This supports dr Lubbe's contention that minority religions have succumbed to the development of ethnic subcultures, which has had the result of allowing walls of hostility to remain intact between them. In his article he concludes that the only way of surviving in South Africa is by being aware of religious pluralism, as political liberation will not ensure inter-religious harmony. Events that have taken place in South Africa recently bear this out.

It is clear that to work towards an understanding of religious freedom, we have to understand religious pluralism and engage in inter-faith dialogue.

## WHAT DO WE AS HINDUS MEAN BY RELIGIOUS FREEDOM?

To Hindus, freedom encompasses freedom of the mind, the body and the spirit. The great Indian Swami Vivekananda asked 'What good is it if we acknowledge in our prayers that God is the father of us all and in our daily lives do not treat every man as our brother?'

The Mahatma stated that no one is free until poverty is completely eliminated.

The Hindu mind thus accepts that freedom creates responsibilities and that one has to be aware of the rights of others.

The South African human rights activist and constitutional writer, dr Albie Sachs (1990:37) has said that 'Belief by its nature is something personal and intrinsic to the individual. It belongs to the conscience of all of us but also has a social dimension, a cultural dimension, even a national dimension.'

In the Vedas, the student poses the question: 'What is life? I see how it functions but what is its source and what is God?'

The teacher responds in the Kenopanishad 1.2 by saying:

It is the ear of the ear  
It is the mind of the mind  
It is the speech of the speech  
It is the breath of the breathing  
It is the eye of the eye.

The teacher then proceeds to explain to the student that the source of life (or God) is infinite. The Kenopanishad goes on to say 'that which cannot be felt by the mind but that which enables the mind to feel is Brahman'.

Hinduism thus recognises humankind's intrinsic belief in infinity, which encompasses nonbelief in a god or gods. Hinduism thus accepts the concept of nonbelief in a god as a religion, but defines an atheist as one who does not believe in himself or herself. Although acknowledging Brahman as our unknowable self, Hinduism acknowledges the human need for a personal god. We live in a dualistic world of subject and object, so we need to experience God out there.

To a Hindu, his belief in his God comes with the understanding that he has a social responsibility. In the *Vamashrama Dharma* (Social Code) it is stated that all should do their duty according to their nature for the collective welfare and, in the process of so doing, they will build up their inner spiritual life.

It becomes clear, therefore, that the practice of one's religion should not conflict with the rights of others.

In South Africa minority religious groups have not enjoyed the benefits that the majority Christian groups have had. They have also been forced to observe the beliefs of the majority group. In most state schools, Bible education is taught. A child is thus forced to attend that class, irrespective of whether he or she is a Christian or not. Sundays are observed as a day of rest. Until March of this year, one was not allowed to visit a cinema on a Sunday and one is still not allowed certain other forms of entertainment on that day. The regime also practises a hypocritical double standard by not allowing gambling in South Africa, but allows these institutions and entertainment centres to be set up in the so-called independent Bantustans. As religious people we need to ask whether one's right to choose for oneself is not being impinged upon and, further, why is it acceptable for these establishments to exist there? Does it mean that it is acceptable for black people to be corrupted - if one believes that such institutions are corruptive?

These observances are a matter of personal conscience. It should not be the duty or prerogative of any state to prescribe to its citizens on these issues. People should have the right to practise their own dietary laws, and have their children attend a school where they can determine the religion which is to be taught. Religious leaders should be chosen without the interference of the state. Minority religious groups should also have access to the state media - which forms a powerful tool. As we all pay taxes to the state our religions should also have the benefit of donations made by the state.

It is obvious, therefore, that the practice of one's belief or nonbelief has a social dimension that impacts on the rights of others. If I believe that Wednesday is my holy day, should I be given a day off on a Wednesday, should all Muslims and Jews be allowed off on Friday and Saturday, and all Christians on Sunday? This kind of democracy would make the workplace ungovernable and it is clear therefore that while issues like these need to be carefully worked out, they are not insurmountable. While religious groupings should have the right to the expression of their faiths, of the rights of the broader society in which we live must be borne in mind.

In the struggle for freedom in this country, there is a recognition by most of the major players that the churches and other religious organisations have played a great role in the dismantling of apartheid. I am sure, therefore, that the peoples of South Africa will not tolerate the kind of state-religious relations that have existed in the past. At an Inter-faith Conference on the relationship between the church and the state held in Johannesburg and hosted by the World Conference on Religion and Peace (WCRP), most of the participants recognised the need for healthy interaction between the state and organised religion. The only acceptable constitutional option would be the option outlined by Albie Sachs (1990:39) which I quote here: 'a secular state with active interaction between the state and religious organisations which not only have a constitutionally recognised sphere of autonomy, but collaborate with the state in tasks of mutual concern'.

In the paper that dr Albie Sachs (1990:37-42) read out at this conference, he made the following submission:

- \* that there was no scope for the suppression of religion;
- \* that no possibility existed for a future state religion;
- \* that there was no possibility of giving religious organisations judicial or other authority beyond the voluntary authority accepted by members.

He stated that, in the light of South Africa's history, the constitutional model outlined above would be the most acceptable. He then went on to say that ideally people from the different religious traditions should get together and draft a charter of religious rights and responsibilities.

The WCRP accepted dr Sachs's proposal and in 1992 engaged in a series of encounters, and arranged workshops among people of various faiths to produce a draft charter. In November 1992, the WCRP hosted an inter-faith conference at which the draft declaration was finalised.

In its declaration (WCRP-SA 1992), the conference agreed on the following clause to be inserted in a future bill of rights:

- 1 All persons are entitled
  - \* to freedom of conscience;
  - \* to profess, practise, and propagate any religion or no religion;
  - \* to change their religious allegiance;

- 2 Every religious community and/or member thereof shall enjoy the right
  - \* to establish, maintain and manage religious institutions;
  - \* to have their particular system of family law recognised by the state;
  - \* to criticise and challenge all social and political structures and policies in terms of the teachings of their religion.

It is interesting that, at this stage in our history, we have engaged in this debate and have managed to achieve some kind of consensus between people of diverse faiths. The document, however, does not reflect the anguish and the intense discussion that preceded it.

If one compares the WCRP declaration (WCRP-SA 1992) with international standards, for example *Article 18 of the Universal Declaration of Human Rights* - which provided for freedom of thought, conscience and religion, freedom to change one's religion and freedom to manifest one's religion - one is struck by the commonality of ideas in the two declarations.

In his article on *Towards a universal standard of religious liberty* Bertie Ramcharan (1987) stated that, after the adoption of the Universal Declaration of Human Rights, Article 18 of the International Covenant on Civil and Political Rights provided for guarantees of freedom of thought, conscience or religion, and recognised the right to have or to adopt a religion, as well as the freedom to manifest religion, and it provided for protection from coercion which has the effect of impairing the freedom to have or to adopt a religion. Article 13, paragraph 3 of the *International Covenant on Economic, Social and Cultural Rights* deals with the right of parents or guardians to ensure that religious and moral education of their children conforms with their own convictions.

In 1981, the existing standard was extended by the *Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief*. The Declaration was widely acclaimed by the International community in 1981. This Declaration seeks to protect freedom of thought, conscience or religion and especially the *freedom to have and to manifest religion*.

Article 2, paragraph 2 contains a definition of intolerance and discrimination, which reads as follows:

For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

In South Africa we have had this debate. Having lived under a regime where one group enjoyed rights above others it is clear that this is one of the most important areas for asserting the simultaneity of the right to be the same and the right to be different.

In his article, Bertie Ramcharan (1987:8-9) singles out some of the issues which arose in the drafting of the Declaration. These were the right to change religion, the introduction of the phrase 'whatever belief' and the definition of religious freedom. He notes in his paper that when the Commission on Human Rights sent its draft to the General Assembly through the Economic and Social Council in 1981, discord remained in the Commission on the two issues. Islamic states asserted that they could not accept the guarantee of an individual's right to change religion, while several socialist states complained that it was not explicitly recognised that the atheistic and nontheistic rights were equal to those of the religiously faithful. Consequently, when the draft Declaration was finalised in the General Assembly, the reference in the Commission's draft to the freedom to adopt or to change religion was deleted and the freedom to have religion was inserted with a clause which declared that nothing which had been stated in the Universal Declaration of Human Rights was to be diminished by the new Declaration. In order to accommodate the views of the socialist states, the Declaration that was finally adopted refers to freedom of religion or 'whatever belief'. He goes on to say that the Declaration as finally adopted contains no definition of words such as 'religion', 'practice', or 'observance'. It is clear therefore that, on key issues, the Commission failed to placate and keep both Islamic and socialist states in the process. In our struggle with these concepts in South Africa, we have had similar battles. The WCRP Inter-faith Conference in South Africa on the declaration also had to examine the same issues.

Our definition of religious freedom recognises the right of the individual to have no belief and the right to change his religion. I believe therefore that we have gone further, in that participants at the Conference accepted this as Article 1 of our Declaration states (WCRP-SA 1992):

## 1 PEOPLE SHALL ENJOY FREEDOM OF CONSCIENCE

- 1.1 All persons shall be free to have and give expression to a system of values or religious beliefs and practices of their choice, and no one shall be coerced into accepting or changing his/her religious affiliation.
- 1.2 Everyone should respect and practise tolerance towards other people, whatever their religious beliefs, provided that the expression of religion shall not violate the legal right of others.

In Article 2 we affirm that religious committees shall be equal before the law.

In Article 3 we confirm that religious committees have moral responsibilities to society. Here people agonised about the use of their land resources for the benefit of others.

In Article 4 we state that people have the right to religious education.

In Article 5 we affirm the right of people in state institutions to enjoy religious rights.

In Article 6 it is stated that religions have the right to propagate their teachings.

In Article 7 we state that religious communities should have access to the public media.

Article 8 of the Declaration was the most contentious and aroused the most debate, especially among women and liberation theologians. This was that 'The State shall recognise systems of family and customary law'. The intention of this clause was to give women who are trapped in religious marriages the right of civil recourse where their religious leaders did not see fit to allow them a divorce. Most of the religious leaders involved in the debate argued strongly for the inclusion of the word 'exhausted' in clause 8.5 of the Declaration. It was the consensus of the house, however, that the use of this word would empower religious leaders even more than they had been in the past. The word 'exhausted' was replaced with the word 'utilised'.

Article 9 states that 'The holy days of religious communities shall be respected'. Article 11 affirms the right of religious institutions to own property and be exempt from taxes.

In March 1986, the Commission on Human Rights at the United Nations, concerned because governments were interfering in the implementation of the Universal Declaration of Human Rights then appointed a special rapporteur, mr Angelo Vidal d'Almada Robeiro to look into the matter. In 1987, he reported the following problems that he had encountered in respect of each of the following freedoms (Ramcharan 1987:10):

- \* to have, to manifest and to practise religious belief;
- \* to establish and maintain appropriate charitable institutions;
- \* to make, acquire and use, to an adequate extent, the necessary articles and materials related to the rights and customs of a particular religion;
- \* to write, issue and disseminate religious publications;
- \* to teach religion or belief in places suitable for this purpose;
- \* to solicit and receive voluntary financial and other contributions;
- \* to train, join and elect or designate appropriate leaders;
- \* to observe days of rest;
- \* to establish and maintain communications with individuals and communities.

In his report he further identifies the problems of legislative discrimination, campaigns for the forced assimilation of religious minorities, and the intransigent attitudes of one religion towards another.

The special rapporteur also advised the Commission that the right to life, liberty and security of person is being violated on religious grounds; so are freedom of movement and freedom of opinion and expression. The right to bring up children in accordance with religious belief is being flouted and the forms of discrimination that he identifies include the denial of one's right to judicial protection or employment, health and housing.

Mr Ramcharan makes the observation that drafting clauses in declarations in a general way is a problem, and that it is essential that any future drafting exercise should be characterised by greater specificity.

We, the participants in the first Declaration, also drafted many clauses in a general way to achieve a measure of consensus (WCRP-SA 1992). It is less than a year since the first declaration appeared, and already women have

expressed their opinion that it does not satisfy their expectations. Women's groups are already examining this declaration and have intimated that they will hold a women's conference to discuss shortcomings in the previous declaration.

## WORKS CONSULTED

- Kritzinger, J N J (ed) 1991. *Believers in the future: Proceedings of the National Interfaith Conference on Religion-Sate Relations, December 2-4, 1990, Johannesburg*. Pretoria: WCRP-SA.
- Lubbe, G J A 1988. Interfaith dialogue in South Africa, in World Conference on Religion and Peace - SA & Institute for Contextual Theology, *Believers in the struggle for justice in peace*, 5. Johannesburg: WCRP.
- Ramcharan, B 1987. *Towards a standard of religious liberty*. Commission of Churches on International Affairs. Geneva: WCC.
- Sachs, A 1990. *Protecting human rights in a new South Africa*. Cape Town: Oxford University Press.
- World Council of Churches 1987. *Religious liberty: Some major considerations in the current debate*. Commission of the Churches on International Affairs. Geneva: WCC.
- World Conference on Religion and Peace (SA) 1992. *Declaration on religious rights and responsibilities*. Krugersdorp: WCRP-SA. (WCRP-SA 1992).

# A legal perspective on religious freedom

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## 1 INTRODUCTION

To strive to understand the meaning of life and death, to live in harmony with nature, to anticipate beyond the grave, to look up to someone wise, loving and almighty and to have serious doubts about all these - therefore to be free to believe and not to believe - is one of humankind's most basic instincts and needs. There can be little doubt that it is a fundamental human right. Furthermore, most religions probably strive towards the advancement of morality and the elimination of human conflict and suffering; yet, a considerable percentage of history's most devastating wars have been waged under the banner of religion and some of its most atrocious human rights' violations have been committed because of religious intolerance. It seems obvious that people need freedom to find the space to believe, but the most prominent urge of the faithful is often to condemn, persecute and ostracise others who do not share their beliefs.

In South Africa most of the world's major religions are practised alongside traditional African notions and customs. Some churches have motivated, justified and even blessed grossly inhuman policies and conduct such as racism, war, exploitation, oppression, brutality and greed. But it has also become a cliché to state that religion is a powerful, potentially unifying factor and a force through which justice, nation-building, peace and understanding can be

achieved. In spite of the often bad record of some major religions, South Africa might have been worse off without religion.

To recognise freedom of religion in theory - and even in a new constitution - hardly poses a problem. Some practical implications deserve attention, though. Should state and church be separated entirely, in view of our diversity of religions and denominations? Or should the creed of the majority be the official or unofficial state religion? How is a future government likely to react to criticism from the churches who previously supported its struggle? To what extent should the state protect and support organised religious activities? How should religious instruction be dealt with in schools? Should there be censorship to protect religious convictions, or to outlaw one or more religions or some of their practices? Could the economy afford observance of all 'holy' days? What happens if the rituals and practices of a religious denomination violate other basic human rights or the laws of the land? We need a legal, political and economic system that will utilise the wealth of South Africa's religious pluralism to the benefit of all, prevent discrimination without abandoning the true meaning of faith, and prevent religion from becoming a major area of conflict soon after apartheid is gone. It will also avoid the threat to human rights, democracy and peace which religion has been and still is in large parts of the world.

## **2 RELIGIOUS FREEDOM AS A BASIC HUMAN RIGHT**

### **2.1 Recognition in human rights declarations**

The Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations in 1948, forms the centrepiece of international human rights law. Article 2 of the Universal Declaration states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion ....

The second part of article 18 sets out some of the implications of the recognition of religious freedom:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In 1981 the General Assembly of the United Nations also adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

On a regional level, the contents of articles 2 and 8 of the African Charter on Human and Peoples' Rights (adopted by the Organisation of African Unity in 1981) largely correspond with articles 2 and 18 of the Universal Declaration. In the European Convention of Human Rights, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights, religious freedom is also guaranteed (Buergethal 1988:82, 128, 143).

Similar provisions occur in state constitutions. The First Amendment to the Constitution of the United States of America (which forms the Bill of Rights, with the nine following amendments, ratified in 1791) states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. Article 4 of the Constitution of the Federal Republic of Germany (adopted in 1949) safeguards religious freedom, as do articles 2(a) and (b) and 15(1) of the Canadian Charter of Rights and Freedoms of 1982, articles 16(2), 25, 26 and 28 of Part III of the Indian Constitution, article 37 of Chapter IV of the Nigerian Constitution of 1989, and articles 10(2) and 21(1)(b) and (c) of the Namibian Constitution of 1989.

Freedom of religion is guaranteed in human rights declarations, firstly in anti-discrimination clauses, along with a range of other factors on which discrimination cannot be based. In this context it is an *equality right*. Secondly, it appears as a *liberty right* in clauses proclaiming the freedom to believe, to practise one's religion actively, and also to change it. As a liberty right, religious freedom is often mentioned in the same context as - and of course related to - freedom of conscience, opinion and expression, as well as freedom of association and the right to assemble peacefully. Freedom of belief as a liberty right is sometimes explained in terms of *rights to non-coercion* and *non-interference belief rights*. Non-coercion rights comprise the right of every individual to be legally protected against being physically forced to renounce one's faith *and* the right not to be legally required (under threat of punishment) to do so, or to adopt another faith or religion. Non-interference belief rights constitute the right to be legally protected against being physically prevented from renouncing one's faith *and* the right not to be legally prohibited (under the threat of punishment) from doing so, or from adopting another (MacFarlane 1985:60-73; Kearney 1991:122). Also see the above-mentioned Declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief, for descriptions of 'freedom', 'intolerance' and 'discrimination').

Furthermore, religious freedom is often mentioned in human rights documents within the context of *cultural rights and social rights*. (See, for example, article 27 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the UN on 16 December 1966.) As such the emphasis is less on the inherent freedom of the individual, and more on the social significance of religious activities.

## 2.2 Why is it a basic right? On the nature of human rights and democracy

For the purposes of this contribution human rights can be defined briefly as claims for recognition that individuals (or groups of individuals) demand from their society, as represented by the government, or against the ruling group in their society. These claims embody values, most essentially *human dignity* and the *equality of all human beings*. Such claims are being recognised in international law, or at least in the widely accepted moral, legal and political notions of the modern international community.

These rights are inherent in all human beings, universal (or at least 'a common standard of achievement for all peoples and all nations', according to the Preamble to the Universal Declaration) and inalienable. Every human being is born with fundamental human rights, which do not have to be earned. A newborn baby does not have to earn the right to live, or the right not to be kidnapped or abused. Disregard or violation of these rights may justify disobedience, resistance and overthrowing of a regime in order to retrieve one's alienated rights. Human rights declarations thus represent catalogues of claims and demands, embodying values which are widely recognised as so essential to human dignity, equality and peaceful coexistence, that their violation or negation could legitimise disobedience, resistance or revolution, if such action is the only reasonable option under the circumstances. (See, for example, the Preamble of the Universal Declaration; Heyns 1991:618-623; Ackermann 1991:1; Davis 1991:453.)

Human rights are normally linked with the concept of democracy. Democracy can be understood to signify the absence of oppression and it thus describes a political and legal system in which there is popular participation, as well as protection of the fundamental rights of individuals (Heyns 1991:618). It means that political power is best entrusted to the majority, but does not mean that whatever the majority does with that power is beyond criticism and must never be resisted (Hart 1963:79). A majority, or those with the physical power to rule or force their will upon others, should therefore not repress and violate the basic rights of others, because it is evil to do so, as well as foolish; it

eventually gives rise to anger, conflict and resistance. In drafting a constitutionally entrenched bill of human rights, an attempt is made to recognise, concretise and document in the legal system of a state a set of values which a society regards as so fundamental and important that not even majority decision-making can ignore or violate them.

Religious freedom is clearly a value for which many people have been prepared to challenge regimes, go to war and die. The right to a free conscience has been described as the most basic of all human rights and the most secret of all freedoms. The first reason for this view is that *religious conviction deals with people's 'ultimate concerns'* (to quote Paul Tillich), which determine the meaning of their lives, now and possibly in eternity. It is something highly personal and intimate (Sachs 1990:43; Richards 1984:771; Kearney 1991:124; *Simon Langa v Masinga* 1976 2 SA 732 (W) 740). The essence of disbelief, conversion and faith presupposes individual autonomy and voluntariness, as well as authenticity, and it often involves profound doubt, struggle and 'wrestling with God' (Gn 32:22-32). Choosing 'good' above 'evil' has meaning only when alternatives are available and the choice is relatively free. The very concept of belief thus implies freedom of choice. To oblige a person to believe, through legal coercion, what he or she does not believe, is a logical impossibility. Such coercion could of course motivate a person to pretend to believe, which is not to be confused with true faith at all.

The assumption that the essence of religion requires individual freedom of conscience may fail to recognise a number of facts: faith can be the outcome of personal conviction, but also of birth in a certain society, and therefore of parental and social pressure; some religious denominations teach their members that their doctrine represents the only and absolute true faith, and that other believers have to be converted, avoided, fought, or even destroyed. A distinction is sometimes drawn between 'absolute truth faiths' and 'conviction faiths', which adopt different attitudes towards nonbelievers, other religions and religious freedom as such (MacFarlane 1985:60-73). Absolute truth faiths do not accept all of these liberty rights. For example, they would insist on the right of other believers to renounce their conviction and adopt the absolute true faith, but refuse to accept the right of believers to renounce the absolute true faith and adopt another. Furthermore, members of absolute truth faiths will insist that the state recognise, support and protect the faith, to the exclusion of all others, and they will refuse to obey the laws of what they do not regard as a true-faith-upholding state (or they may obey such a regime mainly because they regard its existence as a test or form of punishment imposed by their supreme being). From the perspective of human rights and democracy - as explained earlier - such claims by absolute truth faiths (even if they

represent the vast majority in a society) are unacceptable, because they discriminate and violate the basic rights of individuals.

Upholding religious freedom and tolerance does not prevent believers from condemning, disassociating and preaching. To distinguish legitimate activities of this nature from harassment and intimidation - which actually impinge on a person's freedom - is not always easy. The very seriousness of a religious message often involves promises of eternal life and threats of unimaginable pain and everlasting damnation, which strongly influence free choice.

However, before reaching the cynical conclusion that the concept of a free conscience is little more than fiction, or a bourgeois delusion, and that the state could just as well impose a useful centrally planned or approved religion, secular faith, or ideology on its citizens, a second reason why freedom of belief is an important basic right needs to be mentioned. Freedom of belief is *closely related to freedom of opinion, expression and information*. These freedoms are essential for democratic decision-making. It is furthermore assumed that scientific and intellectual progress towards 'truths' is possible only if all ideas (including wrong ones) can be freely expressed and tested in the 'marketplace of ideas'. Religious groups often hold strong and influential views on virtually all facets of a society's sociopolitical life, views which have to be debated.

A third possible reason relates to the *sociological relevance of religion*. Faith is not merely a matter of an individual's conscience. People belong to religious groups with distinct characteristics and traditions, which results in them having a strong sense of identity which is often linked to culture and nationalism. The difficulty lies in distinguishing the legitimate protection of cultural rights, which is recognised by most modern human rights declarations, from unacceptable chauvinism and discrimination against others.

### 3 THE SOUTH AFRICAN SITUATION

A new South African constitution is likely to contain a bill of fundamental human rights, which will *prohibit discrimination based on religious conviction and guarantee freedom of religion* (see, e.g., articles 6(2) and 11 of the Government's Proposals on a Charter of Fundamental Rights of February 1993, and articles 1(2), 2(34) and (35) and 5(3) to 5(5) of the Preliminary Revised Version of the ANC's Draft Bill of Rights of February 1993). However, future questions have to be viewed against the background of our history and the present legal situation.

Although South Africa is often said to be 'a Christian country' because more than 70 per cent of its citizens claim to be Christians, it is not a Christian state with an official state religion. Nor is the South African legal system a religious system, although our common law has developed within the philosophical sphere of the Western Judeo-Christian tradition and is obviously deeply influenced by its notions of justice and morality.

Section 2 of the Republic of South Africa Constitution Act of 1983 proclaims that the people of South Africa acknowledge the sovereignty and guidance of 'Almighty God'. This provision amounts to a confession of faith; it does not constitute a rule of law. The Constitution also begins with a reference to the nation's 'humble submission to the Almighty God'. But in the absence of a constitutional right of the courts to review legislation or executive and administrative acts, which has been the position under our system of parliamentary sovereignty, these constitutional statements lack legal relevance. (The system which is being envisaged for the future is one of constitutionalism, in terms of which the constitution and bill of rights will be the supreme law of the land.)

In theory there has been freedom of religion in South Africa and tolerance has been claimed to exist. There are no state-established churches and the Marriage Act of 1961 provides (in section 3(1)) for the recognition of marriages conducted according to Christian, Jewish and Islamic rites and the rites of any Indian religion. Courts allow people to take the oath in a form which most clearly conveys to them the meaning of the oath, or to make an affirmation instead. The Defence Act of 1957 (sections 44, 47, 72) allowed some space for objection to military service on religious grounds.

A strong preference for Christianity in South African law is clear, however. The first 'national goal' listed in the Preamble to the 1983 Constitution is the upholding of 'Christian values and civilised norms, with recognition and protection of freedom of faith and worship'. Moreover, 'Christian national education' has been proclaimed for white children (in section 2(1)(a) of the National Education Policy Act 39 of 1967) and 'Christian education' for black children (in section 3(a) of the Education and Training Act 90 of 1979). As far as censorship is concerned, section 47(2)(b) of the Publications Act of 1974 protects 'the religious feelings or convictions of all sections of the community', but section 1 of the same Act provides that, in the application of the Act, the constant endeavour of the population of South Africa to uphold a Christian view of life shall be recognised. In spite of the neutrality of section 47(2)(b), the legislator probably intended to subject the entire censorship system to the dictates of Christian morality. The Publications Appeal Board decided not to interpret section 1 explicitly in this way and rather to assume that tolerance and the pro-

tection of all religions had been intended; however, the vast majority of the members of the Board were appointed from an Afrikaner Calvinist background, a substantial number being clergymen. Words and phrases such as 'Jesus', 'Christ' (but rarely 'God') have been cut from films on numerous occasions, and several films and publications have been banned (Van Rooyen 1987:87-98). A series of Sunday-observance laws which cover a wide range of regulative and prescriptive measures (falling within the ambit of commercial and labour law as well as regulating public entertainment and recreation) have shown the Christian bias of statutory law. Many of these laws applied to public holidays with a religious base, namely Good Friday, Ascension Day, the Day of the Vow and Christmas Day (see Van der Vyver 1986:198-200 for details). Much time has been allotted to religion in broadcasts by the SABC, but mostly or overwhelmingly to the Christian faith, especially on television.

The South African government has often interfered with the work of churches, especially when these were perceived to oppose the state's apartheid and security policies, inter alia by deporting missionaries, breaking up services and processions, and banning the Christian Institute of South Africa. Some apartheid measures, such as migrant labour and forced removals, have directly violated Christian dictates as interpreted by most denominations (Van der Vyver 1986:191-193; Kearney 1991:126-128).

#### **4 A BRIEF COMPARATIVE PERSPECTIVE**

As we emerge from our troubled history and venture into our new experience of constitutionalism, well-known and accessible judicial conclusions such as the opinions of the American Supreme Court and the German Federal Constitutional Court are likely to serve as valuable and popular sources of information.

It is significant that in the United States the guarantee of religious freedom (consisting of the 'establishment clause' and the 'non-prohibition' or 'free exercise' clause) appears in the very first Amendment (see 1 above). Like most successful constitutions, the American Bill of Rights emerged from a struggle for liberation and reflected the experiences and aspirations of its drafters. Foremost in the minds of the founding fathers must have been their rejection of a state-imposed religion, and their concerns about freedom of conscience. Thus Americans attempted to erect a 'wall of separation between church and state', in the words of Thomas Jefferson.

Numerous controversial issues dealing with religion have been argued before the Supreme Court. For example, it has been ruled that the state may not set up an official church, that individuals may not be forced to go to or stay away

from church, that no one may be punished for entertaining or professing religious beliefs or disbeliefs, that the government may not prefer one religion over another or even religion to non-religion, that the government may not participate in the affairs of religious organisations, and that such organisations may not participate in the affairs of government. In order to determine whether governmental action violates the establishment clause, it has been ruled that valid action must have a secular legislative purpose. Its principal or primary effect must be neither to advance nor to inhibit religion; it must not foster excessive government entanglement with religion; and it must not create an excessive degree of political division along religious lines. The question of whether the state's conduct amounts to an 'endorsement of religion' has recently emerged as a possible single standard. (Some examples are mentioned in 5 below. See, in general, *Abington School District v Schempp* 374 US 203 (1963), *Everson v Board of Education* 330 US 1 (1947) and *Lynch v Donnelly* 465 US 668 (1984) as well as several other cases discussed by Emanuel 1991:581f and Tribe 1988:1154f.)

The multiplicity of provisions in the more modern German Constitution contrasts sharply with simple demands of the United States Constitution. A complicated scheme of church-state relations is embraced by Germany. The meaning of the non-establishment concept in Germany differs significantly from the position in the United States. While the principle of state neutrality toward religion is recognised, churches are accorded an important role in public life, and are regarded as 'religious bodies under public law' and even have the power to levy taxes for the support of religious activities. Religious instruction in public schools is provided for. On the other hand, any compulsory disclosure of one's religious conviction or participation in a religious exercise, including the mandatory taking of a religious oath, is banned. In several opinions of the Federal Republic's Constitutional Court, various 'models' of neutrality have been developed (Kommers 1989:444f).

## 5 AN ATTEMPT AT SOME GUIDELINES

### 5.1 A general policy on the recognition, protection and support of religions

A number of options regarding the relationship between state, legal system and religion can be mentioned (Sachs 1990:46).

The possibility of a *secular state suppressing religion*, at the one extreme, will not be acceptable (in view of the prominence of religion in South Africa) and seems very unlikely, judging by the draft bills of rights and other ideas which have been put forward.

At the opposite extreme, an official *theocracy* or *state religion*, with *religious law* as the *law of the land*, seems to be equally unacceptable and unlikely. Very few modern states function in this way.

Between these extremes, the question is whether the state should (a) *tolerate religion* but be entirely *secular*, with a *rigid separation between church and state* and no overlapping or co-operation between them, or (b) *support and interact* with *one* religion, or (c) *support and interact* with *all religions*. Such support and interaction could amount either to a situation in which the state was *partly secular* and *partly religious*, with constitutionally defined power-sharing, allowing religious bodies to control some areas of law such as family law and aspects of criminal law, or to a *secular state* with *active interaction between state and religious organisations*, each with legally recognised spheres of autonomy.

It is submitted that the state should interact with all religions, more or less along the lines of the latter possibility. Thus we would have a secular state with many religions, which would be tolerated, treated on an equal basis, appreciated, and encouraged to participate in public life.

Official or *de facto* recognition of only one religion would be undemocratic and a violation of the basic rights of religious freedom and equality (as explained in 2.2 above). A rigid separation between state and religion, on the other hand, would ignore a potentially very valuable source of strength, unity and peace. The vast majority of South Africans do belong to religious groups, many of which have actively struggled against apartheid and other injustices. Religion has been part of the country's spiritual life and culture. We do not really have a history of serious religious conflict, although religion has been used by some to justify apartheid. *Nkosi Sikelel' iAfrika* is a religious anthem, with wide secular appeal. On occasions which set the constitutional negotiation process in motion, as well as at highly emotional and politicised recent funerals, prayers were said by representatives of the Christian, Jewish, Muslim and Hindu faiths, inter alia to foster reconciliation, offer consolation and promote stability. Many beneficial values of different religions overlap, and while most of these values could probably be cultivated in secular societies as well, religion can play a very prominent positive role in positively socialising the citizens of a country.

The sociopolitical role of religion and the need for positive interaction with the state has been recognised in human rights documents and religious declarations. The Preamble to the earlier mentioned Declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief of 1981 states that 'freedom of religion and belief should also contribute to the

attainment of the goals of world peace, social justice, and friendship among peoples', as well as to 'the elimination of ideologies or practices of colonialism and racial discrimination'. Article 5(4) of the ANC's Draft Bill of Rights mentions cooperation by religious organisations with the state 'with a view to furthering the objectives of this Constitution', as well as their role of 'bearing witness and commenting on the actions of the State'. The *Draft Declaration on the Rights and Responsibilities of Religious People* (WCRP-SA 1992), drawn up under the auspices of the 1992 World Conference on Religion and Peace, South Africa, repeatedly mentions the link between religion, social justice, and the promotion of tolerance, as well as interaction with the state.

To recognise, protect and practise religion because of its socio-political usefulness is not enough for many believers, who hold that the true nature of faith is sacrificed on the altar of peace and human justice. However, nothing prevents them from giving their preferred meaning and contents to the basic accommodating framework and space provided by the state, which is probably still preferable to religious conflict and a winner-takes-all solution for pluralism.

To achieve equality and fairness amid competing and even conflicting religious and other creeds, tolerance and compromise are necessary, at least as far as building a social and legal order is concerned. If all parties tried to monopolise the state for their own maximum self-interest, the country would be destined to be plunged into bitter and deadly religious warfare, examples of which abound. A useful point of departure could be to ask ourselves to what agreement we would come if we had to debate the issue *without knowing to which particular religion we belonged, or whether we were going to be religious at all*. Knowing that we could be a member of any of a number of faiths, or a nonbeliever, we would be tolerant with regard to any of the possibilities. Even atheists and agnostics would possibly prefer to have the option to believe - or not believe - rather than the latter only. This perspective of tolerance does not require the denial of one's religion, but merely that each citizen or interest group should allow space for others, in order to secure space for oneself. (This idea is based on John Rawls's 'original position' perspective on social justice, as developed in his *A Theory of Justice* (1971); see also Heyns 1985. The problem is often that people *do not act from behind* Rawls's 'veil of ignorance' when planning a future dispensation and that they know - or at least think that they know - how much power they are going to have, or whether they belong to the majority or a minority, and then act accordingly. Only a realisation that power can shift and that they cannot forever oppress others will move them towards tolerance. This boils down to conceding that power is right, which weakens the concept of justice. Hence Rawls's line of argument provides a more attractive theoretical framework, or at least a standard in terms of which the justice - or lack of it - of a particular social system could be measured.)

How could the state recognise, protect, interact with and possibly support different religions? It should, for example, protect places of worship from aggression and interference and recognise the marriages of different denominations. It could make public facilities available and provide financial support for religious activities, or allow for tax deductions on donations to religious projects, as long as these possibilities are equally open to other social organisations. Furthermore, the government could consult with religious groups on social policy.

In all of these, discrimination has to be avoided. This applies in particular to making available radio and television time, where all competing claims should be accommodated, possibly keeping popular demands in mind. Difficult as the allocation of money, facilities and broadcasting time may be, these commodities and media are still *non-exclusive* and could be distributed in a more or less just way. Some methods of promoting a religion are *exclusive* or indivisible, however, such as the national anthem and the preamble to the constitution. Here not even the dominant religion should enjoy prevalence. Such symbols either have to be entirely secular, or reflect the greatest common denominator between the different religions and nonbelievers.

## **5.2 When should religions not be supported, or even prohibited and outlawed?**

Clearly, not every notion or group claiming to be a religion could aspire to state protection and support. The teachings and other actions of the members of a group (rather than their mere beliefs) have to be scrutinised.

Article 18(3) of the United Nations' 1966 International Covenant on Civil and Political Rights provides guidelines by stating that the freedom to manifest one's religion or beliefs may be subject 'only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others'. In addition to actual or potential harm to others, questions such as how beneficial the creed as a whole is to society and to what extent a particular practice is essential or integral to a specific creed, could be taken into account. Passive conduct, such as the refusal to participate in activities considered to be 'sinful', also deserves more latitude than active attempts to bring about change, which could fall under the contents of article 18(3).

Several ways of acting against objectionable religions are available, the most obvious being to prosecute and convict the perpetrators of specific criminal acts, without affecting the religious organisation as such. (The extent to which

religious convictions may be taken into account in mitigation of punishment is debatable.) Furthermore, organisations and individuals could possibly be declared (preferably by a constitutional court) to have forfeited their fundamental rights by aiming at destroying the democratic order (more or less along the lines of article 18 of the German Constitution, which does not specifically deal with religious groups). Lastly, the state could withhold recognition and support from harmful or socially unacceptable denominations, and deny them access to public facilities.

In the South African situation racist or racially exclusivist creeds are highly relevant. For example, a religious group could deny members of other races access to its places of observance (which is foreseen by article 5(5) of the ANC's Draft Bill of Rights, which proclaims that 'no one shall be barred from entering them on grounds of race'). Office-bearers could even go so far as to preach that members of certain races are not human beings and could or should be destroyed with impunity. Two other areas of human rights law come into play here. The first is anti-racial-discrimination legislation (such as a Civil Rights Act), which is likely to be enacted in a future South Africa. Here the prohibition of racial discrimination will have to be balanced against the ideal of religious freedom. The second is freedom of expression and information.

This brings to the fore the thorny issue of censorship. Should sermons and religious publications which advocate racism - or perhaps state secession - and incite racial or ethnic strife be banned? On the other hand, should the desires of people to have their sensitive religious feelings protected against criticism or offence be accommodated by limiting the free speech of others? Meaningful answers cannot be attempted in this piece. Freedom of expression, like religious freedom, is an extremely important fundamental right which should not be curbed lightly. No rights are absolute, however, and rights will constantly have to be weighed against one another, not only by the courts, but by an active civil society and public opinion.

### 5.3 Schools

The right to free and compulsory education - at least in the elementary and fundamental stages - is recognised as a basic human right in the Universal Declaration (article 26), as well as in many state constitutions. The issue of religious instruction and school prayers is therefore not only highly controversial, but also very important. Whereas it could be argued that parents have the right to choose the kind of education which they prefer for their children, the right to education nowadays is increasingly viewed as primarily belonging to all children, with a corresponding duty on society (rather than on

parents) to make such education available. Furthermore, where school education is compulsory, a parent's decision not to send a child to school because of a religious objection amounts to a criminal offence (Van der Westhuizen 1989:113-116).

The government's draft bill of rights allows for religious instruction or exercise in schools (article 11), whereas the ANC's draft is silent about religious instruction, but states that education 'shall be directed towards the development of the human personality and a sense of personal dignity and shall aim at strengthening respect for human rights and fundamental freedoms and promoting understanding, tolerance and friendship amongst South Africans and between nations' (article 11(7)). (The contents of article 13(1) of the International Covenant on Economic, Social and Cultural Rights of 1966, and article 26 of the Universal Declaration are similar.)

In Germany today elementary and secondary public schools are confessional, interdenominational, or secular. The interdenominational school is the standard form, being a Christian-oriented school designed to serve students of all religious persuasions. Secular schools follow a wholly nonreligious curriculum, but often offer religious instruction on a voluntary basis (Kommers 1989:477-481).

In the United States religion in public schools has given rise to much controversy and litigation. The official reading of prayers, or from the Bible, in public schools has been held to be a contravention of the First Amendment, even when no child is compelled to recite the prayer (*Engel v Vitale* 370 US 421 (1962)). Also the state may not design or modify the curriculum of schools in order to further religion at the expense of nonreligion, or to promote one set of religious beliefs over others (e.g. *Epperson v Arkansas* 383 US 97 (1968)). Religious instruction on public-school premises has been disallowed, but public high schools are required to allow voluntary, student-initiated religious groups to use school facilities before and after school hours, provided that other extra-curricular groups are given similar rights. (See the Equal Access Act 20 USC 1984, *Board of Education v Mergens* 110 S Ct 2356 (1990), and Emanuel 1991:585.)

As far as public schools in South Africa are concerned, it is suggested that religious instruction should form part of the curriculum. The first question would then be which religion is to be taught, and the second how to deal with minorities or individuals who do not wish to receive such tuition. As to the first, one possibility is to base such classes on the religion to which most children (or parents) in the particular school adhere. The disadvantage of such a system

would be that people would be discouraged from moving from certain areas to others, or from sending their children to schools where they would expect to feel excluded or unwelcome. Segregation will thus be perpetuated. Another possibility seems to be to provide entirely neutral tuition, aimed at promoting understanding, appreciation and tolerance for all religions, as well as the national goals of democracy and justice. (See article 5 of the above *Draft Declaration on the Rights and Responsibilities of Religious People* (WCRP-SA 1992)). This option is attractive, but parents are likely to be dissatisfied and not to regard it as true religious instruction at all, while teachers may find it difficult to adapt, at least for the immediate future. As a temporary compromise, the German concept of interdenominational instruction could perhaps be useful, allowing instructors to teach from the basis of a particular religion, but accommodate other religions.

So far as the protection of minorities and individuals against discrimination is concerned, it is suggested that religious instruction be voluntary and that the direct or indirect victimisation of those who prefer not to participate be prohibited, as far as possible. This may be problematic, given the nature of children. It is clear that a new culture will have to be developed. It is hoped this will be enhanced by the increasing presence of children from different backgrounds in the same classrooms.

*Private schools* should be allowed to provide religious instruction and a religion-oriented education, subject to the above conditions regarding the recognition of religions (in 5.1), and provided that such education is available to all those who agree or desire to receive it, regardless of race.

As to compulsory education and the possible right to keep one's children out of school in order to educate them at home or in a private institution according to one's religious beliefs, the American case of *Wisconsin v Yoder* (406 US 205 (1972)) provides an interesting example. The Supreme Court invalidated Wisconsin's refusal to exempt 14- and 15-year-old Amish children from the requirement of attending a (secular) school until the age of 16. The effect of this decision is that, if granting an exemption will *almost* achieve these goals, the state will generally be required to grant it, even at a slight sacrifice of some objectives. In this case the harm that would follow from exemption was not regarded as sufficiently great. The court carefully scrutinised the Amish religion and way of life and in effect found that it did not impose an excessive burden on society and that the particular value in question was an integral part of the Amish way of life. Strict scrutiny has to be applied as far as exemptions are concerned, though. A mere preference for a racist or ethnocentric education should not qualify (Emanuel 1991:612-614; Tribe 1988:1176, 1183-1185, 1245-1250).

#### 5.4 Public holidays, lotteries, gambling and the economy

All religions have days of celebration and observance. A state which claims that it does not discriminate against any religion has to avoid religious bias so far as public holidays are concerned. Public holidays are extremely costly, however, inter alia because of lost labour hours. In a new South Africa different political cultures will have to be merged, taking into account the history and emotions of several sections of the community. We are likely to have enough public holidays with national or international political significance. Economically, we cannot afford to observe all days with religious meaning as national days. Apart from important days on religious calendars, various convictions and habits also have to be taken into account. Muslims may wish to attend mosque on Fridays or to pray at certain hours of the day; some Jews may refuse to travel on Saturdays; and some Christians may regard sport or cinema on Sundays as sinful. These beliefs cannot be imposed on others by the state, but also cannot be taken away from such religious people. Sanctions for disobedience clearly lie in the spiritual rather than the legal sphere and religious communities can act accordingly so far as their members are concerned (Sachs 1990:44).

Religious days should therefore not be official public holidays. However, individuals should be allowed by employers to observe such days and times, so far as this is reasonably possible; this could be achieved without giving an absolute preference to any particular religion. Religious days which have a 'secular public purpose and effect' (to use an American phrase) could be legally proclaimed as holidays. Christmas seems to be generally recognised as a day of goodwill and celebration, while those who wish to observe it as a religious day are free to do so. Laws which require businesses to be closed on Sundays do not necessarily violate equality and freedom of religion by providing a general day of rest for all citizens. (So far as American law is concerned, see *McGowan v Maryland* 366 US 420 (1961), *Thornton v Caldor Inc* 472 US 703 (1985), *Sherbert v Verner* 374 US 398 (1963) and numerous other cases, as well as Emanuel 1991:592f.)

Lotteries and gambling have a history of controversy in South Africa. The social aims of some are indeed positive. It is submitted that the legislature should interfere only when such practices are deemed to be publicly harmful or dangerous and not merely offensive to the religious feelings of some. Those who believe lotteries and games of chance to be an impious interference with the Supreme Being's right to control chance have the right not to participate, and to try to convince others to do the same, as they also have with drinking, dancing or having sex outside wedlock.

## 5.5 Other problem areas

Numerous other problematic questions concerning controversial beliefs and conflicting convictions will have to be addressed (such as the criminal law's treatment of what may be regarded as witchcraft, marriages which may violate the rights of women, conscientious objection to military service, the conviction that children should not receive medical aid or blood transfusions, polygamy and notions on abortion and euthanasia), which may conflict with other recognised human rights, or at least have a profound influence on the interpretation and implementation of a bill of rights. These are often difficult cases, and hard and fast rules are not necessarily advisable. Cases will have to be examined on their own merit, taking into account some of the norms referred to in 5.1 above.

## 6 FINALLY

If one proclaims freedom of conscience and religion, tolerance and equality, it would be presumptuous to endeavour to spell out specific solutions for all possible foreseeable problems. A long process of gaining an understanding of one another and of maturing into a democratic and human-rights frame of mind is necessary. Many of these decisions will probably be taken by future legislators, as well as by a constitutional court. However, a lively but responsible public debate and interaction between the government, the representatives of many faiths, nonbelievers and other interest groups will be necessary. A bill of rights will certainly not provide all the answers and solve all of the problems, and the courts are not necessarily the best place to settle differences or to cultivate tolerance. The constitution and the courts could provide structural and strategic avenues to safeguard democracy, but citizens have to make use of democratic processes, which include more than voting once every few years.

In Athens the apostle Paul spoke to Epicurean and Stoic philosophers at a meeting on the Areopagus. He started by stating that he had seen a monument in Athens, which was dedicated to an unknown god, and that he wanted to tell them about this god. Although Paul's message may have different meanings for different people, the openness of first-century Greek society is enviable. Perhaps the best that South Africans of many and diverse creeds can hope for, is to be free and able to pray, each to his or her own god, who may seem 'unknown' to others. Then we shall not only be just and prosperous in religious as well as secular terms, but everyone will be sincere when they sing and ask for Africa to be blessed.

## WORKS CONSULTED

- Ackermann, L 1991. Introduction in Robertson, M (ed), *Human rights for South Africans*. Cape Town: Oxford University Press.
- Anonymous 1978. Toward a constitutional definition of religion 1974. *Harvard Law Review* 91, 1056-1066.
- Buergenthal, T 1988. *International human rights in a nutshell*. St Paul, Minn: West.
- Burnstein, A 1980. *Religion, cults and the law*. Dobbs Ferry, NY: Oceana.
- Centre for Human Rights, Geneva 1988. *A compilation of international instruments*. New York: United Nations.
- Davis, D 1991. Social power and civil rights: Towards a new jurisprudence for a future South Africa. *South African Law Journal* 108, 453-475.
- De Villiers, B, Van Vuuren, D J & Wiechers, M (eds), 1992. *Human rights: Documents that paved the way*. Pretoria: HSRC Publishers.
- Dworkin, R 1977. *Taking rights seriously*. London: Duckworth.
- Emanuel, S 1991. *Constitutional law*. 9th ed. New York: Emanuel Law Outlines.
- Harris, B 1987. Religious convictions and conscientious objection. *South African Journal on Human Rights* 3, 240.
- Hart, H L A 1963. *Law, liberty and morality*. London: Oxford University Press.
- Heyns, C H 1985. A critical study of the difference principle in John Rawls's *A theory of justice*, MA dissertation, University of Pretoria.
- Heyns, C H 1991. A jurisprudential analysis of civil disobedience in South Africa. PhD thesis, University of the Witwatersrand, Johannesburg.
- Janis, M W & Kay, R S 1990. *European human rights law*. Hartford, Ct: University of Connecticut University Press.

- Kearney, P 1991. Freedom of thought, conscience and religion, in Robertson, M (ed), *Human rights for South Africans*, 123-130. Cape Town: Oxford University Press.
- Kommers, D P 1989. *The constitutional jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press.
- MacFarlane, L J 1985. *The theory and practice of human rights*. London: Maurice Temple Smith.
- Pfeffer, L 1979. *Religious freedom*. Skokie, Illinois: National Textbook Company.
- Rawls, J 1971. *A theory of justice*. Cambridge, Mass: Harvard University Press.
- Richards, D A J 1984. Conscience, human rights and the anarchist challenge to the rule of law. *Georgia Law Review* 18, 771.
- Robillard, St J A 1984. *Religion and the law*. Manchester: Manchester University Press.
- Sachs, A 1990. *Protecting human rights in a new South Africa*. Cape Town: Oxford University Press.
- Sadurski, W 1992. *Law and religion*. New York: New York University Press.
- Tribe, L H 1988. *American constitutional law*. 2nd ed. Mineola, New York: Foundation.
- Van der Vyver, J D 1986. Religion, in Joubert, W A & Scott, T J (eds), *The law of South Africa*, 176-204. Durban: Butterworth.
- Van der Westhuizen, J 1989. A post-apartheid educational system: Constitutional provisions. *Columbia Human Rights Law Review* 21, 111-138.
- Van Rooyen, J C W 1987. *Censorship in South Africa*. Cape Town: Juta.
- World Conference on Religion and Peace (SA) 1992. *Declaration on religious rights and responsibilities*. Krugersdorp: WCRP-SA (WCRP-SA 1992).

All basic international and regional human rights documents referred to are published in one or more of the following works, referred to in the list of works consulted:

- Buergenthal (1988)
- Centre for Human Rights (1988)
- De Villiers, Van Vuuren & Wiechers (1982)
- Janis & Kay (1990).

# Education and religious freedom

*G Mitchell*

In the old days the question of religious freedom was easy to answer: freedom would come with the removal of apartheid. Now that this is happening we have come to realise that the formulation of an appropriate policy for a religiously diverse society is somewhat more complicated than anticipated, and it is apparent that religious freedom in public education can mean several things, depending on whose interests are at stake.

## 1 THE FREEDOM TO EVANGELISE

Many religious people believe that evangelism is their God-given duty. Firmly convinced that their religious tradition is the correct one, believers insist that they should be free to practise this important tenet of their faith.

Mission schools established by various Christian denominations during the nineteenth century considered it their main task to convert pupils to Christianity and nurture them in the faith.

The introduction of Bantu Education marked the beginning of a systematic transference of responsibility from the churches to the state. A fundamental principle of the Christian National Education (CNE) philosophy which informed policy-makers at the time was that parent communities had the right to decide on the religious ethos of their schools. This understanding had its

origins not only as a focus for resistance to British power and culture but also in the conviction that it was the duty of parents to oversee the education of their children - a theological ideal dear to Afrikaner Calvinism (Hexham 1979).

In his speech before Parliament, introducing the Bantu Education Amendment Bill, Dr Hendrik Verwoerd sought to justify transferring control of black education from the churches to the state. Central to his argument is the contention that education at the mission schools 'undermined communal parental authority' (Union of South Africa 1953 = Hansard 1953).

He argued,

amongst the Native people themselves there is a very strong urge that the education should not be run by missions any longer. We have been pressed repeatedly by Natives and by many heads that they wish to have control over their own schools. I am not suggesting that they are all suited to take over control immediately ....

Hansard 1953:4277

In order to justify interfering in the role of the parent community of another ethnic group, Verwoerd introduced the notion of 'assistance by the guardian, the European' (Hansard 1953:3581). When the logic of his position was challenged by Dr Jonker, who pointed out that the religious tradition of the Native was 'heathen', a Nationalist MP was quick to respond, 'Are we not their guardians?' (Hansard 1953:3644). In the context of this supervision the Bantu should 'progressively take over more responsibility' (Hansard 1953:3548).

Lest any thought that taking over missionary educational institutions was anti-Christian, Verwoerd insisted that 'I believe that the Natives should be educated on the basis of Christianity right from the start' (Hansard 1953:3586).

The syllabuses for all subjects were to reflect an underlying Christian bearing. Religious Instruction classes would serve as opportunities for evangelism and nurture. The principle of respect for the religion and culture of parent communities was set aside in favour of an evangelistic vision that saw state education as a means of establishing the Kingdom of God in South Africa (Greyling 1988). In addition to the weekly class in Religious Instruction (later to be called Religious Education or Bible Education), Biblical Studies was introduced as an examination subject.

Because South Africa is divided into an array of homelands and provinces, there are a number of syllabuses for the teaching of religion in schools. Nevertheless, all share the same philosophy. They begin by stating the aim of the subject as being to prepare pupils for personal faith in Jesus Christ. The syllabus then consists of a series of theological topics accompanied by selected biblical references. The priority given to the Bible is justified by appeal to the theological doctrine of its infallibility.

Although purportedly without denominational bias, the implicit acceptance of a doctrine of *sola scriptura*, and the selection of arrangements of the favourite texts of white reformed theology make it possible to know something about the anonymous authors. For example, the Cape Education Department's *Draft Syllabus for Bible Education* describes the content for the Junior Secondary Phase in this way: 'Pupils learn the history of the various forms of God's covenant and discover how God creates and maintains his covenant in spite of Satan's attempts to tempt people to break the covenant'. Rather than a non-denominational reading of the Bible, this type of covenant theology is characteristic of Reformed theology, and particularly of white readings of the Bible. Liberation theologies are ignored and politically controversial topics avoided (Maimela 1987).

Now, on the fortieth anniversary of the introduction of Bantu Education, we can review the extent to which it has achieved what it set out to do. The notion of 'guardianship' led to an authoritarian system of education in which all the coercive machinery of the state was used to ensure that Christian National Education was a 'success'. This has shown itself not only in syllabus structure and content but also in the way in which the administration has taken place. During these forty years, driven by evangelistic fervour, a bureaucratic structure has been created which, instead of progressively allowing greater community participation, has strengthened its hold.

The rulers could justify the decision that Christianity should be the only religion taught in state schools on the basis that South Africa is a 'Christian country'. What does such a claim mean? It cannot mean that all South Africans are Christians because, according to the statistics available to the architects of Bantu Education from the 1946 census, 51 per cent were from recognised Christian churches, 8,8 per cent were 'separatists', and 40,2 per cent were categorised as 'heathen' (Greyling 1988:396). The claim to be a Christian country makes Christianity the only legitimate religion and is in effect a statement of hegemony. There is much more to this than the theological tendency within Christianity to regard itself as absolute. The notion of the superiority of Christianity over the primitive superstitions of other religions has been paral-

led by the belief that there is a hierarchy among the races. The notion of an inferior race with an inferior religion gives these Christians the right to suppress the religious practices of others. The interplay between religion and racism is starkly illustrated by the fact that the white colonisers were Christians while the darker races were Muslims, Hindus and African Traditional Religionists (Moore 1991:126-143). For these people who have experienced political and economic deprivation, the notion of South Africa as a Christian country has served to justify the denial of their civil rights.

Although the educational system was Christian, a compromise was made: for example, the 'Indian' schools in Natal had large numbers of Hindu, Muslim and Christian pupils. In 1966 a *Syllabus for right living* was introduced. It incorporated elements of the religious traditions of 'several communities' (Devan 1983:128). Practical reality and the state's interest in encouraging a unified 'Indian' ethnic identity required some modification to its ideal of a Christian educational system. Nevertheless, the experience of most South Africans from minority religious traditions was that they either sat through classes on Bible Education, or withdrew.

## 2 THE FREEDOM TO WITHDRAW

The liberal tradition in Religious Education (RE) in South Africa has, for over a century, insisted on the need for a 'conscience clause'. The most common version of the clause is that 'no scholars shall be compelled to attend religious instruction, without the consent of their parents or guardians' (De Villiers 1880:8). Similarly, no teacher can be compelled to participate in religious instruction. Despite sustained criticism of the liberal philosophy behind this policy, it has survived (Greyling 1988:251-271). It finds its most recent expression in the guidelines for teaching religion adopted by the 1992 Conference of the South African Teachers' Association. These state: 'Freedom must be given to parents to excuse their children from religious education on grounds of conscience.'

In spite of its intention to safeguard the religious liberty of the individual pupil and teacher, the process of exercising the 'conscience clause' can hardly be entirely uncoercive. During their training it is possible for teachers to withdraw from the RE class by signing a form stating their objections. This choice is recorded on their diploma certificate, and the general opinion is that this will jeopardise their employment prospects.

Adequate research on the psychological impact of the system on children remains to be done. The system is coercive, at least, since it forces the child to make a public profession of belief or unbelief. When all parents are paying school fees, equity will require that facilities should be available to all religions.

### 3 THE FREEDOM TO BE SEPARATE

A proposal for dealing with religious diversity in an equitable way is for the school to provide opportunities for representatives of the various religious communities to address their own pupils. Thus an imam could address Muslim pupils, a rabbi the Jewish, and a priest or pastor the Christian.

It could be asked why there is a need to have this kind of instruction if it is available outside school hours. Furthermore, the degree of religious diversity in South Africa makes such a proposal unmanageable. Within each community, too, there is controversy about the most accurate version of the tradition. For example, whether to have Judaism represented by an Orthodox rabbi or Christianity by a pastor from the New Apostolic Church would be a controversial decision.

In addition to the call for a parallel single-tradition approach to religion in a school, there are proposals that schools that cater for only one religion should be created, for example specifically Christian schools (Van der Linde 1992). (Whether the state would agree to fund schools that cater for sectional interests at the moment is difficult to say.)

### 4 THE FREEDOM FOR A LOCAL OPTION

The proposal to allow the parent community of a school to decide on the religion to be taught in it requires a majority decision at a properly constituted meeting.

Fundamental changes are about to take place in South Africa, and new strategies have emerged. Among white Christians there is increasing support for the notion of decentralising decisions about teaching religion in schools, and allowing for a 'local option'. Towards the end of 1991 the Department of National Education published what it called 'a discussion document', *A curriculum model for education in South Africa* (Department of National Education 1991). In an attempt to pre-empt and control the process of change it proposes that the subject be called 'Religious Studies'. However, it proceeds to

say that each community should be able to decide on the subject content for teaching religion in its local school. Religion is the only subject in the curriculum to be introduced in this way.

Earlier in 1991 there had been an anxious meeting of the Southern African Biblical Studies Society. Members had heard rumours that the Department of National Education intended to replace Bible Education with Religious Studies. The Executive of the Society had prepared a memorandum in response to the proposed changes (Southern African Biblical Studies Society 1991). It insisted that 'in a Christian society the subject Biblical Studies must remain an option'. In addition, the Executive also presented a counterproposal to changes anticipated in Bible Education/Religious Education. It proposed that religion in schools should be taught in a subject called 'Religious Life Science'. It recommended that the specific content of this formative subject should be left to the discretion of the local school: 'The subject must be concretised according to the choices of the parent community of each specific school.'

In the Charter of Fundamental Rights published by the National Party at the beginning of 1993, there is a clear statement of the local option: 'Tertiary institutions have the right to determine their own religious and general character.' Furthermore, 'The parent community of every state or state-aided school shall have the right to determine the medium of instruction and the religious and general character of the school.'

Government officials are consistent in their sudden support for local options, and minority religious groups are now allowed to have their religion taught in their neighbourhood school. For example, the September 1991 *Education Bulletin* of the House of Representatives reads: 'Notice is hereby given that the syllabi for Islamic Studies may be introduced as a local option at primary and secondary schools and that the school and the community should arrive at a decision in this regard' (House of Representatives 1991). Although this shift in policy has been welcomed by many members of the Muslim community, there are some, such as Dr Abdul Kader Tayob, who point out that 'Islamic Studies in schools is not necessarily a victory, but a calculated trade-off with conservative Christian interest groups!' (Tayob 1991).

The local-options model offers one way of dealing with religious diversity in South Africa. However, such a system would work only if geographical and religious apartheid remained intact. Even though official statistics indicate that most South Africans consider themselves to be Christians, there are significant Hindu, Muslim, Jewish and African Traditional minorities. These statistics

conceal the real extent of religious diversity in South Africa. Two recent studies illustrate that even in an 'ethnically pure' classroom, such as in the black schools of the Ciskei, there is considerable religious diversity (Kili 1988, Mxekezo 1991). The surveys indicate that, while many pupils consider themselves to be Christian, a majority continues to uphold the beliefs and rituals of African Traditional Religion. For example, in one survey of 212 high school pupils, 180 indicated belief in the Resurrection and 200 indicated belief in ancestral spirits. Obviously, most had little difficulty in reconciling the two. The boundary between Christianity and African Traditional Religion is blurred and often nonexistent.

The claim in the Constitution that South Africa is a Christian country functions as much more than a demographic observation; it legitimises the use of the coercive power of the state to privilege not only one religion, but a European version of that religion.

Because there is such a strong tradition of partnership between state power and religious hegemony, those who sense power slipping from their control fear that they will have done to them what they did to others.

## 5 THE FREEDOM FROM COERCION

Withdrawing religion entirely from the school offers the simplest solution to the problem of teaching religion in a multi-religious classroom. Proposals along these lines have a long history in South Africa. In 1880 a government commission on education, chaired by the Chief Justice of the Cape Colony, Sir John Henry de Villiers, tabled its report (De Villiers 1880:5-6). It notes with approval that in undenominational schools no Religious Instruction takes place during school hours. In mission schools religion is taught by voluntary teachers and there is the provision that 'no scholars shall be compelled to attend for religious instruction, without the consent of their parents or guardians'. This freedom did not operate in denominational schools. The commission therefore recommended:

Considering the great variety of sects, Christian and non-Christian, to be found in the Colony, and the fact that we are aiming at a national system of education, we are of the opinion that the same conscience clause should apply to all institutions receiving aid from the Government.

(De Villiers 1880:6)

It proceeds:

We do not, of course, wish to discourage the noble and charitable efforts of Christian churches and missionary societies to reclaim a portion of the population from heathenism and from corrupt forms of religion; but we must assert our emphatic opinion, based upon the experience of this as well as of other countries, that no system of national education can serve the purposes for which it is intended, unless all attempts at proselytizing are excluded from the schools. We would therefore recommend for adoption, in this Colony, a conscience clause similar to that which has been found so useful and effectual, in a country which would certainly not err on the side of irreligion - we mean Scotland.

(De Villiers 1880:6)

In the list of proposals at the end of the document, the report goes as far as it possibly can to prevent religious coercion by insisting that any religious observance or instruction take place only on the peripheries of the school time-table, either at the beginning or at the conclusion (De Villiers 1880:21).

While such solutions may solve some of the problems of coercion, it would be difficult to justify on educational grounds the exclusion of the subject, considering that religion plays such a crucial role in human affairs. A pupil's education cannot be regarded as complete without a study of religion.

A multi-tradition approach might be appropriate in a religiously diverse society. Once it is appreciated that a public school has different aims from those of a religious institution, it is possible to teach more than one tradition.

Rather than reproducing models drawn from the past, opinion-makers are increasingly in favour of a system that entrenches in its structures the democratic rights of all its citizens. Therefore Archbishop Desmond Tutu (1992) can call for the removal of the notion of a 'Christian country' from the constitution. He argues that not only does such intimate association with the state bring a religion into disrepute, as has been the case in South Africa's recent history, but any claim to a privileged role would amount to a betrayal of all those from various religious traditions who have joined hands in resisting the tyranny of apartheid and its religious paraphernalia.

In June 1992 the University of Cape Town's Institute for Comparative Religion in South Africa (ICRSA) published *Religion in public education: Policy Options for a New South Africa*. It examines various models for teaching religion in a religiously diverse society, and comes to the conclusion that a multi-tradition approach best suits democratic ideals. In order to safeguard civil rights, freedom from coercion and discrimination must be guaranteed. The religious traditions of all South Africans, which include all the major traditions of the world, can be dealt with in the classroom. The aim would be to introduce pupils to the various traditions. Instead of providing a forum for the propagation of a religion, the system offers information about religion. In this way educational goals are met by making it possible to study a very important component of human life.

The distinction between the roles of the religious institution and the state has been fundamental to the understanding of Religion Education in the United States. The Constitution's First Amendment states that the Congress shall 'make no law respecting an establishment of religion or prohibiting the free exercise thereof'. In a series of cases, the Supreme court developed a general policy for the role of religion in public education. Religion needs to be taught in such a way that there is no place for coercion or discrimination. The state may not, through public education, promote any form of religion; however, schools may teach religion as an academic subject. Rather than serving religious goals, Religion Education can serve the genuinely educational goal of making information available.

The publication of the report on policy options has been followed by considerable debate. While many welcome the possibility of a significant change of direction, some insist that there is something theologically unsound about the programme. They have come to accept that Christian evangelism practised by teachers is desirable and should be retained. Where there is such a failure to recognise that there are ways of studying religion in schools other than the catechetical, then a multi-faith programme would appear to present a new kind of theology which is based on the notion of a universal religion. Furthermore, past experience has taught that the religion of those in power tends to be imposed on all groups in society through public education. As a result, for those who are living with an impending loss of political power, the future appears frightening. They are therefore trying to shift the decision about religion in schools away from a central government to the local communities.

In reality, however, public figures who are likely to shape the next government of South Africa are very aware of the need to have a system of education which unites all South Africans. In the annual ICRSA lecture Professor Albie Sachs

supported the introduction of a multi-tradition syllabus for Religious Education, (Sachs 1993). Because he comes from a minority community and has lost a limb in a bomb explosion triggered by agents of the Christian state, the audience could have expected a degree of anger from him directed towards a theological tradition which has underpinned state practice. Instead, there was a call for a system of education that would promote understanding of all the religious communities, including those that previously supported the status quo. Professor Sachs insists that Religious Education should be implemented in such a way that no-one feels alienated and that 'comfort' is provided during the transition to a new South Africa.

## CONCLUDING REMARKS

It would seem that two of the options offer a greater degree of religious freedom: separate religious schools, or schools offering a non-coercive, multi-traditional approach. Because of the way in which differences have been used to separate people in the past, there will probably be little sympathy for the former. Educationists who consider themselves to be progressive generally reject the 'local option' as an example of 'curricular separate development'. They argue that we should be aiming at a common national identity instead of fostering difference. Parallels with CNE are unavoidable, and others find a shiver running up their spines at the thought of some philosophy rising to power and dominating the rest. Although the multi-tradition option suffers from the practical problem of finding teachers with the training or inclination to present the subject in a non-sectorian way, it does offer a means of dealing with the issues of unity and diversity in such a way that the religious freedom of pupils is respected.

## WORKS CONSULTED

- Department of National Education 1991. *A curriculum model for education in South Africa*. Pretoria: Unisa.
- Devan, P I 1983. Right living in Indian education, in Malan, J and Van den Berg, O (eds) *Religious education in a changing society*, 124-130. Bellville: University of the Western Cape.
- De Villiers, J H 1880. *Cape of Good Hope: Report of the commission appointed to inquire into and report upon the working of the Education Acts in force in this colony, 1879-1880*. Cape Town: Saul Solomon.

- Greyling, J A 1988. The place of education in a comprehensive missionary approach with special reference to religious education in Black schools in South Africa. DD thesis, University of Pretoria.
- Hexham, I 1979. Religious conviction or political tool? The problem of Christian National Education. *Journal of Theology for Southern Africa* 26, 13-23.
- House of Representatives 1991. *Education Bulletin: Department of Education and Culture* 26, 1.
- Institute for Comparative Religion in Southern Africa 1992. *Religion in public education: Policy options for a New South Africa*. Cape Town: The Institute.
- Kili, N 1988. A critical/comparative study of biblical studies and religious education syllabi in Ciskei secondary schools with special reference to teacher training in these subjects. MEd thesis, University of Fort Hare.
- Maimela, S 1987. What the churches want and expect from religious education in schools. *Journal of black theology in South Africa* 1, 43-49.
- Moore, B 1991. Racism, religion and religion education, *Religion education: Issues and methods in curriculum design*, 126-143. Underdale: University of South Australia.
- Mxekezo, A 1991. Religious education in Ciskeian secondary schools at the cross-roads: A critical/comparative analysis of the present situation and suggestions for future considerations. MEd thesis, University of Fort Hare.
- Sachs, A 1993. *Religion, education and constitutional law*. Cape Town: ICRSA.
- Southern African Biblical Studies Society 1991. Minutes of the Tenth Annual Meeting of the Southern African Biblical Studies Society held on 24 May 1991 in Pretoria.
- Tayob, A 1991. Islamic education in schools: Is it a long-awaited boon?, *Al-Qalam* 17:8, 7.

Tutu, D 1992. *The secular state and religion: Archbishop Naidoo memorial lecture, July 1992*. Cape Town: Salesian Press.

Union of South Africa 1953. *Debates of the House of Assembly, 24th Aug-2nd Oct 1953, Hansard 83*. Cape Town: Parliamentary Printers.

Van der Linde, H J 1992. Christelike onderwys in die nuwe Suid-Afrika: Lesse vanuit Noord-Amerika. *Roeping en Riglyne* 40(4), 1, 2, 13-14.