



UNIVERSITY OF <sup>TM</sup>  
**KWAZULU-NATAL**

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**INYUVESI  
YAKWAZULU-NATALI**

**SCHOOL OF RELIGION, PHILOSOPHY AND CLASSICS**

**THE INFLUENCE OF CHRISTIAN VALUES IN POST-1996 SOUTH  
AFRICA: A PHILOSOPHICAL PERSPECTIVE**

**Student's Name: Isaac Mutelo  
Student's Number: 215081289**

**Submitted in partial fulfillment of the requirements for the degree of  
Master of Arts in Philosophy, in the School of Religion, Philosophy and  
Classics, College of Humanities, University of KwaZulu-Natal,  
Pietermaritzburg Campus.**

**Supervisor: Dr Heidi Matisonn**

**March 2017**

## **ACKNOWLEDGEMENTS**

### **"In the name of God, the Most Gracious, the Most Merciful"**

My special and heartfelt gratitude goes to my supervisor Dr Heidi Matisonn, under whose supervision this dissertation has been completed. I am humbled by her professional guidance and substantial suggestions during the course of this study. I highly appreciate her efforts in carrying me through to the end. My deepest gratitude goes to my late father, Mr Andrew Mutelo, in whose memory I dedicate this research work. I equally owe my deepest gratitude to my mother, Mrs Catharine Mulenga for her unwavering support and prayers in my life. Thanks also goes to my brothers: Andrew, Joseph, Paul, Peter and John; and to my beloved sisters: Elizabeth, Jane and Faustina and to all my nephews and nieces. Their prayers, support and encouragements can never be underrated.

Special thanks is credited to Marion Jordaan ("Mum") for her untiring editorial contribution to this work and ongoing support in my academic endeavours. Thanks also goes to Fr Martin Badenhorst, Prior at Emaphethelweni Dominican Priory where I am resident; Fr Damazio Ngoma, my Regents of Studies; Fr Thomas Chuma, my student master; Sr Sue Rakoszy, my Spiritual Director and all Dominican brothers at Emaphethelweni Dominican Priory (Fr Clement Mweni, Fr Walter Kawisi, Fr Joseph Falkiner, Nana Amponsah, Kelvin Banda, Evans Zulu, Wilbroad Mulenga, Moses Chanda, Ernest Mwape, Guide Marambanyika and Edward Murambwa) for their ongoing spiritual, academic and emotional support. Finally, my profound gratitude goes to Bro Philip Denis, Bro Godfrey Chikaura and Bro Lindelwa Ndlamini who contributed to the completion of this work through insightful discussions and support.

## DECLARATION – PLAGIARISM

I, **Isaac Mutelo**, declare that:

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Isaac Mutelo

Student Name

3 March 2017

Date

Heidi Matisonn

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## **ABSTRACT**

One of the many attractions of South Africa post-1996 is its apparent ability to allow the coexistence of both religious and non-religious values in society. Among the many religions in South Africa, Christianity has always held a prominent position. In both the past and the present, the influence of Christianity politically, socially and morally has been significant. This study focuses on the influence of Christian values post-1996. A critical examination of the post-1996 interplay between religious freedom and other non-religious rights and freedoms shows that certain Christian values have given rise to a predicament in which there is a clash of rights. The clash of rights arises from the fact that certain rights and democratic values are infringed upon by some Christian values in society. This indicates that the role of Christian values in society and how far such values can be permitted in society remains unclear.

The study seeks to track – and unpack – the above predicament or clash of rights with reference to the writings of selected key thinkers and three judgements of the Constitutional Court relating to the problem. The predicament and the unclear position of Christian values partly caused by a conflict of religious and non-religious rights in South Africa is the impetus for this research and the contribution it seeks to make. In that regard, the study will explore and critically analyse the possibility of overcoming the predicament or conflict of rights arising from the influence of certain Christian values in South Africa post-1996. By exploring three Constitutional Court cases which will be used as case studies and the views of key thinkers on this study area, an interpretation of religious freedom and what it entails will be reached.

I will discuss and analyse what I consider to be the three strategies being used in contemporary scholarship and legal systems to deal with the predicament. Although the reconciling or balancing of conflicting rights is evident from current scholarly discussions and judicial decisions, the notion of exemption is also considered. Further, the concept of an objective appeal to public reason which this study considers as being primarily based on the three democratic values of equality, human dignity and freedom will be emphasised. The centrality of this notion, which this study considers as central in transcending the stipulated predicament or conflict of rights, needs emphasis due to the fact that public reason precedes the values of a particular religious institution as Lenta rightly upholds. From this perspective, this study will stress that only those Christian values which are not contrary to democratic values and do not infringe upon the rights of others ought to be permitted to influence society.

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## INTRODUCTION

Christian values often play a significant role in the public sphere. In the context of this study, “the public sphere” refers to South African society in terms of both the law regulating the general public and its citizens who do not directly belong to a particular Christian institution or organisation. This involves the ability of Christian values to influence the enactment and application of public policies and morals instituted by legal systems, especially in terms of how the secular law should be constructed.<sup>1</sup> Further, “public sphere” also denotes the extent to which citizens who are not Christian, or by extension, who do not belong to any religion are influenced by certain Christian values.<sup>2</sup>

Christian values are regarded as primary principles that guide and regulate a good Christian living. Christian values are not only part of believers’ identity as Christians, they are also linked to Divine law which is often perceived as obligatory. Since Christian values are based on beliefs and doctrines, they are considered categorical and authoritative. For example, the prohibition of same-sex marriages is often perceived as a central Christian value based on the emphasis to safeguard marriage between a male and a female. Given that almost eighty percent<sup>3</sup> of the South African population claim to be Christian, the place of Christian values in the enactment and application of public policy and in generally applying laws cannot be underestimated.

In South Africa, some Christian institutions have been attempting to influence society with their values. The word “influence” in this study refers to the ability of Christian institutions<sup>4</sup> to approve or disapprove certain issues of public policy and moral order in society. Such an influence is based on religious values which are regarded as central by Christians. In pre-1990 apartheid South Africa, Christian values influenced society and the political system in one way or the other. The State justified the apartheid system using Christian values from the perspective of pro-apartheid churches such as the *Nederduitse Gereformeerde Kerk* (NGK) which had secured a close relationship with the state, acting as an established church of the

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<sup>1</sup> This is reflected in *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19 / [1 SA 524 [2006].

<sup>2</sup> This is reflected in *Christian Education South Africa V Minister of Education*, [2000 (4) SA 757 (CC)] and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* (CCT223/14) [2015] ZACC 35) / [2015] ZACC 35.

<sup>3</sup> SouthAfrica.info, 2015. *South Africa's Population*. [Online webpage]. Available from <[http://www.southafrica.info/about/people/population.htm#.WByGO\\_197Dd](http://www.southafrica.info/about/people/population.htm#.WByGO_197Dd)>. [Assessed 2 October 2016].

<sup>4</sup> Christian institutions are church-based organisations formed for a certain cause. In the context of this study, the notion of Christian institutions will apply to Christian organisations that will be mentioned when dealing with the Constitutional Court cases in the second chapter such as the Marriage Alliance of South Africa and Christian Education South Africa.



Nationalist Party government. Similarly, struggle fighters and liberation movements used certain anti-apartheid Christian institutions such as the South African Council of Churches (SACC) to oppose the apartheid system. During the period of transition between 1990 and 1995, Christian institutions actively facilitated the process of reconciliation and political negotiations.

In South Africa's post-1996 democratic context, the Constitution as the highest law clearly stipulates different rights and freedoms which citizens possess and which ought to be respected. One of the rights which is clearly stipulated by the Constitution is the "right to freedom of religion" spelt out under Section 14 (1) and substantiated by other constitutional stipulations such as Sections 15(2), 30(1) and 15(3) concerning religious belief and observance. The constitutional rights and freedoms linked to religion have been used by some Christian institutions to foster Christian values in society. In that sense, it is through the constitutional guarantees of religious freedom that some Christian institutions have been attempting to influence society with Christian values. In the process, other constitutionally protected rights and democratic values may be violated. How to reconcile the Constitutional rights regarding religious freedom of belief and observance through which some Christian institutions influence society with their values and other rights which are violated in the process is a daunting and complex issue.

How can one reconcile the place of Christian values and their influence in society based on the constitutionally protected "right to freedom of religion" on the one hand and the infringement of other rights which such an influence cause? Alternatively, in what way can one understand and transcend the predicament or conflict of rights arising from the influence of certain Christian values in society in South Africa post-1996 context? This stated predicament indicates that the rights concerning freedom of religion which uphold religious liberty and how far it may influence society needs to be examined. The second chapter of this study explore three Constitutional Court cases as case studies where the influence of certain Christian values seems to have affected negatively other rights and the democratic values of equality, human dignity and freedom. The cases to be explored in the second chapter are *Christian Education South Africa V Minister of Education*,<sup>5</sup> *Minister of Home Affairs and Another v Fourie and*

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<sup>5</sup> [2000 (4) SA 757 (CC)].

*Another*,<sup>6</sup> and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*.<sup>7</sup>

The three Constitutional Court cases will clearly demonstrate the already affirmed conflict of rights arising from the influence of certain Christian values in South Africa post-1996. The Constitutional Court's construing of religious freedom and the views of key thinkers such as Pienaar, Lenta, Mofokeng, du Plessis, Van Der Schyff and van der Vyver will be central to this study. Both internal and external aspects of religious freedom will be explored in the third chapter. While the internal aspect of religious freedom concerns one's liberty to adopt or to adhere to certain religious values or beliefs, the external aspect of religious freedom concerns the application of such beliefs or values through practice or observance. Given that the external aspect of religious freedom sometimes affects other rights of third parties in society, this study will assert that this aspect is limited or that it ought to be limited.

With regard to the approaches for transcending the predicament arising from the influence of certain Christian values in society, three strategies will be identified and explored. Firstly, there have been attempts to reconcile the concerned Christian values with non-religious rights and freedoms that are infringed. Through the "proportionality principle", one may balance differing conflicting rights especially in cases where this can be done without any rights being violated. Secondly, the possibility of granting an exemption can be considered. Thirdly, the notion of public reason is central. Through what will be dubbed "justifiable exemption", the possibility of granting an allowance to certain Christian institutions to influence society with their values might be viable. Such a possibility might not be feasible in cases where such an influence infringes upon other constitutionally guaranteed rights. The three strategies will be analysed in accord with Constitutional Court sentiments regarding religious freedom and the views and arguments of the affirmed leading thinkers in this study.

The fourth chapter will firstly give an overview of what has been discussed in the previous chapters. Having given such preliminary considerations, the chapter will offer my personal perspective of how the predicament or conflict of rights can be transcended, based on what has been explored from the Constitutional Court cases, key thinkers and the constitutional guarantees of the "right to freedom of religion". The chapter will affirm that the influence of Christian values that do not threaten or violate other rights and democratic values should be

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<sup>6</sup> (CCT 60/04) [2005] ZACC 19) / [1 SA 524 [2006]

<sup>7</sup> (CCT223/14) [2015] ZACC 35) / [2015] ZACC 35

permitted to exist in society. In contrast, the chapter will firmly uphold that Christian values that impinge upon other constitutionally conceded rights and democratic values should be curtailed. This position is in line with John Stuart Mill's Harm Principle and what I consider as justifiable toleration of Christian values in society.

## CHAPTER ONE

### 1. A Brief Historical Background (1948-1995), Constitutional Basis for Religious Freedom and The State–Religion Relations

#### **1.1 Introduction**

Historically, Christian values have played a central role in the enactment of public policy and development in the public and political sphere. Between 1948 and 1990, the apartheid years, Christian institutions were key players in both supporting and opposing apartheid. On the one hand, through pro-apartheid Christian institutions and churches such as the *Nederduitse Gereformeerde Kerk* (NGK), the apartheid system was upheld and safeguarded – indeed, to the extent of providing theological or biblical justifications for the apartheid system. On the other hand, Christian institutions such as the South African Council of Churches (SACC) became essential to the anti-apartheid movement by supporting political organisations or liberation movements and organising various politically motivated protests and campaigns against the Nationalist government and its political regime. During the period of transition (1990-1995), the role of Christianity shifted, and its influence in the public sphere was based on its advocacy of values such as justice, reconciliation and its moral principles.

In post-1996 South Africa, the position of Christian values and religion in general in the public sphere has been somewhat clarified by the Constitution. After 1996 a radical change occurred in the South African political context, in that there has been a clearer separation of religion (its values) and the state. The enactment of the South African Constitution brought great clarification not only to the role of religion in the political sphere and democratisation process of South Africa society but also in terms of its relations to the state. Sections 14(1), 15(2), 30(1) and 15(3) of the South African Constitution clearly grant religious freedom to all religions in South Africa. South Africa also acknowledges the plurality of religious institutions, which entails that it does not favour a particular religion or religious group, thereby enabling one to call it a “religious-neutral state” rather than a liberal or secular state. In its relations with religious institutions, the state does not have a “wall of separation”, but rather collaborates with religious institutions on issues of public policy, legislation and democratisation processes. Such a non-rigid religion-state relationship allows Christian institutions to participate in the political sphere and influence society with its values.

Further, the Constitution gives certain political rights to religious institutions in South Africa, although it does not stipulate clearly how far religious values can go in the issues of public policy and the process of democratisation. The approval of the South African Charter of Religious Rights and Freedoms which to a greater extent clarifies what is meant by “freedom of religion” and the role of religious institutions in South Africa is a promising move in solving this predicament. South Africa acknowledges a diversity of views among its people and upholds the right of all individuals through the principles of equality and freedom. However, the state can censor such freedom to make it conform to the rule of law and prevent it from infringing upon the rights of others. Certain sections of the Constitution such as the limitation clause (Section 36) and the constitutional right against unfair discrimination are vital in creating certain boundaries for religious freedom.

## **1.2 The Influence of Christian Values (1948-1995): A Brief Historical Background**

### **1.2.1 The Political Structure (1948-1990)**

The political structure of the period between 1948 and 1990 is characterised as the apartheid era. The apartheid political system reached its climax when the National Party in 1948 took power from the United Party. Serfontein (1982:7) observes that the National Party’s “triumph was based on two crucial issues: apartheid and an emotional appeal to Afrikaner nationalism with its implied call to Afrikaner political unity.” The National Party government legalised most segregated policies and laws which had been endorsed but loosely implemented by the United Party government. The apartheid political structure was based on a number of well-attested policies and laws which held the system together. By 1960’s, the term ‘apartheid’ had acquired a negative connotation and the National Party government tried to discard it though its policies and basic structure remained intact.

According to Denoon (1987:69), the National Party government claimed that apartheid had disappeared by 1968, and that only the policy of separate development which advocated the creation of “independent homelands” or “national-states” which divided different ethnic groups existed. The National Party established ten homelands known as *Bantustans* as a basis of the apartheid system which fostered ethnic groupings. For example, according to the official apartheid policy, these *Bantustans* or national states were “based on the principle of ‘diversity’, ‘ethnicity’ and the ‘right of self-determination’ of each separate group ‘to control its own affairs’” (Serfontein 1982:7). However, the strict application of the concept of separate

development fostered the birth of separate homelands and policies concerning influx control, pass laws, separate educational institutions, censoring of mixed marriages and so forth.

### **1.2.2 The *Nederduitse Gereformeerde Kerk* and the State (1948-1990)**

The State justified the apartheid system using Christian values from the perspective of the *Nederduitse Gereformeerde Kerk* (NGK), having been a pro-apartheid church institution itself. In this case, the influence of certain Christian values through the NGK was central in safeguarding the apartheid political system and its principles. Nscokovane (1989:39) highlights that “for the *Nederduitse Gereformeerde Kerk*, the election victory of the Nationalist Party in 1948 – meant monitoring of the implementation of the general principles of separation with regards to its approach to race relations.” The NGK gave a theological foundation to the apartheid political structure by supporting most policies and laws of the apartheid system.

Soon after the National Party won the 1948 election, Die Kerkbode, the main newspaper of the Afrikaner-speaking churches, noted: “as a Church we have always worked purposefully for the separation of the races. In this regards apartheid can rightfully be called a church policy” (Villa-Vicencio 1983:59). Similarly, a document produced in 1948 by the Transvaal Synod of the NGK stated that “Scripture posed the unity of humanity. Yet Scripture also recorded and presupposed the division of humanity in races and nations as a deed of God” (Kinghorn 1990:64). In the apartheid era, the aspirations of the Nationalist Party government and the religious values of the NGK which safeguarded them biblically could not be separated since the link between the two was based on its close relationship to the Afrikaner culture and the rise into power of the Afrikaner nation.<sup>8</sup>

From 1948, the NGK highly influenced the policy making process of the Nationalist Party government with its values. For example, policies such as the 1949 Mixed Marriage Act and the 1950 Group Areas Act which the NGK had promulgated under the Federal Mission Council of the NGK were immediately transferred into legislation.<sup>9</sup> Implicitly, the Christian values of the NGK were used as a tool used by the state to justify its political agendas in theological

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<sup>8</sup> Corrado, E 2013. *The Godliness of Apartheid Planning: The legitimizing role of the Dutch Reformed Church*. [Online webpage]. Available from < <https://www.ideals.illinois.edu/bitstream/handle/2142/45241/Corrado%20Final%20Capstone.pdf?sequence=3>>. [Assessed 2 May 2016].

<sup>9</sup> Mscokovane, C 1989. *Demons of Apartheid: A Moral and Ethical Analysis of the NGK, NP and Broederbond's Justification of Apatheid*. Braamfontein: Skotaville Publishers, pp 39.

terms. Serfontein (1982:71) highlights the position of the NGK with regards to government political structure:

Virtually blind support of the government in all its policies and actions; blind support for apartheid political principles, apart from minor criticisms of details of application; a golden rule that nothing must be said or done to “embarrass” or “confront” the government; the maintenance of special liaison machinery and committees through which the NGK, without any fuss and publicity, could be in contact with the government or government departments.

Further, the official position of the NGK on race, human relations and other social and political issues highly affected the apartheid government – how the NGK interpreted scripture and its ecclesiastical formulations became central to the future of the South African political dispensation. According to Nsokovane (1989:46), “in 1950 a Dutch Reformed Church conference held in Bloemfontein concluded that the only permanent solution to the racial situation in South Africa was ‘total separation’ (i.e. Apartheid) of white and black.” This policy was based on the religious idea that since all nations and peoples are equal, they are to be given opportunities to prosper in their own nationhood and cultural identities as desired by God.

Such a theoretical justification by the NGK made the apartheid political structure positive; that is, it was perceived as justifiable to let people of different races and ethnicities govern themselves and live in separate areas. For instance, while affirming “the theology of humanity as equal because of separation,” the NGK 1950 Synod noted that “the Church accepts the existence on earth, of nations and races as separate entities through God’s providence” (Kinghorn 1990:66). The centrality of NGK’s religious values and ethos in apartheid South Africa can also be realized through the politicians of the Nationalist Party who continued to refer to Christian principles and ethos, especially given that the “Constitution of the Republic, promulgated in 1961, described South Africa as a Christian nation” (Norman 1981:114).

How did the NGK understand and interpret scripture so that it may promulgate the apartheid policies? How did such Christian values influence the public sphere? The understanding of the NGK on race was clearly stated in its synodical documents<sup>10</sup> adopted by its General Councils following the rise to power of the Nationalist Party government in 1948. While the NGK supported the need for unity and diversity among human beings, it is “firmly grounded in the framework of apartheid and provides a Scriptural basis for apartheid and white domination”

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<sup>10</sup> The *Human Relations in South Africa* was issued in 1966 while the *South African Scene in the Light of Scripture* was issued in 1974 by the NGK.

(Villa-Vicencio 1983:63). In this case, the NGK saw its role as making sure that diversity through separate development did not promote injustices.

The NGK seemed to hold a dilemma: “first of all, the DRC [NGK] rejects racial injustice and discrimination in principle. Equally clearly, the DRC [NGK] accepts the policy of separate development” (Gruchy 1986:73). The contradiction here depended on the fact that the apartheid system and the policy of separate development seemed inseparable. How could the NGK deny the apartheid policy while at the same time accept the concept of separate development which was the basis for racial prejudice, discrimination and social injustices? Although the NGK supported the apartheid policy of separate development, it nevertheless emphasised that this policy should not be used to marginalize or oppress others such as blacks as this would be against God’s will (Kinghorn 1990:62). They hoped for an impossible outcome that the idea of separate development would be applied in accordance with the biblical principles of love and justice.

The 1974 General Council of the NGK somewhat shows that its results were politically motivated because it clearly forced the NGK to support the division of people which was based on the preservation of the Afrikaner culture and identity as is apparent in its separate churches – the fulcrum of the apartheid system. One might question whether the policy of separate development which the NGK supported in principle was practically applied according to the Christian principles of righteousness and justice in an honourable manner without violating human dignity. The difficulty arises because the notion of separate development was the basis of the apartheid policy – it was awkward for the NGK to uphold separate development and at the same time claim to be against racism.

Towards the end of the 1970s, the NGK began slowly acquiring a revisionist position regarding its political stance. A number of NGK theologians and ministers began contradicting the Christian values that were being used to justify the apartheid system. For example, according to Nsokovane (1989:39), Keet maintained that “common to all arguments, (i.e. biblical arguments for racialism in the NGK), is the false assumption that diversity is synonymous with separation.” Gradually, many changes within the church doctrine which highlighted a faint but growing opposition of the NGK to the Nationalist Party began to be evident. For example, the *South African History Online* (2011) uphold that “in 1986 the church showed its repentance by preaching for all members of all racial groups to pray under one umbrella, thus making South African history by welcoming Black people back in the church.”



### **1.2.3 The South African Council of Churches and the State (1948-1990)**

The influence of Christian values in the post-1996 democratic South Africa can be traced from the place of religion in the pre-1996 period. In the apartheid era, struggle fighters and liberation movements used certain anti-apartheid Christian institutions such as the South African Council of Churches (SACC) to oppose the apartheid system. In this case, Christian values played a central role in bringing an end to the apartheid political dispensation. As Hay (1998:38) articulates, “the rights of blacks were gradually being eroded, and the major Christian churches saw their role as trustees over black people”. This led to the creation of the Christian Council of South Africa (CCSA) in 1934 which later in 1968 became the South African Council of Churches (SACC).<sup>11</sup> Some freedom fighters and leaders of liberation movements used the SACC and its member churches as a means of exposure by mobilising people in both urban and rural areas, especially among black workers. Consequently, some leaders of the liberation movements increasingly became either part of anti-apartheid churches or they were directly supported by most of these churches.

The SACC took bold steps in the fight against apartheid and its policies especially from 1948. According to de Gruchy (1986:98), soon after the Nationalist Party came into power, Bishop Hennemann issued a pastoral letter in 1948 stating:

In recent years it (i.e., segregation) has reappeared in the guise and under the name of “apartheid”. A beginning has already been made to put into practice this noxious, unchristian and destructive policy...To make matters worse, all this is done in the name of Christian civilisation.

As de Gruchy points out, from 1948 the conferences, synods and documents on the racial crisis from the SACC upheld its stance against the policy of separate development and many other laws linked to it which held apartheid together. The SACC described the apartheid political structure as being contrary to Christian principles and values. As Norman (1981:101) highlights, “the race issue moved the churches into political opposition to the National Party government after 1948.” In the 1960s, member organisations of the SACC continued to demonstrate their faith within their own contexts by associating themselves with various political and liberation organisations as their contribution in assisting the political struggle.

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<sup>11</sup> The South African Council of Churches (SACC) is a Christian ecumenical body with various member churches and other associate organisations and movements.

The member churches of the SACC at the Cottesloe Conference unanimously agreed that all churches based on the generally agreed Christian principles and values were encouraged to fight against racism by rejecting all discrimination which promulgated social injustice and oppression through dividing people (Hay 1998:41). This entailed that the churches had a role of countering the state where political and social injustices occurred. Alongside liberation movements and freedom fighters, the Cottesloe Conference made it clear that the Christian faith demands justice and equality before the law, and that the Christian faith renounces the discrimination of racial groups on church grounds. This ecumenical council highlighted that the task of the church is not only to confront unjustified political structures but also to “help to direct national movements towards just and worthy ends” (Villa-Vicencio 1983:150). This was followed by an analysis of many government amendments and policies which the Cottesloe Conference considered unjust and contrary to the Christian principles and values.

Although in the 1960s and 1970s the SACC encountered the government’s resentment and repressive actions due to its anti-apartheid sentiments arising from Christian values, it continued to emerge as a forceful adversary of the government as it increasingly gained a political self-identity. For example, in 1968, the SACC issued a bold statement “addressed to Christians and in terms of Christian scriptures and Christian tradition denounced apartheid as a sin” (Cook 1990:174). The 1980s marked a period when the SACC moved into the centre of the political arena and became highly politicized. According to Hudson-Allison (2000:187), “the SACC found itself in an increasingly repressive state apparatus in the 1980s that political context, combined with its adherence to an alternative theological tradition, moved the SACC to challenge the state.”

From the perspective of the SACC, apartheid was a heresy<sup>12</sup> and inconsistent with Christian values and had to be opposed: if necessary through civil defiance. For example, when a new Constitution was promulgated in 1983, the SACC took an active stance alongside anti-apartheid political organisations by taking a front role in criticizing its policies. The SACC encouraged its member churches to advise their congregants to refrain from involvement in systems, agencies or organisations which justified or promoted the apartheid political structure. In 1983, the SACC took a bold step by joining the United Democratic Front (UDF)<sup>13</sup>, a step which brought it closer to tensions with the government (Borer 1999:55). In 1985, a conference

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<sup>12</sup> In Christian theology, the word heresy refers to an erroneous teaching or ideology.

<sup>13</sup> The United Democratic Front was an important non-racial coalition and anti-apartheid organisation created in 1983 with direct relations to liberation movements and political organisations such as ANC.

held by the SACC reaffirmed the need for the church to embark on a more forceful resistance and campaign of civil disobedience against the political structure. The conference also discussed the need for the member churches to call for “disinvestment and similar economic pressures” so as to “break the power of an oppressive and unjust system and thereby bring it to its knees” (Nash 1985:57). This meant that member churches of the SACC would not invest in organisations or institutions which supported apartheid, and that would call for economic sanctions on the government.

In the mid-1980’s, the churches saw a worsening political situation in South Africa instead of reform and change. The churches thus began calling for the removal of the apartheid government, more or less in line with the political and liberation movements of the mid-1980s. As Borer (1998:61) highlights, “the document<sup>14</sup> had serious implications for church/state relations because it requested Christians to cease praying for the Government and instead to pray against it, that is, for its removal.” Towards the end of 1985, leaders of the SACC held a consultation meeting in Harare organised by the World Council of Churches to assess the South African political situation. At the consultation conference, leaders of trade unions and political organisations were also invited and given opportunities to engage in the deliberations and make contributions.

According to *ICT News*<sup>15</sup> (1986:3), the conference affirmed that “apartheid can in no way be reformed; we therefore reject categorically all proposals for modification of apartheid...churches inside and outside South Africa to support movements working for the liberation of their country.” In September 1985, a group of Christian theologians predominantly consisting of representatives from the SACC and other organisations<sup>16</sup> produced the *Kairos Document* which “provoked varied reactions – from qualified support to outright condemnation” (Hay 1998:45). The *Kairos Document* did not only stir internal and international attention, but also encouraged the churches to be more critical and courageous in the fight for political liberation – the document called the government a “tyranny” and “illegitimate” and declared that its reformation or conversion was impossible (Borer 1998:61). The document was followed by strong statements from the SACC in the same year calling for the end of the apartheid system.

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<sup>14</sup> The [unnamed] document was issued by the South African Council of Churches at a conference in 1985.

<sup>15</sup> *ICT News*, 1986. March, 3. Johannesburg: ICT Achieves.

<sup>16</sup> The *Kairos Document* was produced by members of the black consciousness movement, the Christian Theological Institute and prominent Christian theologians such as Albert Nolan.

Since most leaders of liberation movements and other freedom fighters had been imprisoned or detained, “the South African Council of Churches took a place of leadership in the resistance, causing the security forces to bomb its offices. Black clergy<sup>17</sup> became important figures within the struggle” (Daye 2004:31). Thus, although the SACC realised the danger and risks involved in using church buildings as gathering places for liberation and resistance movements, it nevertheless allowed the move so as to be one with such struggle movements and freedom fighters.<sup>18</sup> In 1987, another conference under the World Council of Churches was organised in Lusaka, Zambia which was attended by the SACC. The conference created an atmosphere where the churches and leaders of liberation and resistance movements could dialogue about the political crisis in South Africa primarily based on Christian principles and values.

Apart from declaring the South African apartheid government illegitimate, the SACC through the 1987 Lusaka Conference also highlighted its strong support and allegiance to the ANC and other liberation movements and freedom fighters. This means that the member churches of the SACC in South Africa opted to join forces with resistance movements, rather than only allowing them to use church facilities for politically motivated gatherings where possible.

Although the 1987 Lusaka Conference did not support the use of violence as the quoted statement indicates, it desperately reaffirmed its full backing and support for the urgent need of political liberation of South Africa. After the Conference, the SACC undertook a central role in the political struggle and began to critically analyse the legitimacy of the state and its apartheid policies. It articulated its disapproval of certain policies such as the Education Act, Group Areas Act and the Population Registration Act. At this point, the SACC had acquired a central position in the political struggle which made it increasingly politicised and its values politically influential in opposing apartheid which was largely due to the churches’ involvement in liberation and resistance movements.

In 1988, when the Nationalist Party government announced the banning of the UDF and other anti-apartheid organisations, the church felt the urgency of confronting the political situation (Gruchy 1986:125). Soon after the bannings, the SACC organised a meeting to discuss the matter. According to Borer (1998:71), this meeting released a firm statement by declaring that:

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<sup>17</sup> Desmond Tutu and Allan Boesak were among the most vocal Christian leaders in the political struggle.

<sup>18</sup> SACBC *Commission for Justice and Peace*, 1986. “Use of Church Buildings and Facilities”, Plenary Session Report, pp 1-2, photocopy.

The ban on the activities of the 17 organisations is a blow directed at the heart of the Church's mission in South Africa, because the banned organisations are organisations for our people, the majority of which belong to our church.

As Chikane (1988:2-4) puts it, the SACC concluded that "if the State wants to act against the Church of God in this country for proclaiming the Gospel, then so be it". Furthermore, the SACC created the 'Standing for the Truth Campaign' with the aim of persuading and forcing the state to abolish certain apartheid policies and enter into negotiations which would lead to the creation of a democratic Constitution and nation (Chikane 1988:2-4). Thus, anti-apartheid churches used various means such as sermons, church news networks, pastoral letters and so forth to oppose apartheid policies. 1989 was marked by the churches becoming more vigorously engaged in nonviolent resistance against apartheid. For example, the SACC was an active actor of "the Mass Democratic Movement's Defiance Campaign on August 2, 1989, a struggle directed at the upcoming September elections for the tricameral parliament" (Hudson-Allison 2000:200). This action united the anti-apartheid churches with secular liberation movements and organisations in the call for political freedom.

According to the *Institute of Contextual Theology* (1989:10), in reaffirming its involvement in the Defiance Campaign, the SACC stated that "the role of the Church is to create peace. But on the road to negotiation, reconciliation and peace, it will be necessary to confront, pressurise and defy". In September the same year, SACC leaders organised pacifist demonstrations which were also accompanied by leaders of various liberation movements and opposition parties. A few months after campaigns in the form of marches and protests in which Christian institutions affiliated to the SACC were fully involved, the many bannings were cancelled and most political activists including Nelson Mandela were released from prison.

#### **1.2.4 The Influence of Christian Values in the Transition Period (1990 – 1995)**

By 1990, the churches began moving away from their 1980s political standing when they perpetuated civil disobedience and identified themselves with liberation movements and freedom fighters. The period between 1990 and 1995 was a complex time of revision and transition in terms of the role of Christian values in the changing political scene. Hay (1998:47) highlights that:

With the unbanning of the liberation movements...the return of leaders from exile, the churches stepped back from the symbolic leadership positions they had assumed under the period of severe repression of the mid-to-late 1980's.

The position of the church prior to 1990 had been affected by the political crisis which had brought the church and its values to the centre stage of the political arena. The place of the SACC in the political realm during the period of transition was determined by both the reforms within the Christian contexts and the changing political milieu. By 1990, the NGK had reconciled with the SACC in highlighting that the apartheid was contrary to Christian values. As the *Southern African Catholic Bishops' Conference* (2016) clearly highlights, “since February 1990, priority is given to conflict resolution, education, democracy and development.” Thus, the year 1990 was marked by the emergence of violence and negotiations, a context where the church played a role of mediation in the changing political dispensation.

Borer (1998:173) highlights that leaders of the SACC “expended their full energy on trying to keep political opponents talking with each other, while at the same time desperately trying to stem the rising tide of violence”. This means that Christian institutions such as the SACC had to acquire a new identity as mediators of political negotiation and deliberations. Although the SACC would increasingly perceive itself as a facilitator of the political negotiations, by 1990, it was also cautious of the negotiations which would soon be underway. The SACC vowed to support and spearhead negotiations which would lead to Christian values such as justice and equality for all.

In the changing political context, Christian institutions such as the SACC saw their role as not only educating the people about the changes in the political sphere, but also as being supportive and mediators of ongoing political negotiations. In 1991, the SACC also participated in campaigns regarding the unbanning of various apartheid laws and policies and the call for the return of political expatriates (Macozoma 1990:10). Subsequently, both the SACC and SACBC became part of the newly created National Coordination Committee for Repatriation (NCCR), whose affiliation involved political organisations such as AZAPO, ANC and PAC. According to Borer (1998:177), “the NCCR marked the first time that these church organisations worked directly with liberation movements...close to 6, 000 exiles were assisted in their return by the NCCR.”

Although negotiations had been initiated in 1990, by 1991 they were disturbed by disagreements and violent confrontations between the government and liberation movements. In such a situation, the SACC spearheaded meetings and negotiations between the ANC and the government and also among the three opposition parties; namely, AZAPO, ANC and

PAC.<sup>19</sup> In the same year, leaders of the SACC met with President de Klerk to submit a statement consisting of measures that would help facilitate dialogue and curb the escalating political unrest. Borer (1998:259) quotes Lamola who highlights that some of the proposals that were presented include “a speedy installation of an interim government; joint control of security forces, the apprehension by the police of all perpetrators of violence, an international monitoring force, disclosure of all past covert operations.”

In 1992, the SACC continued to play a mediation role in maintaining both secretive and public discussions and negotiations mainly between the government and other political organisations or movements. Following escalating protests and violent attacks, the government’s lack of interest in peaceful negotiations, and the unsuccessful attempts of Christian institutions to lessen violence, the SACC affirmed its support for mass protests<sup>20</sup>. At the same time, the SACC tried to seek outside help. Chikane (1993:8) affirms:

In 1992, the SACC and SACBC worked with their international partners, the World Council of Churches and the Pontifical Council for Justice and Peace, to bring in international violence monitors through EMPSA’s international coordinating office at the WCC in Geneva.

By 1992, leaders of the SACC realised that peaceful confrontations with the government were by large ineffective and unproductive. According to the *SACC National Conference Resolution Report* (1992), the May 1992 Church Leaders Meeting in a document entitled “A Call to Build a New South Africa” stated that the “minority and illegitimate government had a premeditated strategy of undermining the influence and effectiveness of the liberation movement and their leadership by orchestrating violence”<sup>21</sup>. As the SACC entered 1993, it continued to play its mediation role while being aware of the changes and reforms occurring within political and religious contexts. As the process of democratisation was broadening and negotiations were becoming more forceful, the 1993 SACC National Conference affirmed the new role of Christian values or ethos in the political world.

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<sup>19</sup> Chikane, F 1992. *Report of the General Secretary to the National Executive Committee, February*. Johannesburg: SACC Archives. pp2

<sup>20</sup> The SACC stated that “we believe that mass action has been necessitated by the deadlock occasioned by the Government’s unwillingness to accept genuine democratic processes to take their course”. *Cf.*, SACC National Conference Resolutions, 1992. *Resolution 2*. Johannesburg: SACC Achieves.

<sup>21</sup> *A Call to Build a New South Africa* document also stated that the government “therefore manipulates the political playing field by creating an adverse climate for the holding of free and fair elections which are to lead to the establishment of a democratic South Africa”.

## **1.3 The Constitution: Basis for the Influence of Christian Values**

### **1.3.1 Constitutional Guarantees of Religious Rights**

The 1996 South African Constitution explicitly upholds various fundamental human rights. As the cornerstone of democracy, the Constitution secures fundamental rights which demonstrate the state's neutrality to individuals and institutions, both religious and non-religious. The explicit articulations of various rights and freedoms are contained in the Bill of Rights. Section 7(1) of the Constitution defines the Bill of Rights as "a cornerstone of democracy in South Africa" since "it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Section 7(2) of the Constitution mandates the state to "respect, protect, promote and fulfil the rights in the Bill of Rights." From these general stipulations, the Constitution, through the Bill of Rights, highlights many essential human rights.

Section 9(1) of the Constitution states that "everyone is equal before the law and has the right to equal protection and benefit of the law". This is further clarified by Section 9(3) which prohibits unfair discrimination based on grounds such as religion. From this perspective, the primary consideration in understanding the basis for the influence of Christian values in post-apartheid South Africa can be traced to the respect for religious freedom as affirmed in the 1996 South African Constitution. Du Plessis (2010:17) rightly argues:

The South African law on state and religion is embodied in the Constitution of the Republic of South Africa, 1996, as prime source; in the common law knowable from (and developed through) case law; in legislation, and in administrative/policy directives.

Although the quote highlights the centrality of the Constitution in regulating the guarantees of religious rights and those of the state, it also underlines the necessity for ongoing development of the law of the land through legislation due to the various complex particular cases which might arise. As Oliver (2002:531) affirms, although the context and content of the rights related to religion are "recognised by the Constitutional Court", they must nevertheless "be understood against the backdrop of the constitutional negotiation process". From this perspective, the influence of Christian values in the public sphere does not only rely on the constitutional provisions but also on the statutory rulings and interpretations of the Constitutional Court which become central to the relations between the state and religious institutions.

Although the jurisprudence of the Constitutional Court is vital in the highlighted process, the Constitution especially through the Bill of Rights is central in defining constitutional



guarantees of the rights related to religion through which some institutions seek to influence the state with certain Christian values. The South African Constitution highlights a number of rights related to religion. Section 14 (1) firmly states that “every person shall have the right to freedom of conscience, religion, thought, belief and opinion” (Rautenbach 1995:108). Section 14(1) of the South African Constitution clearly positions religion on an equal footing with other rights such as freedom of thought and opinion. This is in line with the Universal Declaration of Human Rights which puts together and treats equally the freedom and rights of religion, conscience and thought. As cited by Koshy (1992:22), the Universal Declaration of Human Rights states:

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 a community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

From this perspective, it is apparent that the Constitution upholds religious liberty. The highlighted constitutional ‘right to freedom of religion’ is clarified by other sections of the Bill of Rights. In this case, Sections 15(2), 30(1) and 15(3) can be considered. Firstly, Section 15(2) allows for the free exercise of religious observances at “state or state-aided schools”<sup>22</sup> provided that such adherences conform to the stipulations made by the relevant public authorities, that they are exercised “on an equitable basis”<sup>23</sup> and that “attendance at them is free and voluntary”<sup>24</sup>. From this outlook, it is apparent that Christian institutions may advocate Christian values in educational settings as long as the three constitutional provisions are met. For example, Section 15(2) grants a right to schools run by Christian institutions to impart certain Christian values and a Christian ethos.

Secondly, Section 15(3)(a) recognises marriages conducted under a system of personal or religious law or “adhered by persons professing a particular religion”. Under this provision, marriages conducted by Christian institutions are recognised by the state. With regards to religious practices, Section 31(1) guarantees Christian institutions the right to freely practice and maintain their beliefs or convictions. Section 31(1) explicitly states:

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

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<sup>22</sup> Section 15(2)(a) of the South African Constitution.

<sup>23</sup> *Ibid.*, 15(2)(b).

<sup>24</sup> *Ibid.*, 15(2)(c).

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

Thirdly, the rights relating to religion in South Africa may also be traced to the Constitution's prohibition of unfair discrimination and segregation based on religious belief and conviction. Section 9(1) of the South African Constitution on "Equality" affirms that "everyone is equal before the law and has the right to equal protection and benefit of the law" and Section 9(3) elucidates this regulation or legislation by affirming that "the state may not unfairly discriminate directly or indirectly anyone on one or more grounds, including ...religion, conscience, belief". Although this point reaffirms religious freedom which is clarified in Section 14(1), it also upholds the fact that religion is seen as other organisations in the political or public sphere and may not be segregated or marginalised by the state.

Finally, rights related to religion can also be traced through the political rights highlighted in the South African Constitution which generally affirm that all citizens, groups or religious institutions are free to participate in the public and political sphere. Section 19(1) on 'Political Rights' which highlights that all citizens have freedom to political participation and choice gives a hint on the position of Christian values in the democratic South Africa. Section 19(1) of the South African Constitution stipulates:

(1) Every citizen is free to make political choices, which includes the right to – (a) form a political party; (b) participate in the activities of, or recruit members for, a political party; and (c) campaign for a political party or cause.

The fact that the Constitution grants such political rights to every citizen implies that Christian institutions may participate in the political activities of the state and even challenge the state according to the guiding principles of the Constitution. Clearly, Section 19 of the South African Constitution allows for all citizens to participate and exercise their political rights without being discriminated against or ignored. In this case, Christian institutions can form a political party and support particular political organisations based on Christian values. Concerning the interaction between the state and religious institutions, Dlamini (2003:160) argues that although the South African Constitution portrays the state as democratic, it also permits the "free interaction between the state and religious organisations" in political and other public matters.

The rights and freedoms related to religion do not only uphold general respect for certain Christian values in the public sphere, they also have to be acknowledged as relevant and appealing. From this perspective, the Constitution grants Christian institutions freedom to

participate in the public or political sphere without marginalising the influence of religious values on the basis of religion. Although the Constitution highlights the various freedoms and rights related to religion or religious institutions, it does not clarify the boundaries or parameters of the influence of Christian values in the public sphere. The South African Charter of Religious Rights and Freedoms (SACRRF) is an attempt to offer this clarity.

### **1.3.2 South African Charter of Religious Rights and Freedoms (SACRRF)**

It is important to reiterate that Sections 14(1), 15(2), 30(1) and 15(3) of the Bill of Rights make provision for religious freedom although they do not clarify what this freedom exactly entails. As Coertzen (2008:365) highlights, “the Constitution does not clearly identify in detail what freedom of religion implies. It is the task of religions in South Africa to identify the religious rights that they claim”. From this perspective, religious institutions through a Charter of Rights known as the South African Charter of Religious Rights and Freedoms (SACRRF) seek to clarify not only the identity but also the influence of religious values in the new post-1996 political dispensation, based on the rights stipulated by the Constitution.

To clarify what religious freedom means and the role of religion and its values in the democratic South Africa, the SACRRF was drawn up after the enactment and approval of the South African Constitution in 1996. Although the SACRRF has not yet been approved, religious institutions in South Africa hope that this Charter will be approved by Parliament. The drawing up of this Charter is in line with Section 234 of the South African Constitution on the ‘Charters of Rights’ which states that “in order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution”.

The SACRRF is a legal Charter or document enacted by South African religious institutions and organisations to try and define rights and freedom of various religions and faith-based organisations in South Africa. It highlights in a more elaborate way the relationship between the state and religion, and the responsibilities that religious institutions have in the general public. Since the South African Constitution does not say much about religion (such as Christian institutions) and its position or role in South Africa especially in the public arena, the Charter has been used to clarify this predicament. As Coertzen (2014:129) puts it, “the Charter is also a very useful tool for religions to determine their own identity in terms of the rights and freedoms that they can legitimately claim”.

The SACRRF attempts to define the meaning of “freedom of religion” as expressed in the South African Constitution, and some of the definite responsibilities and rights linked to such freedom. The Charter clearly emphasises the separation between the state and religion, and the autonomy or self-determination of religious values which the latter ought to enjoy without the unnecessary intervention of the state especially in terms of the judicial system. For example, Section 9(2) of the South African Charter of Religious Rights and Freedoms states that “every religious institution is recognised and protected as an institution that has authority over its own affairs” and Section 9(4) states that “the confidentiality of the internal affairs and communications of a religious institution must be respected”.

The assertion clearly indicates that religion is somehow independent in all its dealings, and that the state cannot unnecessarily intervene to silence it or regulate its general participation by unfairly limiting the influence of its values. As van der Vyver (2012:151) observes, the South African Charter of Religious Rights and Freedoms “guarantees the right to self-determination of religious communities”. The Charter also deals with the rights which religion in general is entitled to possess in the political and public sphere. For example, Section 6 states that “every person has the right to freedom of expression in respect of religion” which is clarified by Section 6(1) which affirms that “every person has the right (a) to make public statements and participate in public debate on religious grounds”. The Charter anticipates that the “freedom of religion” advocated in the South African Constitution also entails that religious institutions can actually participate in the political sphere without being unfairly ridiculed or marginalised.

Therefore, the “right to freedom of expression in respect of religion” affirmed by the Charter entail that religious institutions can actively participate and engage in the political arena as a separate institution. In 2012, The Council for the Protection and Promotion of Religious Rights and Freedoms in South Africa submitted the SACRRF to the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Freedoms for official recognition and passing in Parliament. The passing into law of the SACRRF means that freedom of religion and the rights entailed therein will be protected by the legal system of South Africa. Should the Charter be approved by Parliament, the place of religion in South Africa will be clearer than it is in the Constitution at present, though the consequences of its acceptance might be a subject of debate.

### 1.3.3 The Meaning of Religious Freedom

Despite the explicit Constitutional stipulations of religious rights in Sections 14(1), 15(2), 15(3), and 30(1), a question arises. What does freedom of religion really mean? An attempt to define religious freedom requires first and foremost defining religious autonomy. This is because the right to freedom of religion is primarily based on the principle of religious autonomy. For Van der Schyff (2003:512), “freedom of religious autonomy refers to aspects of the relationship between the state and religion, as well as other institutional aspects of religion, such as the regulation of own affairs and doctrine, religious dignity”. Religious autonomy goes as far as giving religious institutions the internal aspect of religious liberty. This entails the right to regulate their beliefs and doctrines which are within the spectrum or domain of a particular religious organisation or institution.

From the highlighted perspective and based on Section 31(1) of the Bill of Rights, Christian institutions in South Africa have the right to regulation of beliefs and doctrines in their own circles. Further, religious autonomy in this case suggests that individuals or groups are given the opportunity and the means to choose freely the belief or worldview to which they wish to adhere and the space in which to apply or practice it. In line with this, Kumalo (2013:636) points out that South Africa “observes the fact that its citizens are religious and allows them to practice their religions freely in public spaces without placing any limitations or biases on any particular religion”.

Reading the Constitution from the affirmed perspective with regard to religious autonomy does not give religious institutions the right to influence the general public with their values. Such a difficulty highlights the need to define religious freedom beyond the notion of religious autonomy. Thinkers such as Meyerson and Coertzen define religious freedom in terms of the Bill of Rights<sup>25</sup>. Coertzen (2011:11) follows Blei in arguing that “religious freedom means more than just having a religion and upholding inner convictions and feelings” because it “includes the right of everybody to express his or her religion and faith in worship, teaching, practice, and maintenance.” Christian institutions are free to practice their religious values in both private and public spheres.

Further, Christian institutions can influence society with religious values by either engaging actively with issues of public policy or enforcing their values within their religious institutions.

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<sup>25</sup> Coertzen follows Blei who perceive freedom of religion in line with the *Universal Declaration of Human Rights* (1948).

Based on the Constitutional right to freedom of religion, the state grants Christian values protection given to other non-religious rights. Wherever the question of “the right to freedom of religion” arises, one may question how far the influence of certain Christian values can penetrate the public sphere based on the concept of religious freedom. This affirms the relevance of the Constitutional limitations for religious freedom.

### **1.3.4 Constitutional Limitations for Religious Freedom or Rights**

The Constitutional stipulations concerning various fundamental human rights which includes those relating to religion can be examined and reinterpreted in accordance with the limitation clause (Section 36) which stipulates:

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

According to the limitation clause, the relevant factors include “the nature of the right” and the significance of the purpose of the constraint together with its nature, extent and the link between such a constraint or limitation and its purpose.<sup>26</sup> The practical application of the limitation clause has been at the centre of some Constitutional Court cases where the Court had to decide how far certain Christian values can go in the public sphere. With regard to the right of freedom of religion and the practice of religious values, Section 31(2) states that such rights “...may not be exercised in a manner inconsistent with any provision of the Bill of Rights.” From the perspective of the limitation clause and Section 31(2) of the Constitution, it seems apparent that religious freedom is not absolute but that it has to be exercised in accordance with other Constitutional rights and freedoms.

With regard to the place of religion, and particularly that of Christian institutions in South Africa’s public sphere, the Constitution does not clarify how far Christian values may enter the political arena. The fact that religious freedom in the Constitution of South Africa is treated as one of many rights means that it is not absolute in the public sphere. As Peron (2003:3) puts it, South Africa provides “a political ideal where individuals are free to pursue their own goals in their own ways provided they do not infringe on the equal liberty of others”. As a democratic state, South Africa reaffirms a framework where a diversity of ideas and convictions flourish. Amidst such diversity, the limitation clause provides a form of control or balance of various

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<sup>26</sup> Section 36(1)(a), (b), (c) and (d) of the Constitution of South Africa

fundamental rights. Therefore, the South African Constitution presents the “government as the guardian and provider of general welfare empowered to act on its own discretionary authority in the pursuit of the common good” (Gray 1995:77).

Accordingly, internal religious liberty involves the freedom to practice and regulate religious beliefs and convictions as long as they do not conflict with the general law or infringe on the rights of others. For that reason, the participation of Christian institutions in the public sphere through the influence of its values has to be perceived as being in line with the Constitution, so that its contribution lies within the rule of law. As Peron (2003:3) puts it, a democratic state provides “a political ideal where individuals are free to pursue their own goals in their own ways provided they do not infringe on the equal liberty of others.” Such an understanding of freedom of religion is often understood in the context of “freedom under the law” so that “individuals should enjoy the maximum possible liberty consistent with a like liberty for all” (Heywood 2007:46).

## **1.4 Religion and the State**

### **1.4.1 The State and Christian Institutions: Relations**

The fact that the separation between state and religion in South Africa can be generally described as flexible is appealing since this “doctrine of the separation of church and state has undergone, and is undergoing, constant modification” (Kasomo & Napoo 2013:15). Thus, it is somewhat challenging to affirm the definite relationship between the state and the Christian institutions in South Africa, a relationship which might somehow highlight the boundaries regarding the influence of certain Christian values in the public sphere. In that way, van Wyk (2005:670) observes that:

the relationship between the church and the state cannot be determined and formulated only once and conclusively. This relationship varies and changes in tandem with social and political changes.

The position of van Wyk reaffirms the complexity of the state-religion relationship in South Africa post-1996. Given that the separation between religious institutions and the state is not straightforward in post-1996 South Africa, determining how far Christian values can influence the public sphere is equally not clear. As Coertzen (2008:262) stresses, although “in 1994 (1996) South Africa got a Constitution which guaranteed freedom of religion”, it “does not clearly identify in detail what freedom of religion implies”. The position of the South African

Constitution which has already been clearly highlighted provokes the question of the separation of Christian institutions and State which is not clearly elaborated from a constitutional perspective. Following Kumalo (2013:633), a closer look at the Constitution and the rulings of the Constitutional Court indicates that the South African context does not follow a strict separation between religion and the state although “the two institutions (church and government)” have “to maintain their relative autonomies from each other”.

Similarly, the Constitution does not have an established religion whereby one religion is officially sanctioned. Since South Africa has no state or established religion or religious sect, the situation where Christian institutions or any other religious institution controls the state by regulating certain laws and government policies is avoided. Similarly, the case where the state dictates religious institutions by controlling religious practices, monitoring the contribution of religious institutions in the public arena and repressing its dealings and internal communication is not Constitutionally tolerated. According to the *Catholic Parliamentary Liaison Office* (2005:4), South Africa in the post-apartheid era has adopted the model of “separation with interaction” which entails that “there is no wall of separation between religious groups and the state; interaction is encouraged, as is the input of religious groups into the formation of public policy”. This openness is the basis of the religion-state relations and a reaffirmation of a possible influence of Christian values in the public sphere.

Furthermore, although the Constitution makes it clear that South Africa is a democratic state, it does consider and respect freedom of expression from religious groups whose inputs cannot be ignored. Thus, Piper (2009:68) sees the South African situation as an “institutional context that accommodates organised religion alongside the state” which gives room for the “constructive role that organised religion or faith-based organisations can play in liberal and democratic contexts”. The flexible collaboration which defines the relationship between the South African state and certain Christian institutions<sup>27</sup> is apparent.

Tayob (2015:126) plausibly contends “that South Africans should stay clear of both a religious state and a highly secularized state that keeps religion and state in strict separation”. There is no “wall of separation” between the state and religion in South Africa because Christian institutions are allowed to both practice their beliefs and regulate religious matters and also to participate in the public arena where religious input is acknowledged in the formation of the

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<sup>27</sup> The state and religious institutions such as South African Council of Churches in South Africa often collaborate in certain issues of public policy.



legal policies and laws<sup>28</sup>. The separation of religion, and particularly Christian institutions, and state in South Africa also means that although Christianity is officially separated from the state and its dealings or regulations of the public law or policy, certain Christian values have an influence in the law-making processes or in the application of such laws. This has been the case in South Africa where Christian institutions such as the SACC have been able to engage with the state, thereby influencing the state and society with religious values. In line with this, the *Catholic Parliamentary Liaison Office* (2005:8) highlights:

The writers of the 1996 Constitution...did not want to impede the ability of religion to influence the public sphere in a positive way. The model of separation (to break up the unhealthy alliance between one form of religion and the state) with interaction (to allow religious groups to participate in the reconstruction process) is thus well-suited to the South African context.

Therefore, with reference to Sections 8 and 19, the South African Constitution shows that religion, and in this case, Christian institutions have a special role to play in the public sphere through their values. The role of Christian values in the public sphere is based on the fact that although Christian institutions are separated from the state, they are nevertheless free to participate and make inputs in the public sphere. This conforms to Kuperus (2011:284) who argues that “South Africa churches today interact with a democratic state that respects religious pluralism rather than an authoritarian state that upholds Christian nationalism”.

#### **1.4.2 State Liberality and Pluralism of Religions in South Africa**

Being a democratic state, South Africa holds certain liberal values or principles. The word liberal comes from the Latin word *liber* which literally means ‘to be free’. Liberalism is a political worldview based on the idea of maximizing freedom for individuals, groups or institutions (Heywood 2007:46). From this perspective, the sort of freedom entailed by the concept of liberalism affirms the idea that individuals (or groups) are given the opportunity and the means to choose freely the belief, worldview or conviction to which they wish to adhere and the space in which to apply or practice it. South Africa as a liberal state reaffirms a framework where a diversity of ideas and convictions flourishes. The notion of a liberal or democratic state presents the “government as the guardian and provider of general welfare empowered to act on its own discretionary authority in the pursuit of the common good” (Gray 1995:77).

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<sup>28</sup> Sections 15(2), 30(1) and 15(3) of the South African Constitution.

The fact that the South African Constitution protects the rights of all citizens with respect to diversity in cultures, opinions, religions, beliefs, values and practices is worth emphasising. According to Section 2 of the South African Constitution, the “Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. In line with Section 2, van der Vyver (2008:345) argues:

The South African Constitution indeed instructs the state to ‘respect, protect and fulfil the rights in the Bill of Rights’, including the provisions proclaiming ‘freedom of conscience, religion, thought, belief and opinion’.

The South African Constitution also affirms the principle of equality which further puts certain Christian values on par with other civil organisations in the political arena. Equality demands that the state treats all worldviews justly and with fairness. For example, the fact that people might have different cultural, traditional, secular or religious opinions in South Africa does not give the state permission to treat a particular group or worldview unfairly or differently. This adheres to the idea of equal freedom or liberty which seems to balance the values of equality and diversity whilst safeguarding the autonomy of Christian institutions and their values in South Africa’s public sphere.

Essential values such as freedom and equality which the South African Constitution upholds form principles of a neutral state. According to Jones (1989:9), “a neutral state is one that deals impartially with its citizens and which remains neutral on the issue of what sort of lives they should lead”. From the perspective of state neutrality, Smith (2000:61) recognizes ‘religious equality’ and ‘religious pluralism’ as the two principles which grounds religious freedom in the Constitution. Under the current standing of the South African Constitution, neutrality among different worldviews both religious and non-religious entails the equality of the influence of such views in the public sphere. Van Wyk (2005:674) asserts that “in our pluralistic society the authorities can no longer be expected to transform into legislation the likes and dislikes of a particular religion”.

Due to the central place of religion generally in South Africa, some thinkers argue that South Africa can best be described as a religiously neutral state as evidenced by the Constitutional religious provisions. For example, Kumalo (2013:636) affirms that “South Africa is not just a religious country simply because the majority of the people allege to belong to some religion, but even the Constitution of the country declares it to be a religiously neutral state”. This means that the South African state advocates the pluralization of religion and a compliant religion-

state relation<sup>29</sup>. The concept of pluralism of religions and its relation to the state is well-captured by Piper (2007:71) when he writes:

Today the Constitution affirms all religions and not only one; the state does not promote religious purposes through law and policy; it does not restrict freedom of religion; and no religious body has any special constitutional standing.

In line with Piper, van der Vyver (2007:108) argues that “South Africa is not a secular state but can perhaps best be depicted as a religiously neutral state. That is to say, religion is not a political taboo”. As a religiously neutral state, South Africa does not practice bias or discrimination by preferring one religion over the other, but all religions are respected and given equal voice in the public sphere<sup>30</sup>. From this perspective, the state does not also unfairly discriminate against the influence or role of religious values in both private and public spheres.

## **1.5 Conclusion**

This chapter served as the background to the study. The chapter firstly gave a brief overview of the role of two Christian institutions or church organisations between 1948 and 1995. This served as a historical background to the role of Christian values in post-1996 South Africa. The chapter maintained that while the NGK justified the apartheid political dispensation theologically based on Christian values, other Christian institutions such as the SACC affirmed otherwise. The chapter also explored in detail the Constitutional basis for religious freedom and other related rights. The Constitutional stipulations of the “right to freedom of religion” and other provisions concerning this right are the basis for the influence of Christian values in society. From the above perspective, the chapter affirmed that religious freedom is guaranteed by the Constitution just as any other rights and freedoms in the post-1996 democratic context – legally both the freedom to hold or adopt a particular belief and to practice such a belief is protected. The chapter maintained that the Constitution does not articulate the boundaries of the exercise of religious freedom in society. In this regard, the approval of the South African Charter of Religious Rights and Freedoms (SACRRF) will be helpful in clarifying this right.

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<sup>29</sup> Koegelenberg, A R 2006. “ACreative Church-State Development Partnership,” in Burns, A T (ed). *Your Servant, for Jesus’ Sake: Essays in Honour of Bishop Kevin Dowling*. Merrivale: Redemptoris Pastoral Publications. pp 5.

<sup>30</sup> Christian holidays still appear on the national calendar; Christian prayers are sometimes recited in public and state-aided schools, and the mention of the word “God” on affidavits at police stations show how South Africa can be seen as a religiously neutral state rather than a liberal state.

However, the limitation clause (Section 36) and Section 31(2) of the Constitution is useful in discussing the meaning of freedom of religion constitutionally.

The final part of this chapter dealt with the relations between the state and Christian institutions in the post-1996 context. The fact that the South African model does not favour a “wall of separation” in state-religion relations was affirmed as being in line with the Constitution. By implication, this means that although Christian institutions function autonomously from the state and the state’s dealings, their influence in society cannot be ignored or underrated. However, since South Africa is a democratic state, the chapter maintained that it upholds the principles of state liberality and pluralism. This necessitates that through democratic values such as equality and freedom, the state does not only respect all worldviews, but also that all worldviews whether religious or not are considered with equal significance as long as they conform to the Constitutional spirit. The chapter demonstrated that the Constitutional basis for religious freedom, the state–religion relations and the pre-1996 context are the background to the research topic and the building block upon which this study is based.

## CHAPTER 2

### 2. The Constitutional Court's Reading of Religious Freedom: Three Case Studies

#### **2.1 Introduction**

The previous chapter explained that the Constitution is the highest source of law which stipulates fundamental human rights in South Africa. Seemingly, the influence of certain Christian values in the public sphere is based on the Constitutional provisions of religious freedom. For example, the Constitution clearly affirms that “every person shall have the right to freedom of ...religion”<sup>31</sup> and that “persons belonging to a cultural, religious or linguistic community may not be denied the right... to enjoy their culture, practise their religion”<sup>32</sup>. Although this seems to emphasise religious autonomy, what remains questionable is how far Christian institutions can go in terms of influencing the public sphere with its values.

In some cases, the advocacy of certain Christian values in the public sphere by some Christian institutions has led to a clash of rights. The clash has been between the rights relating to religion and other fundamental rights which are violated due to the influence of Christian values. How can the Constitutional Court reconcile the Constitutional rights and freedom of religious belief and autonomy through which some Christian institutions seeks to influence society and the state with its values on the one hand and the Constitutional rights which seem to be violated or infringed in the process of advocating such Christian ethos or values on the other hand? This chapter explains the dilemma caused by the influence of Christian values in South Africa post-1996. Given that the Constitution gives a firm but unclear delineation of religious freedom and what this entails, the Constitutional Court through a number of cases has over the years attempted to provide an interpretation of Constitutional provisions relating to freedom of religion.

In *Christian Education South Africa v Minister of Education* [2000 (4) SA 757 (CC)], the Court decided against the Christian Education of South Africa's appeal to be allowed to practice corporal punishment in some Christian schools. The Constitutional Court ruled against the claim that Christian faith demands that parents discipline their children through corporal punishment, and that based on the Constitutional stipulations on religious freedom, Christian institutions have a right to employ Christian values which include the use of corporal

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<sup>31</sup> Section 14 (1) of the South African Constitution.

<sup>32</sup> *Ibid.*, 31(1).

punishment in its schools. Similarly, in *Minister of Home Affairs and Another v Fourie and Another*, the Court ruled against religious claims opposing same-sex marriages although it maintained that religious institutions are not obliged to recognise same-sex unions or officiate such same-sex marriage ceremonies. In both cases, the Constitutional Court observed that Christian values are vital to society.

In *Ecclesia de Lange v Methodist Church of South Africa*, the Constitutional Court hesitated from interfering with the autonomy and self-governing of religious institutions. Ms De Lange, who had been suspended from her ministerial duties in the Methodist Church of South Africa after announcing her intention of marrying her same-sex partner was referred back to the arbitration process of her church. Although the Constitutional Court hesitated to make a judgement in this case which had to do with religious convictions and doctrines, it maintained that if the applicant had followed the process from the start and advanced the argument of unfair discrimination, the judgement would have had a different outcome.

## **2.2 Understanding the Problem: The Influence of Certain Christian Values**

Certain Christian institutions attempt to influence society and the state with their values or ethos. In this process, since religious values conflict with other equally protected rights and values, Christian institutions retaliate against the law of general application. For Lenta (2009:27), this has been partly because “the values animating liberal constitutionalism collide at times with the beliefs of members of religious groups”. In South Africa, this has been clear in a number of cases where Christianity has directly or indirectly opposed or influenced the processes leading to the legalisation of certain generally applying laws and policies. In other cases, certain Christian institutions have challenged laws and policies which they deem contrary Christian values and convictions.

The point that the influence of Christian values in society is based on the “constitutional guarantees of religious rights” needs emphasis (du Plessis 2010:18)<sup>33</sup>. Explicitly, the Constitution guarantees religious institutions the freedom to regulate their beliefs and opinions and by extension, to maintain and practice religious stipulations and observances<sup>34</sup>. Based on such rights, the attempt to influence the state and society has been in line with the religious claims of autonomy, sovereignty and freedom of religion enjoyed by religious institutions

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<sup>33</sup> *Ibid.*, 15(1)

<sup>34</sup> *Ibid.*, 9(1) and 9(3)

based on the Constitutional requisites. For example, the principle of autonomy and self-determination has been one of the most vital arguments used by certain Christian institutions to influence the public sphere with their values in the post-1996 democratic South Africa.

The claim that “religious believers in South Africa have made public their opposition to the laws and legal decisions that contravene their beliefs” requires reaffirmation (Lenta 2009:27). The attempts of Christian institutions to influence the state and policy making processes through their values, suggests a conflict of rights. Realising this conflict, Judge Westhuizen in the case dubbed *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* generally remarked:

Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association”.<sup>35</sup>

The highlighted conflict indicates that the political role of religion has not been clarified. Section 31(1)(a) of the South African Constitution states that “when interpreting the Bill of Rights, a court, tribunal or forum — (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. This is further qualified by Section 9(1) and (2) which states:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

From this perspective, freedom and equality are the defining principles of the South African Constitution. Unfair discrimination by the state or any other person, group or institution are forbidden<sup>36</sup>. In most cases, based on its Constitutionally protected freedoms or rights, certain Christian values have been seen as infringing upon the rights of others. Dlulane (*eNews Channel Africa*, 2015) rightly describes such a situation as a “a clash between the right to religious freedom and the right not to be discriminated against”. Part of the dilemma has been how to reconcile the relationship between the essential values of Christianity through which Christians seek to influence the state and society on the one hand and the rights which they violate in the process of advocating such religious ethos or values on the other hand.

According to van der Vyver (2012:151) the Courts have to “always try to reconcile the conflicting rights and freedoms, but where that becomes too challenging, the provision that is

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<sup>35</sup> [2015] ZACC 35 para.77.

<sup>36</sup> Section 9(1) of the South African Constitution.

most supportive of the basic norm will prevail”. Although the process of reconciling different conflicting rights has actually helped the Courts deal with various cases especially those brought by some Christian institutions<sup>37</sup>, what remains challenging is exactly how to maintain a fair balance between equality and other rights related to religion such as sovereignty or autonomy. The stance of the Courts has demonstrated that in “the course of debates concerning controversies, such as same sex marriage, public reason precludes exclusive appeal to the truth of a particular religious beliefs and doctrines” (Lenta 2009:28-29). This indicates that the rights concerning freedom of religion and belief which upholds religious liberty and how far it can go in influencing the decision or policy making and the society as a whole still have to be reinterpreted.

In cases such as *Christian Education South Africa v Minister of Education* [2000 (4) SA 757 (CC)], Christian Education South Africa had to seek religious exemptions to practice its religious values based on the notion of religious liberty. Clearly, where certain Christian institutions have tried to demand religious exemptions or special allowances which would violate or infringe the rights of others, the Court has had to reaffirm its sole duty through the constitutional principle of equality to protect and treat with equal respect all people regardless of whether they are secular or religious<sup>38</sup>. In cases where some Christian institutions have attempted to challenge the state through the Courts, they have been turned down. This is clear in cases such as *Christian Education South Africa v Minister of Education* [2000 (4) SA 757 (CC)] and the *Minister of Home Affairs and Another v Fourie and Another*.

It seems that although the Constitution grants Christian institutions freedom of religion and belief, the “practice” or practical application of such beliefs or doctrines does not seem to be fully protected. A vital question arises here. Do such instances demonstrate that Christian believers are denied their rights to enjoy religious freedom guaranteed under clause 15 of the Constitution? If affirmative, does this then imply that their right to influence the state or political sphere with their values or religious convictions has been infringed? In responding to such questions, Mofokeng (2007:122) argues:

the freedom of religion clause should be interpreted in a manner that would guarantee linguistic and religious communities the right to have their private law matters regulated in accordance

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<sup>37</sup> In *Minister of Home Affairs and Another v Fourie and Another*, the Marriage Alliance of South Africa was the involved Christian institution.

<sup>38</sup> The notion of “equality” is elaborated in *Christian Education South Africa v Minister of Education* [2000 (4) SA 757 (CC)].



with the personal laws of their choice, provided they do not conflict with the spirit and values of the Constitution.

What Mofokeng is advocating is the need for the state through the Courts to grants religions or in this case Christian institutions the right to follow their doctrines by regulating their customs and values without unnecessary intervention. This seems to have been the plea of Christian institutions in *Christian Education South Africa v Minister of Education* and the *Minister of Home Affairs and Another v Fourie and Another*. This would entail that Christian institutions are allowed to have an influence on the public sphere and engage with society with their values, a conclusion which could be abstracted following the judgement made by the Constitutional Court's judgement in *Ecclesia de Lange v Methodist Church of SA*. Such influence is based on religious autonomy whereby Christian institutions are free to regulate their beliefs and doctrines.

## **2.3 The Attempt of Christian Values to Influence the State/Society: Case Studies**

### **2.3.1 Christian Education South Africa v Minister of Education**

#### **2.3.1.1 The Appellant's (Christian Education South Africa) Stance**

*Christian Education South Africa v Minister of Education*<sup>39</sup> is one of the most significant cases in the history of the South African legal system where Christians actually challenged the Constitution with the aim of upholding religious ethos or values. In this case, the “constitutionality of a provision in the South African Schools Act, which prohibits corporal punishment in independent schools, was at issue” (van der Vyver 2012:166). The case was heard on 4<sup>th</sup> May 2000 in the Constitutional Court of South Africa and the judgment was delivered on 18<sup>th</sup> August 2000. In this case, the appellant was Christian Education South Africa and the respondent was the Minister of Education. The *Project NoSpank*<sup>40</sup> in its Report to Friends, (2000) asserts that “the appellant is a voluntary association of 196 independent Christian schools with a total of approximately 14 500 pupils”. Christian Education South Africa was established in 1983 mainly to promote Christian education in schools, especially those run or governed by Christians where religious values are part of the curriculum.

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<sup>39</sup> [2000 (4) SA 757 (CC)].

<sup>40</sup>This is a web or online presence for ‘Parents and Teachers Against Violence in Education’.

Christian education generally encourages parents, learners and teachers to affirm Christian values as a foundational basis for learning. As the *Christian Education National* (2006) affirms, in Christian education, educators and learners are called to “to see and understand the world through the perspective of God’s truth. The Bible becomes the lens in which students’ view what they are learning”. Thus, in *Christian Education South Africa v Minister of Education* the former affirmed that safeguarding Christian values and an environment which is favourable to and in conformity with the Christian faith was crucial. Christian Education South Africa challenged “the constitutionality of section 10 of the South African Schools Act, which proscribes corporal punishment in any school, public or private/independent” (du Plessis 2010:20). Section 10 of the South African Schools Act of 1996 which deals with the "Prohibition of Corporal Punishment" states:

(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

According to this Act, administering corporal punishment at any school is a criminal offence. As Veriava (*Mail & Guardian*, 2013) observes, rather than engaging in corporal punishment, this Act affirms the need for “school governing bodies to develop codes of conduct that prescribe the rules that pupils must adhere to. The codes also establish due disciplinary processes when pupils have transgressed”. Contrary to this Act, Christian Education South Africa argued that corporal punishment was a central element as far as Christian values are concerned in its schools. It argued that the proscription of corporal punishment stipulated by Section 10 of the South African Schools Act (1996) restricts the rights of parents which is extended to teachers to follow the categorical necessities of their faith.

In *Christian Education South Africa v Minister of Education*,<sup>41</sup> the appellant contended that corporal punishment was “a vital aspect of the Christian religion and that it is applied in the light of its biblical context using biblical guidelines which impose a responsibility on parents for the training of their children”. The appellant quoted a number of verses from the Christian Bible which support the use of corporal punishment on children in the community<sup>42</sup>. The appellant further contended that parents have a responsibility imposed by God to train their children. On this ground, the Christian faith allows and obliges parents to delegate their responsibility to teachers who are to partner with them in the training and upbringing of child.

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<sup>41</sup> [2000 (4) SA 757 (CC)], para.3

<sup>42</sup> The appellant quoted Proverbs 23:13-14 which state: “Do not withhold discipline from a child, if you punish with a rod he will not die. Punish him with a rod and save his soul from death”.

In that sense, “parents have the ultimate responsibility to educate their children towards...a Christian way of living. The Christian school community is a partnership with parents and the school sharing in this vision” (*Christian Education National*, 2016).

The appellant thus claimed that corporal punishment was inseparable from the dictates and understanding of Christian values and religious expression. They added that parents who sent their children to Christian schools where Christian education is paramount had to sign a document known as “Consent to Corporal Punishment” which gives the school and teachers a right to use corporal correction, otherwise, they were free to send their children somewhere else<sup>43</sup>. As Lenta (2009:38-39) puts it, the appellant contended that “parents had expressly agreed to the infliction of corporal punishment on their children at school, and there was an exit option for parents unwilling to allow their children to be subjected to corporal punishment”. The appellant further argued that Section 10 of the South African Schools Acts infringes certain provisions of the South African Constitution as far as religious freedom was concerned.

Firstly, they argued that Section 14 of the South African Constitution on “Privacy” states that “Everyone has the right to privacy...”. Based on this provision, Christian schools had the right to privacy which allowed them to apply corporal punishment in accordance with their Christian values. Secondly, they cited Section 15 (1) of the South African Constitution on “Freedom of Religion, Belief and Opinion” which states that “everyone has the right to freedom of conscience, religion, thought, belief and opinion”. The appellant argued that forbidding corporal punishment in Christian schools infringes their freedom of religion and belief which includes administering corporal punishment to their children as already highlighted above.

Thirdly, the appellant argued that forbidding corporal punishment in Christian schools infringes their Constitutional right to “Education” stipulated by Section 29 (3) of the Constitution which states that “everyone has the right to establish and maintain, at their own expense, independent educational institutions...”. Fourthly, the appellant appealed to the Constitutional Court based on the contention that forbidding corporal punishment in Christian schools infringes its Constitutional right to “Language and Culture” which according to Section 30 of the Constitution states: “everyone has the right to use the language and to participate in

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<sup>43</sup> In *Christian Education South Africa v Minister of Education*, the appellant claimed that “the correctional procedure to be followed includes giving the parents themselves the option to apply corporal punishment should they so wish. Should such option not be exercised, the correction is to be applied in the form of five strokes given by the principal, or a person delegated by him, with a cane, ruler, strap or paddle”.

the cultural life of their choice”. Finally, the appellant also cited Section 31 of the South African Constitution on “Cultural, Religious and Linguistic Communities” which affirms:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community — (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

Based on all the highlighted arguments from the religious and Constitutional perspectives, the appellant highlighted that forbidding corporal punishment hinders them from practicing their beliefs and religious ethos, and thus the Schools Act had to be declared unconstitutional. Such a declaration would be justified given that its provisions obstructed the ‘right to freedom of religion’ stipulated by the Constitution and the cultural life in independent and private schools. In line with this, the appellant demanded to “have section 10 declared unconstitutional and invalid to the extent that it prohibits corporal punishment in independent schools where parents have consented to its application”<sup>44</sup>.

### **2.3.1.2 The Respondent’s (Minister of Education) Stance**

In this case the Minister of Education as the respondent did not agree with the appellant. According to the *Project NoSpank* in its Report to Friends (2000), the respondent argued that it was the “infliction, not the prohibition, of corporal punishment that infringed the Constitutional rights of children and their rights to equality, human dignity and freedom and security of the person”. Following this argument, the limitation of corporal punishment was justifiable even if it might have limited the applicant’s religious rights, which included the right to freedom of religion. The Minister of Education argued that the argument of the appellant to be granted freedom to exercise Christian ethos and values in the case of administering corporal punishment in its schools is contrary to certain provisions of the Constitution in the Bill of Rights<sup>45</sup>.

The respondent contended that corporal punishment is contrary to Section 9 of the South African Constitution on “Equality” which states that “everyone is equal before the law and has the right to equal protection and benefit of the law”; Section 10 on “Human Dignity” which stipulates that “everyone has inherent dignity and the right to have their dignity respected and

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<sup>44</sup> *Ibid.*, para.3

<sup>45</sup> *Ibid.*

protected” and Section 28 on “Children” which affirms that “every child has the right – ... (d) to be protected from maltreatment, neglect, abuse or degradation”. The respondent also highlighted that the appellant’s contention was against Section 12 (1) of the Constitution on “Freedom and Security of the Person” which states:

Everyone has the right to freedom and security of the person, which includes the right —... (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

In *Christian Education South Africa v Minister of Education*, the respondent “furthermore places reliance on section 31(2) which states that section 31(1) rights ‘may not be exercised in a manner inconsistent with any provision of the Bill of Rights’”<sup>46</sup>. On the behalf of the Minister of Education, the Director-General of the Department of Education highlighted that Section 3(4)(n) of the National Education Policy Act adopted in 1996 by Parliament mandates the Minister of Education to:

Control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution.

The quoted clause shows that it was within the rights of the respondent to repel any appeals advanced by the applicant which seem to purport or advocate corporal punishment. The Director-General of the Department of Education on behalf of the respondent further highlighted that the preamble of the same National Education Policy Act “facilitates the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights”.<sup>47</sup> Thus, based on the above arguments both from the perspective of the South African Constitution and the National Education Policy Act, the respondent firmly held that Christian schools cannot be permitted to employ corporal punishment based on the arguments they advanced.

### **2.3.1.3 Judgement of the Constitutional Court**

In this case, the Constitutional Court had to decide whether or not Christian schools would be given a special allowance to employ corporal punishment despite the arguments of the respondent which are in line with the general constitutional ban of such an exercise in all schools. As Veriava (*Mail & Guardian*, 2013) puts it, “the Constitutional Court had to

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<sup>46</sup> 2000 (4) SA 757 (CC) para.8.

<sup>47</sup> *Ibid.*, para.9

determine whether the prohibition against corporal punishment violated the rights of parents who, in line with their religious convictions, had consented to its use”. This issue was complex. To start with, “it is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter — some overlapping, some competing”.<sup>48</sup> For example, both the appellant or applicant and respondent use the Constitution in backing up their stance and claims.

In weighing the arguments from both the perspective of the appellant, the respondent and the stipulations of the Constitution, “Sachs J on behalf of a unanimous court said that he would assume in the appellant’s favour that religious and community rights of the appellant had been limited” and maintained that “the question then was whether such limitation was justifiable” (*Project NoSpank*, 2000). From the statement of Judge Sachs, the question that is central is whether or not a “justification of the limitation of the right to religious freedom and religious community practice” would be possible especially with reference to “section 36 of the limitations clause”.<sup>49</sup> For example, Section 36 of the South African Constitution places limits on the Bill of Rights which contains the freedom of religion and belief if such freedom diminishes or violates the basic principle of human dignity<sup>50</sup>. According to van der Vyver (2012:167), in considering other conditions at play, Judge Sachs affirmed:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding.

Judge Sachs highlighted that the appellant cannot consider the right to be exempted from the generally applicable Constitutional provisions based on the right to practice religious ethos, and by extension in fostering them to the general public. Nevertheless, he compromisingly pointed out that it would be unfair for the appellant to be put on the extremely troublesome situation of choosing either to follow the demands of faith and the stipulations of the Constitution. He asserted that religious believers need to be given enough room to both follow

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<sup>48</sup> *Ibid.*, para.15.

<sup>49</sup> *Ibid.*, para.29.

<sup>50</sup> Section 36 of the South African Constitution stipulates that: “The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

the dictates of their beliefs and the demands of the state. In this case, “what they were prevented from doing was to authorise teachers, acting in their name and on school premises, to fulfil what they regarded as their conscientious and biblically-ordained responsibilities” (*Project NoSpank*, 2000). The parents and teachers could maintain Christian ethos in their schools which should nevertheless exclude the delegation of teachers to inflict corporal punishment on the learners.

The Constitutional Court had to put children’s rights at the centre of the case by highlighting the need for their protection from all forms of abuse and violence, including corporal punishment. In its Report to Friends, *Project NoSpank* (2000) argued that when all the highlighted “factors were weighed together, the scales came down firmly in favour of upholding the generality of the law in the face of the appellant’s claim for a Constitutionally compelled exemption”. In this case, “Sachs J handed down a carefully reasoned judgement dismissing the appeal on the basis that section 10<sup>51</sup> imposes a constitutionally acceptable limitation on parents’ free exercise of their beliefs” (du Plessis 2010:21)<sup>52</sup>.

The Constitutional Court reaffirmed that corporal punishment was contrary to the stipulations of the Constitution and that a limitation on the ‘right to freedom of religion’ and belief was required in order to protect the children against such inhumane punishment. As Veriava (*Mail & Guardian*, 2013) puts it, the Court maintained “the prohibition and found that corporal punishment is a violation of the legal rights of the pupil to human dignity, freedom of security of person and protection from maltreatment, neglect, abuse or degradation”<sup>53</sup>.

#### **2.3.1.4 Comment**

*Christian Education South Africa v Minister of Education* case was primarily based on religious freedom as a Constitutional right which religious institutions are entitled. Christian Education South Africa developed its arguments from both religious dictates and the Constitutional stipulations concerning the right of religious freedom. The Minister of Education also brought forward arguments from both Constitutional and National Education Policy Act perspectives.

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<sup>51</sup> Section 10 of the South African Constitution on ‘Human Dignity’ states that “everyone has inherent dignity and the right to have their dignity respected and protected”.

<sup>52</sup> Explaining the reason for the ban on corporal punishment, Justice Albie Sachs maintained that “the deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involved an element of cruelty in the system that sanctioned it. The activity is planned beforehand; it is deliberate”.

<sup>53</sup> The judgment on the issue was handed down by J Sachs through a unanimous agreement with other Judges such as Langa DP, Chaskalson P, Cameron AJ, Yacoob J and Goldstone J.

The case partly involves an internal conflict of various Constitutional rights which go as far as involving the crucial Constitutional value of human dignity. While the parents have the right of freedom of religion through which they claim the right to educate their child in line with their Christian ethos and beliefs, the children are at same time as human beings entitled to be protected constitutionally from all forms of violence, and in this case, corporal punishment.

The judgement of the Constitutional Court illustrates that based on the South African Constitution, the “right to freedom of religion” and by extension, its ability to influence the state with its values can be limited if it is contrary to the constitutional principles of human dignity and equality. The Court through its judgement placed a limit on the free exercise and influence of Christian values and ethos in Christian institutions and society at large, especially in cases where such values violate or harm a third party. Given that allowing corporal punishment in Christian institutions violated certain Constitutional values or fundamental rights, “the Court refused to grant an exemption in Christian Education” (Lenta 2009:40).

Nevertheless, its cautious judgement also demonstrates how forceful certain Christian values are in the society<sup>54</sup>. Freedom of religion, which involves both having religious convictions and practising them, was affirmed as an essential right (Kroeze 2003:114). Further, although the Court ruled against the arguments of the appellant, it however maintained the necessity of religion and the relevance of its ethos to the general public. In that way, the Court carefully and cautiously dismissed the arguments of the appellant without necessarily infringing upon the “right to freedom of religion” and belief, and by extension, its ability to influence the general public and policy making processes. It for example, argued that the Christian belief and doctrine on corporal punishment does not grant teachers the right to employ corporal punishment on learners, although this prohibition does not extend to parents at their homes.

The judgement also showed that believers might not necessarily be coerced to act against their religious convictions. As du Plessis (2010:22) highlights, *Christian Education South Africa v Minister of Education* was “one Constitutional Court Judgement in which the significance of religious and related rights was stated most unequivocally”. The Court reaffirmed the importance of religious beliefs in regulating the moral order. The Court also granted that Christian values can influence the general public as long as they do not infringe the rights of a third party as corporal punishment does.

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<sup>54</sup> 2000 (4) SA 757 (CC) para.36



## 2.3.2 Minister of Home Affairs and Another v Fourie and Another

### 2.3.2.1 The Appellant's (Fourie and Another) Stance

The case dubbed *Minister of Home Affairs and Another v Fourie and Another*<sup>55</sup> was heard on 17<sup>th</sup> May 2005 and decided upon on 1<sup>st</sup> December 2005. In this case, Ms Cecelia Bonthuys and Ms Marié Fourie were appellants in the Constitutional Court of South Africa. The couple had been involved in a same-sex romantic relationship for more than ten years and their relationship had also been acknowledged by their families and friends. When they decided to “get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities” through marriage, “there was one impediment. They are both women.”<sup>56</sup> From a historical perspective, Church (2006:99) argues:

In South Africa until recently the traditional notion of marriage as a legal institution was that it was the voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasted. The celebrated common-law definition of heterosexual marriage held sway.

The applicants contended that the common or traditional law prevents them from publicly celebrating the mutual commitment and love which they genuinely share through marriage. The law does not only prevent them from making their union official, but that it also discriminates against them and infringes their constitutional rights. The applicants also contended “that the exclusion comes from the common law definition which states that marriage in South Africa is ‘a union of one man with one woman, to the exclusion, while it lasts, of all others’”<sup>57</sup>.

The definition of marriage was partly based on the common law and demanded that for a union to acquire a legal status and thus to be formalised, it ought to be in accordance with the stipulations of Act 25 of the 1961 Marriage Act. The Act affirms that a minister of a particular religion is free to use the Marriage Formula which is regulated in terms of his or her beliefs and those of the couple in question. However, according to Clause 30(1) of the Act, in the case of non-religious marriage officers, the following question (which is part of the marriage formula) must be put before each party in consideration:

Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D.

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<sup>55</sup>[1 SA 524 [2006] / (CCT 60/04) [2005] ZACC 19).

<sup>56</sup>*Ibid.*, para.1

<sup>57</sup>The same sentiment is expressed by Judge Innes in *Mashia Ebrahim v Mahomed Essop* [1905 TS 59] para. 61. In other cases, such as *Hyde v Hyde* and *Woodmansee* [1866 LR 1 P], the exclusion is said to be “for life”.

as your lawful wife (or husband)?’, and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that A.B. and C.D. here present have been lawfully married.

The particular reference to “wife” or “husband” embedded in this formula clearly excludes them (Ngcukaitobi 2012 :233). However, the applicants did not directly challenge the highlighted marriage formula<sup>58</sup>. What they opposed against was the reference to “wife (or husband)” mentioned in the civil marriage formula as contained in Act 25 of the 1961 Marriage Act which by implication supported the presupposition that a marriage had to be between a man (husband) and a woman (wife) according to the general understanding. Further, with reference to the Constitution, the appellants argued that the Bill of Rights protects them from unfair treatment and discrimination based on their sexual orientation. For example, Section 9(1) of the Constitution states that “Everyone is equal before the law and has the right to equal protection and benefit of the law”. The stipulation is further qualified by Section 9(3) which reads:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

### **2.3.2.2 The Religious (Christian) Arguments**

Among various arguments that were advanced in support of the traditional marriage on the part of the respondent, this paper only focuses on religious ones especially those that were raised or advanced by Christians who were the second *amicus curiae*<sup>59</sup> in the Court on this case and had submitted an affidavit. The major argument concerned the procreative element or factor which according to the Christian ethos was the primary and sore purpose of any marriage and conjugal love. The argument was provided by a Christian association known as Marriage Alliance of South Africa which represents the majority of Christian churches and faith-based organisations in South Africa<sup>60</sup>.

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<sup>58</sup> The formula was challenged in *Lesbian and Gay Equality Project and Others V. Minister of Home Affairs and Others* [Case CCT 10/05] which was heard the same day as the preceding case.

<sup>59</sup> *Amicus curiae* means “friend of the Court”. In this case, the Marriage Alliance of South Africa stood as an impartial adviser to the Court by offering information that bore on this case.

<sup>60</sup> At the time of the presentation of the affidavit to the Court, the Co-Chairpersons of the Marriage Alliance of South Africa were: Cardinal Wilfrid Napier (Chairman of the Southern Africa Bishops Conference); Rev Moss Ntlha (General Secretary of the Evangelical Alliance of South Africa) and Dr Michael Cassidy (International Team Leader/African Enterprise).

According to *Amazon Web Services* (2006), the Marriage Alliance of South Africa argued that the “the purpose of marriage is to... establish the proper environment for procreation and nurture of godly offspring”. In this case, the procreative prospect was highlighted as being the basis and constrictive feature of marriage, in which case the union between Ms Cecelia Bonthuys and Ms Marié Fourie do not fit or qualify. While advocating for a traditional definition of marriage, the Marriage Alliance of South Africa firmly maintained:

We believe that the extension of the definition of marriage to include same-sex couples would seriously undermine marriage and the family as the fundamental building blocks of society. We believe marriage is intended to be the life-long union of a man and a woman (*Amazon Web Services*, 2006).

From that perspective, the Marriage Alliance of South Africa highlighted that by their very nature same-sex unions cannot acquire the official marital status to the point of being considered marriage or even closely comparable to marriage. Here, “the corollary is that such unions can never be regarded as marriages, or even marriage-like or equivalent to marriages”<sup>61</sup>. From the viewpoint of the Marriage Alliance, allowing same-sex unions to acquire marital status especially in religious setups would be a violation of the right to the freedom of religion, given that the traditional definition of marriage forms one of the central Christian values. Put alternatively, since “Marriage is the sacred union between one man and one woman; the practicing of homosexuality, is sinful before God and therefore forbidden” (*Freedom of Religion South Africa*, 2015).

Whilst the hearing of the case under consideration was underway, many Christian organisations supported the Marriage Alliance’s position through protests, marches and public pronouncement through media and press releases. For example, the African Christian Democratic Party (ACDP) clearly highlighted that it was against same-sex unions and its legalisation, and had expressed its hopes that the Constitutional Court would rule against such unions. According to *the Mail & Guardian* (2005), Kenneth Meshoe, leader of the ACDP said:

The ACDP has continually said that we do not support the legalisation of so-called gay marriages, as this, among other things, will lead to the acceleration of the breakdown of the family, meaning that our country faces severe degeneration of morals and a high divorce rate. By upholding the definition of marriage as being between a male and female, the Constitutional Court will be in line with the majority of nations across the world that have upheld this view. We trust that the Constitutional Court will rule in favour of the wishes of the majority of South Africans.

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<sup>61</sup> [1 SA 524 [2006] / (CCT 60/04) [2005] ZACC 19). para.88.

Thus, the Marriage Alliance of South Africa with the support of various churches, religious institutions and Christian political associations such as the African Christian Democratic Party maintained that Ms Cecelia Bonthuys and Ms Marié Fourie and any other same-sex couples should not be granted the allowance for marriage by the Constitutional Court. According to Lenta (2009:28) and as already highlighted above, they argued that “same-sex marriage is inconsistent with passages of the Old and New Testament of the Bible”. Understood from this perspective, only a man and a woman qualify to form a marriage based on matrimonial love and to whose case the Marriage Formula of “wife (or husband)” highlighted in Section 30 (1) of the 1961 Marriage Act 25 rightly applies<sup>62</sup>.

### 2.3.2.3 Judgement of the Constitutional Court

In its decision, the Constitutional Court strongly condemned the societal negative attitudes regarding same-sex unions which was first and foremost underlined by discrimination based on sexual orientation. The Court held that denying Ms Cecelia Bonthuys and Ms Marié Fourie the institution of marriage would be a substantial discrimination of their rights based on Section 9 of the South African Constitution under the heading ‘Equality’. Section 9 of the South African Constitution states:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms...
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

With reference to the above, the Court affirmed that the Constitution protects same-sex couples from being discriminated by any person, organisation or institution based on their sexual orientation. According to Judge Sachs, “to penalise people for being who and what they are is profoundly disrespectful of the human personality and violators of equality. Equality means equal concern and respect across difference” (*Heyns and Partners*, 2013). Thus, according to Church (2006:99) in the final judgement the “the common law definition of marriage was

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<sup>62</sup> Section 30 (1) of the 1961 Marriage Act 25 on “Marriage Formula” states: “in solemnizing any marriage, the marriage officer, if he is a minister of religion or a person holding a responsible position in a religious denomination or organization, may follow the rites usually observed by his religious denomination or organization, but if he is any other marriage officer he shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative: “Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”

declared to be inconsistent with the Constitution and invalid” by the Constitutional Court’s unanimous decision.

The Court found that the common law discriminated against same-sex couples and that it unfairly denied them the right to enjoy the responsibilities and status of the institution of marriage that was being given to heterosexual unions or couples. The discrimination of same-sex unions which was caused by the discrepancy within the stipulations of the common law and the 1961 Marriage Act 25 by favouring heterosexual unions was affirmed as having been an infringement of the Constitutional rights due to the appellants. In that way, the Constitutional Court declared that the common law definition of marriage, and Section 30(1) of the Marriage Act, which excluded same-sex marriages, were inconsistent with Sections 9(1) and 9(3) and Section 10 of the Constitution that deal with the right to equality and the right to human dignity respectively.

By upholding this stance, the Court dismissed the arguments raised by the Marriage Alliance of South Africa that marriage is primarily for procreation and raising of children. The Court stressed that “however persuasive procreative potential might be in the context of a particular religious world-view, from a legal and constitutional point of view, it is not a defining characteristic of conjugal relationships”.<sup>63</sup> From the constitutional perspective, considering procreation as the basis of marriage discriminates against same-sex unions by infringing on their rights. Even in terms of heterosexual couples, holding procreation as the sole purpose and basis of marriage would demean couples who might be incapable of procreation for one reason or the other. The Court also cited couples who may desire marriage when their capacity to conceive has already passed and also couples who might be married but decide through their right to privacy and freedom not to have either sexual relations or children<sup>64</sup>. While reacting to the arguments that were presented in Court by the Marriage Alliance of South Africa, Judge Sachs asserted:

“It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others”.<sup>65</sup>

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<sup>63</sup> [1 SA 524 [2006] / (CCT 60/04) [2005] ZACC 19). para.86.

<sup>64</sup> *Ibid.*, para. 86 & 51.

<sup>65</sup> *Ibid.*, para. 92.

#### 2.3.2.4 Comment

The *Minister of Home Affairs and Another v Fourie and Another* indicates that freedom of religion and the rights of believers cannot negate the Constitutional rights of Ms Cecelia Bonthuys and Ms Marié Fourie or any other same-sex couple, primarily based on the already highlighted Section 9 of the Constitution on “Equality”. Although the Court acknowledged the significance of Christianity and religion in general and the relevance of its values in the general public, it clearly contended that religious beliefs do not hold prominence over the Constitution as far as equality is concerned. The Court highlighted the need for the state to prevent unfair discrimination based on Constitutional rights. Here, there seem to be an assumption that where the “right to freedom of religion” and autonomy – which act as a basis for the influence of religious values – conflict with other Constitutional rights, there is a need to maintain a balance based on the principle of equality. However, the Constitutional Court’s judgement was unclear on the influence of Christian values when it stated:

the recognition of same-sex marriages would in no way force religious institutions to accept or perform such marriages within their chosen belief, nor would the recognition deprive any religion or heterosexual couple from marrying within the tenets of their beliefs (*Heyns and Partners*, 2013).

The ruling accepts the relevance and influence of Christian values within religious circles. Further, though Ms Cecelia Bonthuys and Ms Marié Fourie can legally enter into a same sex union, Christian institutions are not coerced to accept or perform such unions based on their categorical commands. By reaffirming religious autonomy and self-determinism, this points to a certain predicament. One may establish that Christian institutions are free to regulate which values to uphold and which ones not to uphold based on their own biblical rules and regulations. This follows that even if Ms Cecelia Bonthuys and Ms Marié Fourie won the Court case and are free to engage in marriage through a civil union, they can nevertheless still be denied the right to have their marriage approved by the Marriage Alliance of South Africa or other religious institutions which do not allow same-sex unions. In the *Minister of Home Affairs and Another v Fourie and Another*, although the Constitutional Court judged against the stance of the Marriage Alliance of South Africa, the judgement highlights the forcefulness of religious values in both religious and secular spheres.

### 2.3.3 The *Ecclesia de Lange v Methodist Church of SA*

#### 2.3.3.1 Case

The *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* [2015 ZACC 35]<sup>66</sup> was a case heard by the Constitutional Court on 28<sup>th</sup> August 2015 and decided upon on 24<sup>th</sup> November 2015. In this case, the applicant, Ms De Lange was made a probationary minister of the Methodist Church of South Africa in August 2001. In 2006, she was then made a full minister of the forenamed Church and had since then been a serving different congregations. Being lesbian, Ms De Lange began a relationship with another woman, which deepened as time went on. While Ms De Lange was serving a congregation in Cape Town, her partner moved in and they began living together<sup>67</sup>.

In December 2005 when Ms De Lange was assigned to serve at a church in Vredeloof, her partner also moved in and they continued staying together even after the applicant began serving congregations at Windsor Park and Brackenfell in 2006. On 8<sup>th</sup> December 2009, “the Methodist Church discontinued De Lange’s services as ordained minister of the Church, following her announcement that she intended marrying her same-sex partner” (*Freedom of Religion South Africa*, 2015). The church told the applicant that her impeachment was based on Article 4.82 of the Laws and Discipline of the Methodist Church of South Africa which states that “Ministers shall observe and implement the provisions of Laws and Discipline and all other policies, decisions, practices and usages of the Church”<sup>68</sup>.

By her showing a desire to enter into a marital union with a woman, the churches maintained that she had violated its policy stipulated in the provisions of Laws and Discipline which does not approve same-sex marriages. Badenhorst (*Freedom of Religion South Africa*, 2015) summarises the beliefs of the Methodist Church which is shared among almost all Christian denominations and institutions in South Africa concerning marriage which the applicant was guilty of violating:

The Methodist Church believes that according to the Bible, marriage is a divinely-ordained lifelong union of one man and one woman, and that any other understanding of marriage is incompatible with the Scriptures and thus with Church doctrine. (This view of marriage is of course central to the Christian faith, and is held by the majority of Christian churches around the world).

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<sup>66</sup> [2015] ZACC 35 / (CCT223/14) [2015] ZACC 35).

<sup>67</sup> *Ibid.*, para.4

<sup>68</sup> Clause 4.82 of the Laws and Discipline of the Methodist Church of Southern Africa. 2007, 11<sup>th</sup> Edition.

Following Clause 4.82 of the Laws and Discipline of the Methodist Church of South Africa, the Church highlighted that Ms De Lange as a minister had an irrevocable mandate of being the custodian of the beliefs and doctrines of the Church. For example, as a minister she may “not enter into same-sex or any other form of marriage contrary to the Church’s understanding of marriage as a sacred covenant by one man and one woman” (*Freedom of Religion South Africa*, 2015). Based on this stance on the part of the Church, Ms De Lange was suspended from the Church on 10<sup>th</sup> December 2009. In line with the stipulations of the Civil Union Act 17 of 2006, Ms De Lange soon after her dismissal entered into a union with her partner, although they later divorced.

The District Disciplinary Committee of the Methodist Church examined the suspension together with the charges against Ms De Lange and confirmed the suspension on 13<sup>th</sup> January 2010<sup>69</sup>. The District Disciplinary Committee argued that “the discrimination against Ms De Lange is justified as the Church is entitled, in terms of sections 15 and 18 of the Constitution, to require its ministers not to enter into any marriage or civil union other than a heterosexual one” (*Constitutionally Speaking*, 2015). When Ms De Lange appealed the decision of the District Disciplinary Committee to the Connexional Disciplinary Committee which is the highest Disciplinary Committee of the Methodist Church in South Africa, it also reaffirmed the earlier judgement and charged that “she remained an ordained minister, but was barred from exercising any ministerial functions, holding any station or receiving any emoluments”.<sup>70</sup>

Having been turned down by both the District Disciplinary Committee and the Connexional Disciplinary Committee, Ms De Lange appealed to arbitration in terms of Article 5.11 of the Laws and Discipline of the Methodist Church of South Africa which calls for mandatory *Arbitration* when disagreements occur between ministers and the church leadership. In terms of clause 5.11 of the Laws and Discipline of the Methodist Church of South Africa, “if a matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Ministers and members of the church”. The same clause (clause 5.11) states:

No legal proceedings shall be instituted by any formal or informal structure or grouping of the church or any minister or any member of the church, acting in their personal or official capacity, against the church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the church. The mediation and arbitration processes and forums

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<sup>69</sup> *Ibid.*, para.7.

<sup>70</sup> *Ibid.*, para.7.



prescribed and provided for by the church for conflict dispute resolution (Appendix 14) must be used by all Ministers and members of the church.

Between March 2010 and May 2011, Ms De Lange tried to sort out her case with the arbitrator and the convenor but later gave up by refusing “to make further submissions to the convenor or engage further with the arbitration process on the grounds that doing so would be futile... unfair and serve no purpose”.<sup>71</sup> Ms De Lange did not also observe further dates for the arbitration process as arranged by the arbitrator, and after setting the arbitration agreement<sup>72</sup> aside, she brought the case to the High Court for hearing. In the High Court, she firstly advanced the claim that she had been unfairly discriminated based on her sexual orientation but later on gave up this argument. Upon examining her argument that the arbitration process be declared invalid and that she be reinstated by the church as a minister, the High Court judged that “she must submit to arbitration as it could not be said that arbitration would be unfair or futile.”<sup>73</sup>

When Ms De Lange latter appealed to the Supreme Court of Appeal, the Court reaffirmed the judgement of the High Court by stating that “the concurring judgment nudged the parties to remove their dispute from the judicial secular arena, and to resolve it in accordance with clause 5.11 of the Laws and Discipline”.<sup>74</sup> Here, one may remark that both the High Court and the Supreme Court of Appeal ruled in favour of the right to self-determination of the Methodist Church which shows the forcefulness of Christian values. Having been turned down by both the High Court and Supreme Court of Appeal, Ms De Lange appealed to the Constitutional Court based on the argument that she had been unfairly discriminated. She argued that the Methodist Church of South Africa had unfairly dismissed and suspended her and had unlawfully withheld her ministerial roles. According to Badenhorst (*Freedom of Religion South Africa*, 2015), in her appeal to the Constitutional Court, Ms De Lange asked “the Court to find that the Church unfairly discriminated against her on the basis of sexual orientation and that she should be reinstated as minister of the Methodist Church”.

By suspending and forbidding her from performing her duties as a minister, she asserted the Church had by insinuation infringed her rights against certain constitutional provisions which

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<sup>71</sup> *Ibid.*, para.15 & 17.

<sup>72</sup> The arbitration agreement is based on Section 3(2) of the Arbitration Act 42 of 1965 which states that “the Court may at any time on the application of any party to an arbitration agreement, on good cause shown (a) set aside the arbitration agreement; or (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

<sup>73</sup>[2015] ZACC 35 / (CCT223/14) [2015] ZACC 35). para.19.

<sup>74</sup> *Ibid.*, para.25.

protects her from being discriminated unfairly by anyone based on her sexual orientation as stipulated in Sections 9 and 10 of the South African Constitution. She also argued that the conduct of the Church by suspending her was contrary to the stipulations of the Unfair Discrimination Act of 2000. In that way, she further asked the Court to overrule the Methodist Church's arbitration agreement by declaring her dismissal as having being constitutionally unfair and subsequently, to declare it void before the Constitution of the land. She also asked the Court to coerce the Methodist Church to revoke the suspension and reinstate her as a minister of the Church.

However, the Constitutional Court found that she had earlier on disavowed the unfair discrimination argument in the High Court when she stated:

This is not a case where I complain about unequal treatment. Although unequal treatment is at the heart of the matter that is not an issue before this Court. All that this Honourable Court must decide is whether the Disciplinary Committee's decision is a rational just administrative action or not.<sup>75</sup>

Subsequently, when she restated the argument of unfair discrimination in the Supreme Court of Appeal, the Court also refused to hear the case since she had earlier plainly renounced her claim of unfair discrimination in the High Court. Following the Supreme Court of Appeal's decision, the Constitutional Court equally dismissed her argument of unfair discrimination on the basis that she had earlier on deserted such a claim in the High Court. According to Watson (*The Citizen*, 2015), while highlighting that the applicant should have advanced her unfair discrimination argument from the start rather than desert it in the process, the Constitutional Court asserted that "if and when the unfair discrimination claim has been properly ripened, it will require all the judicial, if not Solomonic, wisdom we Judges can muster right through our court system".

In its final judgement, the Court charged that the applicant was out of order by failing to submit to the arbitration agreement process according to clause 3(2) of the Arbitration Act as regulated by the Church even after she had agreed to undergo such a process by signing the arbitration order. The Court held that in sensitive issues like the one under consideration which relates to church dogma or scripture and its interpretation, internal church processes such as arbitration was the ideal medium to analyse the matter of whether the applicant should or should not be allowed to continue exercising her ministerial duties even if she is engaged in a same-sex marriage. The Court agreed with the Church that the applicant should be subjected to the

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<sup>75</sup>*Ibid.*, para.49

arbitration process in line with the rules of the Church, thus the Court advised the applicant to restate the arbitration process and submit to it.

When she argued that such a process would be biased and unfair since the process itself, the arbitrator and the convenor were either members of the Church or at least appointed by the Church itself which do not approve same-sex unions, such a claim was dismissed by the Court. The Constitutional Court highlighted that it would not interfere since the issue at hand regards church values and doctrine, and that the forum provided by the arbitration of the Church was the correct setting to deal with the issue, although this process would be subjected to judicial examination if the applicant had advanced the equality or unfair discrimination claim from the beginning and had not deserted it in the process as she had done. In its conclusion, the Constitutional Court reasoned:

arbitration is the appropriate forum to decide if the line that has been drawn by the Church in Ms De Lange's case is acceptable. It would not be appropriate for this Court to interfere at this stage especially considering that the line is close to the Church's doctrines and values. No good reason has been shown why arbitration would not be suited to resolving the present dispute<sup>76</sup>.

### **2.3.3.2 Comment**

What makes *Ecclesia de Lange v Methodist Church of South Africa* a crucial case is the fact that the appellant was referred back to the Arbitration process of her local Church. If the Court had not referred the applicant back to the arbitration process but had passed judgment based on the unfair discrimination argument, it would have demonstrated how far the state through the Constitution can go in limiting the influence of religious values in the public sphere. Being the supreme law which grants essential rights to all people and clarify which values are generally applicable, how far can the state go in limiting Christian values without infringing the "right to freedom of religion" and self-determination or autonomy? Notwithstanding the question, the case remains a ground-breaking court case with regards to the autonomy of Christianity and freedom of religion and how far church values can go in the public sphere in as far as the constitutional limits are concerned. Commenting on the issue before the judgement was delivered by the Constitutional Court, *Freedom of Religion South Africa* (2015) lamented:

This is undoubtedly the most important case for religious freedom and the autonomy of the Church that has ever come before our courts, and one that could open the door to the courts

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<sup>76</sup>*Ibid.*, para.45.

dictating to the Church what she may and may not believe, preach and how she should govern her internal affairs (i.e. to religious persecution in South Africa).

If the Court had considered hearing the case on the grounds of unfair discrimination, which it avoided doing, this would have led to various implications on the issue of religious freedom and values. For example, if the applicant had won the case, the ability of the Church to regulate its own affairs through which it influences the state and the policy making process would have been deeply curtailed. Subsequently, the Methodist Church would have been forced not only to reinstate the appellant as a minister of the Church, but to start accepting people from same-sex marriages or unions as Church ministers. Such a move on the part of the Court would have also entailed that the arbitration process and the Clause 4.82 of the Laws and Discipline of the Methodist Church had to be overruled or considered invalid. According to *Freedom of Religion South Africa* (2015) by implication, the Courts would successfully start:

Telling the Church how to govern her affairs; dictating what the Church (and therefore, also its members) may and may not believe, and may and may not preach – what is acceptable, and what is not...and Forcing the Church (including pastors and members) to act against their conscience, religion and belief.

Such would have been a plausible implication because the current attempts of Christian churches in South Africa to influence society and public decision making processes in the legal sphere with its values would have been refuted. It would not for example, publicly affirm the religious arguments which according to Christian belief are the main reason for marriage to be limited to a man and a woman. Further, Christian churches which do not favour same-sex union would have been obliged to conduct same-sex marriages or ceremonies and failure to do so, would have been a violation of the right to equality which prohibits unfair discrimination based on sexual orientation and would led to penalisation or imprisonment (*Constitutionally Speaking*, 2015).

Christians would have been forced to comply with the regulations of the state with regards to its affairs and how far Christian institutions can go in engaging with the general public and political arena with arguments that are based on its doctrines and sacred scripture. Clearly, by directing the applicant to return to the arbitration process, the Constitutional Court safeguarded the freedom of religion and its autonomy and denied the state's ability to cross the line of the Church's self-determination and autonomy. By implication, this decision did not only show the forcefulness of Christian values in the public sphere, but that the Court acknowledged the need

for such values in the public sphere, especially in religious spheres and the inability of the state to intervene in such cases.

The Court seem to have agreed with the affirmation of *Freedom of Religion South Africa* that “it is not for the State (government / courts) to tell us what we may and may not believe, preach and how we should run our internal affairs!” (*Freedom of Religion South Africa*, 2015). By referring the applicant back to the arbitration process, this raises a vital question which shows the fact that the Constitution is not clear as far as religious influences are concerned in the public sphere. In line with this, Mofokeng (2007:124) raises a vital question:

the question is whether it is possible for a person to belong to a religious group, and to have the freedom of religion as guaranteed under section 15 of the Constitution without the legal recognition and protection of the right to put that religion or opinion into practice?

One may question Section 15(3) of the Constitution which although recognises the importance of religious convictions or practices and their autonomy, is not really helpful in regulating how far Christian values can go in influencing the public sphere with its values in as far as religious freedom is concerned (van der Vyver 2012:149). Nevertheless, in the *Ecclesia de Lange v Methodist Church of SA* which is a recent case, one can see just how influential Christian values are in the public sphere based on freedom of religion and the provision of autonomy and self-determination through which the Court has hesitated to trespass.

## **2.4 Conclusion**

This chapter discussed the Constitutional Court’s appraisal of religious freedom post-1996. The first part of the chapter clarified the predicament or clash of rights which has arisen from the influence of certain Christian values in society. Based on the constitutional guarantees of religious freedom deliberated on in the previous chapter, Christian values and their influence sometimes conflict with other constitutionally protected rights and democratic values in society. This is partly due to the unclear position of religious freedom and its boundaries in society. The chapter affirmed that although the Constitution guarantees the freedom of religious belief, the guarantees regarding the observance of such beliefs or values is questionable.

The second part of the chapter explored three Constitutional Court cases which clearly demonstrate the predicament or conflict of rights arising from the influence of certain Christian values in South Africa post-1996. The explored cases are: *Christian Education South Africa V Minister of Education, Minister of Home Affairs and Another v Fourie and Another*, and *De*

*Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* The chapter exposed the arguments involved in the cases and the Constitutional Court's judgements on the cases with regard to religious freedom and other related rights through which the concerned Christian institutions claim the right to influence society with their values.

In *Christian Education South Africa v Minister of Education and Minister of Home Affairs and Another v Fourie and Another*, the Constitutional Court strongly recognised the centrality of religious values both to believers and to society but ruled against religious claims. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, the Constitutional Court affirmed its reluctance to interfere in issues relating to the regulation of religious values and beliefs, and thus referred Ms De Lange back to the arbitration process of the Methodist Church of South Africa according to rules and regulations of the Church. Although the three Constitutional Court Judgments are quite clear, the Court had to consider various conflicting and overlapping rights and freedoms in these issues. The cases demonstrate that given the unclarified parameters of religious freedom, how far Christian institutions can go in influencing society with their values is unclear. While attempting to deal with the predicament, the Constitutional Court may try to reconcile conflicting rights, consider the possibility of exemption and finally emphasise the centrality of democratic values of equality, human dignity and freedom.

## CHAPTER THREE

### 3. Religious Freedom and the Strategies in the South African Model

#### **3.1 Introduction**

As shown in the three case studies explored in the previous chapter, Christian institutions claim the right to influence society with their values based on the Constitutional guarantees of religious freedom. Despite the explicit Constitutional stipulations of religious rights in Sections 14(1), 15(2), 15(3), and 30(1), a question arises. What does freedom of religion really mean? It is one thing to look at the Constitutional stipulations of religious freedom, and it is quite a different thing to actually perceive the Constitutional guarantees of religious freedom from the perspective of case-law<sup>77</sup> in South Africa. In that sense, religious freedom which is the basis for the influence of Christian values in South Africa has to be understood from both Constitutional guarantees and the Constitutional Court's interpretation of what "the right to freedom of religion" and other related rights actually necessitate.

To fully deal with the notion of religious freedom, this chapter categorises it into two dimensions; namely, internal aspect of religious freedom and external aspect of religious freedom with reference to the South African case-law and perspectives of key thinkers. Considering religious freedom from these perspectives is vital since this right in a broad way involves various freedoms which can be grouped into internal and external or private and public aspects. For example, the "right to freedom of religion" comprises "the freedoms of religious autonomy, religious choice, religious observance, propagation of a religion or denomination and religious teaching"<sup>78</sup> (Van der Schyff 2005:195). As will be explored in this section, rights such as freedom of religious doctrines or beliefs can be considered as internal or private aspects of religious freedom while the practice or practical observance of such beliefs can be considered as external or public aspects.

Understanding this fact requires not only looking at the three Constitutional Court cases explored in the previous chapter but also other selected cases which also attempt to clarify what freedom of religion involves. Based on the Constitutional guarantees of religious freedom and the importance of Christian values in South Africa, the Constitutional Court has been able to

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<sup>77</sup> Case-law refers to the legal law established through the interpretation or reading of the Constitutional law by the Constitutional Court and other judicial systems in former cases.

<sup>78</sup> Section 15(1) of the South African Constitution.

deal with a number of cases whereby Christian values conflict with other Constitutional rights and fundamental values. The Constitutional Court has in some cases attempted to reconcile the influence of certain Christian values in society and the Constitutional rights which seem to be violated or infringed in the process of advocating such Christian values. In its attempt to deal with this predicament or clash of rights, three strategies can be identified. Firstly, there is what can be considered as the “positive recognition”<sup>79</sup> of religious values which is characterised by the proportionality principle. Under this strategy, the Constitutional Court has in some cases attempted to reconcile Christian values with other rights and freedoms by balancing such rights. In so doing, the Constitutional Court has in some cases considered the possibility of accommodating Christian values based on their relevance in the society, importance to Christians and also Constitutional guarantees of religious freedom. For example, the Constitutional Court considered the possibility of granting accommodation in *Minister of Home Affairs and Another v Fourie and Another* although it did not in the final judgement.

Secondly, the Constitutional Court considers, though not strongly, the principle of religious exemptions. In some Constitutional Court judgements, there have been clear indications that the Court does consider the possibility of granting Christian institutions special allowances to influence society with their values. In cases where Christian values infringe upon the rights of others, the Constitutional Court has been hesitant to grant exemptions despite the fact that such an option is evident in some cases. For example, in *Christian Education South Africa v Minister of Education* the Constitutional Court explored the possibility of granting a religious exemption but ended up affirming the impossibility of such a move.

Finally, the Constitutional Court has also appealed to public reason in its attempt to reconcile or balance the influence of certain Christian values in society and the rights which they infringe. Here, two approaches to public reason are noted. Firstly, there is a subjective appeal to public reason whereby the Court recognises the values and convictions of everyone based on the notion of legal plurality. Christian values are recognised as vital to the Christian institutions concerned and to society. Based on the freedom of religious belief, Christian values are acknowledged and considered as essential. Secondly, an objective appeal to public reason can be identified in the South African case-law. In this context, the Constitutional Court considers the common interests or the generally applicable values and laws as being preminent to

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<sup>79</sup> Bilchitz, D & De Freitas, S 2012. ‘Right to Freedom of Religion in South Africa and Related Challenges’. *South African Journal on Human Rights* (28), pp.14



individual and religious values. The three strategies taken together highlight the way the judicial system deals with the predicament that arise when the influence of Christian values conflict with other values and rights.

## **3.2 Religious Freedom in South African**

### **3.2.1 Internal Aspect of Religious Freedom**

The most primary element of religious freedom is its internal aspect since it stresses the liberty of an individual or religious institution or organisation to adhere to certain religious values freely and to maintain them. It entails the ability to choose what to believe. As Pretorius (2013:115) understands it, the internal aspect of religious freedom refers “to the freedom to believe, which embraces the freedom to choose one’s religion – religious or non-religious”. Due to the emphasis on the right of a religious institution or an individual to freely adopt certain beliefs and values, the internal aspect of religious liberty is underlined by the “inviolability of the individual's conscience” (Freedman 2000:105). From this perspective, Christian institutions in South Africa can claim to have the liberty to alter or adhere to certain beliefs which they perceive as acceptable and to use such beliefs as the basis for their influence in the society<sup>80</sup>.

The internal aspect of religious freedom underlines religious autonomy and self-determinism<sup>81</sup> and is essential in guaranteeing the freedom of religious expression. In that way, the right to “freedom of religious expression” is primarily based on the principle of religious autonomy. For Van der Schyff (2003:512), freedom of “religious autonomy refers to aspects of the relationship between the state and religion, as well as other institutional aspects of religion, such as the regulation of own affairs and doctrine, religious dignity”. Religious autonomy goes as far as giving Christian institutions the internal aspect of religious liberty. This means that Christian institutions have the right to regulate their beliefs and values which are within their

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<sup>80</sup> With reference to the American Constitutional ‘free exercise clause’, Tribe (1988: 1160) argues that “the free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief. It prohibited not only direct compulsion but also indirect coercion which might result from subtle discrimination; hence it was offended by any burden based specifically on one's religion. So viewed, the free exercise clause is a mandate of religious voluntarism”. What is vital in Tribe’s assertion is that he depicts freedom of religion as being based on conscience which is central to religious beliefs.

<sup>81</sup> Section 235 of the South African Constitution on “Self-determination” states: “the right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation”. This shows that Self-Determinism as an element of religious autonomy can be determined by the legal system.

circles. Further, Christian values ought to be valued by the legal system as consisting of dignity and as appealing in their own respect. In that way, the “powers of domestic governance” (Van der Vyver 2012:149) of Christian institutions with regards to their values cannot be unjustifiably dismissed.

From the highlighted perspective and based on Section 31(1) of the Bill of Rights, Christian institutions in South Africa have the right to regulate of beliefs and values in their own circles. In *S v Lawrence, S v Negal*,<sup>82</sup> Justice Chaskalson P delivering Judgement on behalf of the majority asserted that “the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrances or reprisal” (Rautenbach 2002:9-10)<sup>83</sup>. The internal aspect of the right to the freedom of religious belief in this case suggest that Christian institutions are given the opportunity and space to choose freely the belief or worldview to which they wish to adhere. As Kumalo (2013:636) remarks, South Africa’s post-1996 “observes the fact that its citizens are religious and allows them to practice their religions freely in public spaces without placing any limitations or biases on any particular religion”.

The freedom of Christian institutions to regulate their own doctrines and values is emphasised by Section 31(1) of the Constitution which safeguards religious institutions and groups the right to control and practice their beliefs individually and collectively. The Constitutional Court considers religious convictions which citizens adhere to without unjustified reprisal. From this viewpoint, the internal aspect of the “right to freedom of religion” includes “an absence of coercion and constraint”<sup>84</sup> given that “freedom of religion is impaired if people are forced to act in a manner contrary to their beliefs” (Freedman 2000:105)<sup>85</sup>. Christian institutions are at liberty to change or accept certain religious values or convictions without unnecessary

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<sup>82</sup> *S v Lawrence, S v Negal, S V Solberg* (1997 (4) SA 1176 (CC)). In this case, religious freedom as contained in Section 15 of the Constitution was considered.

<sup>83</sup> The affirmed definition of religious freedom conforms to the definition upheld in *R v Big M Drug Mart Ltd* [(1985 18 DLR 4th), a Canadian case.

<sup>84</sup> In *R v Big M Drug Mart Ltd* [(1985 18 DLR 4th) (para.354)], Justice Dickson J declared: “if a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine and limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercions and constraint, and the right to manifest beliefs and practices”.

<sup>85</sup> *S v Lawrence, S v Nagel, S v Solberg* (judgment delivered by Chaskalson P) para 92-93.

intervention or coercion on the part of the judicial system or the state. A particular Christian institution cannot be prevented from adopting certain beliefs which it finds appealing.

The internal understanding of religious freedom is the cornerstone of other Constitutional rights related to religion highlighted in the first chapter. From this perspective, religious institutions pose the right to “require that their members be conformist and to exclude non-conformists” (Pistorius 2013:521). By implication, Christian institutions can determine certain regulations or rules which its adherents are required to abide in order to be affiliated to that religious institution. In *Wittmann v Deutscher Schulverein, Pretoria and Others*, Justice Van Dijkhosrt J noted that religious institutions are guaranteed the right to associate with those members who agree to the dictates of a religious organisation. Justice Van Dijkhosrt J stated that “freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the associations to conform with its principles and rules”<sup>86</sup>.

From the above, Christian institutions, based on the freedom of religious belief and regulation “may exercise their freedom of autonomy in setting of guidelines for the admission of members to their organisations” (Pistorius 2013:525). A Christian institution may have its own views on certain issues relating to gender, abortion and so on which would be in some way binding on its members. This is because the internal aspect of religious freedom is central in regulating Christian values by concerned Christian institutions and fulfilling the demands of such institutions. A Christian institution regulates who qualifies to be a minister and who does not and has the liberty to suspend a member of its religious institution if such a member violates certain doctrinal principles.

In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, the Methodist Church of South Africa argued in the Constitutional Court that Ms De Lange as a minister had an irrevocable mandate to be the custodian of the beliefs and values of the Church. As such, she was not to engage in a same-sex marriage based on Clause 4.82 of the Laws and Discipline of the Church. From the perspective of the internal aspect of religious freedom, such an argument is appealing given that the “sphere of sovereignty applies to the exercise of internal powers by, for example, a religious institution (an institutional right)” (van der Vyver 2012:163). In the case under consideration, the Constitutional Court acknowledged the need to respect the internal or private aspect of religious autonomy by avoiding intervening

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<sup>86</sup> *Wittmann v Deutscher Schulverein, Pretoria and Others* [1998(4) SA 423 (T) (451E) (n 17)].

in the matter of internal doctrinal issues of the Church. The Court suggested that the arbitration process based on the rules of the Church Community would be the most appropriate and primary platform to deal with the issue. Justice Moseneke DCJ representing the Court decision of the majority declared:

Arbitration is the appropriate forum to decide if the line that has been drawn by the Church in Ms De Lange's case is acceptable. It would not be appropriate for this Court to interfere at this stage especially considering that the line is close to the Church's doctrines and values. No good reason has been shown why arbitration would not be suited to resolving the present dispute".<sup>87</sup>

The above shows that the internal aspect of religious freedom came out strongly in this Constitutional Court judgement. The Court clearly stated the inappropriateness of a situation whereby the legal system can intervene in private doctrinal issues of religious institutions. Through the internal aspect of religious freedom, religious institutions are at liberty to maintain, constitute and establish their own religious beliefs given that the Constitutional guarantee of freedom of religion involves the liberty to regulate its affairs. Pistorius (2013:524) reaffirms this argument by upholding that the "freedom to regulate doctrine is a necessary element in ensuring true freedom of religious autonomy as religious liberty can only come to full expression if churches are free to regulate their own doctrine and confessions". This shows that the internal aspect of religious liberty is essential since it upholds the right of a Christian institution to respects its values.

Nevertheless, the internal aspect of religious freedom was questioned, and to a greater extent limited in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (*Strydom* case),<sup>88</sup> where the job appointment concerned did not directly involve the instruction of religious doctrine. In *Strydom*, the "court was called upon to decide whether it was permissible for a congregation to terminate the services of the head of its 'art academy' who openly entered into a gay relationship" (du Plessis 2009:31/360). Mr Johan Strydom, a music teacher who was head of the 'art academy' at Gemeente Moreleta Park congregation had his contract terminated by the Nederduitse Gereformeerde Kerk due to his involvement in a same-sex relationship. Mr Strydom contended in the Transvaal Provincial Division of the High Court of South Africa that he had been unfairly discriminated against based on his sexual orientation, and that the contract had not clearly stipulated that his duty extended to religious and doctrinal instruction.

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<sup>87</sup>[2015] ZACC 35 / (CCT223/14) [2015] ZACC 35). para 45.

<sup>88</sup> *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269; 2009 (4) SA 510 (T).

On the contrary, the Nederduitse Gereformeerde Kerk maintained that the termination of the complainant's contract was justifiable given that the church was acting in accord with its religious beliefs based on religious freedom as stipulated in the Constitution. On this basis, the church "insisted it had to ensure that people in leadership positions did not set a bad example. The church contended it could not be seen to condone the 'sin' of living in a homosexual relationship" (News24, 2008). In his judgement, Judge Dion Basson found that "the respondent unfairly discriminated against the complainant on the ground of his sexual orientation".<sup>89</sup> The court's decision bears a certain impact on the internal aspect of religious freedom, to the extent that its absolute element can be restricted in certain cases. The discrimination of the Nederduitse Gereformeerde Kerk against Mr Strydom had a negative impact on his right to dignity and equality, and the church had unlawfully discriminated against him under the Promotion of Equality and Prevention of Discrimination Act. The judgement of the Strydom case appealingly shows that a limitation on the internal aspect of religious freedom might be plausible especially in cases of unfair discrimination of jobs that do not necessarily relate to the instruction of religious doctrine.

The challenge with issues relating to moral conduct such as the question of same-sex marriage explored in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* is that they are not free from diverse opinions. This is especially the case in terms of its rightness or wrongness to the extent of being a defensible reason for determining membership or job opportunity in a Christian institution. Plausibly, Freitas (2012:1) argues that "appointments by (and membership to) a church may require an adherence to the core tenets of such a church, irrespective of the functions emanating from such an appointment". When a Christian institution employs a person in a position that is distant from its core beliefs or doctrines, so that the activity to be carried out by the employee does not entail a substantial relationship to its religious doctrines, then any form of work-related discrimination can be justifiably ruled out by the legal system. On the other hand, appointments relating to sacerdotal or ministerial positions and other "religiously based jobs"<sup>90</sup> which have a closer "proximity to the doctrinal core"<sup>91</sup> are examples where an employee might be dismissed by a religious institution.

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<sup>89</sup> Ibid., para 41(1).

<sup>90</sup> Lenta, P 2009. 'Taking Diversity Seriously: Religious Associations and Work-related Discrimination'. *South African Law Journal* 126(4): 827-860. pp. 38.

<sup>91</sup> Ibid., 859.

### 3.2.2 The External Aspect of Religious Freedom

The internal aspect of religious freedom as asserted above showed that Christian institutions have a greater liberty to adhere to certain religious values and doctrines and to regulate internal affairs based on its doctrines. Reading the Constitution from the perspective of the internal aspect of religious freedom excludes the right of Christian institutions to influence the general public with their values. Such a right fall under the external aspect of religious practice since it concerns the expression or exercise of religious values. In that way, although the Courts are resistant to “embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of ...[religious] belief” (Van der Vyver 2012:161)<sup>92</sup>, where such beliefs conflict with other non-religious rights the Courts have had to intervene. How far religious values can go in influencing society through religious practice has been highly debatable in the legal system in South Africa.

The European Court of Human Rights defines what can be considered as the external aspect of religious freedom as the “freedom to manifest one’s beliefs” (*European Court of Human Rights Research Division*, 2013:8). The external aspect of the “right to freedom of religion” in South Africa concerns the manifestation or practice of religious values or beliefs. This goes beyond religious autonomy since it does not only involve the regulation of certain religious values and its internal affairs. The external aspect of religious freedom involves a further aspect involving the practical application of such values both in private and public. As Justice Chaskalson P noted in *S v Lawrence*, “the essence of the concept of freedom of religion is... the right to manifest religious belief by worship and practice or by teaching and dissemination” (Rautenbach 2002:10). Through the external aspect of freedom of religion, Christian institutions attempt to influence the society with their values in South Africa.

This is based on religious liberty which is guaranteed by the Constitution as consisting of both internal and external aspects of the right to freedom of religious belief and expression. This conforms with Coertzen (2011:11) who follows Blei in arguing that “religious freedom means more than just having a religion and upholding inner convictions and feelings” because it “includes the right of everybody to express his or her religion and faith in worship, teaching, practice, and maintenance.” Similarly, Mestry (2006:58) argues that the “right to freedom of religion” involves the “right to express one’s religious belief or philosophical convictions, both in private and in public, individually or jointly with others, freely in the form of teaching,

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<sup>92</sup> [1999 (9) BCLR 951 (SE) at 958 (South Africa)].

practice, worship and observances”. The internal and external aspects of religious freedom taken together underlie the not only the ability of Christian institutions to adhere to certain beliefs and regulate their values and affairs but also the actual observance and practice of religious values. This means that Christian institutions are free to practice their religious values in both private and public spheres. Christian institutions also have the liberty to influence society with religious values by either engaging actively with issues of public policy or enforcing their values on their constituencies and the general public.

### **3.2.3 The Concept of Religious Freedom: Imbalanced?**

In the South African legal context<sup>93</sup>, the extent to which Christian values influence the society is indicated by the imbalance on how the freedom to hold religious values is separated from the freedom to practice or express them (Mofokeng 2007:121). Ideally, Constitutional provisions of religious freedom ought to protect both the regulation and practice of religious values and convictions in a way that is in accord to their choice. I uphold that Christian institutions ought also to be permitted to promote or practice Christian values both in religious circles and society. Following the place of Christian values in the society, such a distinction which has already been highlighted in the previous sections between religious belief and religious practice is essential. Although it has been noted that unlike the internal aspect of the right to religious freedom, the external aspect is not absolute in the sense that the state might intervene in limiting such freedom, it is apparent that the legal system in South African has been overemphasizing this fact. If a Christian institution has absolute freedom to uphold and regulate its values, why over-limit the manifestation or practice of such beliefs once they are used to influence the society?

The emphasis on the practice aspect of religious freedom was acknowledged in *S v Lawrence* where the Court described freedom of religion as the “the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination”<sup>94</sup> (Mestry 2006:59). In that way, any laws or constraints that prohibit or restrict an individual or religious institution from adopting and manifesting religious values can be said to violate the “right of freedom of religion”. From this perspective, a Christian

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<sup>93</sup> The affirmed is limited to the Constitutional guarantees of religious freedom and the three Constitutional Court cases explored in the previous chapter.

<sup>94</sup> *S v Lawrence; S v Negal; S v Solberg* [1997 10 BCLR 1348 (CC) (100 -102); (116 -118)].

institution can be said to have the freedom based on the Constitutional guarantees to uphold certain religious values both in belief and to practice them to the extent of influencing the society with such religious values. Although the right to the freedom of religious belief is apparent in the legal systems in South Africa, the practice of such belief is questionable. Mofokeng (2007:121) argues:

despite the fact that everyone has a right to freedom of religion under section 15 of the Constitution, the section does not adequately afford people the right to practise their religions freely, as people would understand that right.

The state absolutely protects religious institutions to adhere to certain religious values though the application or practice of such values is not equally protected. Based on Constitutional guarantees of the right to freedom of religion, Christian institutions are free to regulate and practice their beliefs in a manner that is consistent with their values and religious principles. In *Christian Education of South Africa v Minister of Education*, Christian institutions opted to apply corporal punishment which they perceived as imperative to their religious values. It follows that if all parents who sent their children to such Christian institutions believe that corporal punishment is an essential Christian value which ought to be practiced by teachers, then the state ought to protect that element. Following Mofokeng, this is because religious convictions and their practical application cannot be separated since “belief leads to practice based on that belief” (2007:122). Mofokeng (2007:122) gives an example:

if a man and a woman belong to X religion, they have a Constitutional right to believe in and belong to X religion, they may enter into a marriage in accordance with the rules of X religion. To marry in terms of X religion means that they actually put their religion into practice. However, if the marriage is in accordance with X religion, it may not be legally recognised in South Africa because it is not a civil marriage (that is, a marriage entered into in accordance with the provisions of the Marriage Act 25 of 1961).

Mofokeng emphasises that for the “right to freedom of religion” to be fully realised, the legal system ought to treat equally both the freedom to hold certain values and practice them. Following his indicated example, this would mean that a marriage conducted in accordance with religion X ought to be legally accepted, given that such a marriage is simply a manifesting of the right to ascribe to certain religious values. If both belief and practice were treated equally, then in the case of the Constitutional Court in *Christian Education of South Africa v Minister of Education*, Christian institutions would have to be allowed to practice their religious values in the concerned Christian schools. Given that the Constitutional Court judged against Christian Education of South Africa in the case at hand, the Court protected the right to religious belief



but did not protect the practice or manifestation of such beliefs. Although one may be free to uphold any sort of religious values, I affirm that only those values which do not conflict with other Constitutional values and fundamental rights are fully guaranteed. Christian institutions can only influence society with values which do not infringe upon the rights and freedoms of others. Mofokeng (2007:124) perceives a problem in this case because “the distinction between the practice of one’s religion and the right of belief goes to the root of personal law”.

Personal law as a vital component of the freedom to belief might be characterised as part of values which a Christian institution might consider binding and essential. With regards to *Christian Education of South Africa v Minister of Education*, Christian Education of South Africa considered corporal punishment part of their personal or private law. The defect in the Constitutional provisions is that they guarantee both the practice and belief aspects of personal law but only protect the latter. If the state only goes as far as protecting fully the right to freedom of belief and can overrule the practice of such beliefs, then one may argue that religious freedom is imbalanced. As Mofokeng (2007:124) puts it, “the right to freedom of religion in so far as the right to practise one’s religion is concerned, is rendered useless, because such a right is limited only to the protection “belief” which inseparable from the “practice” of that belief”. Can someone who belong to a particular Christian institution have the “right to freedom of religion’ provisioned by the Constitution if the practice of his or her religious belief or conviction is not legally protected or guaranteed?

Internal and external aspects of religious freedom demand that a particular religious institution not only be allowed to regulate its beliefs but also that such beliefs be practised by adherents. Along the same lines, Pierre de Vos (*Daily Maverick*, 2012) affirms:

Section 15(1) of the Constitution guarantees for everyone the right to ‘freedom of conscience, religion, thought, belief and opinion’. *This means one has a right to believe what one wants to believe* (no matter how bizarre, uninformed or harmful to others); to bring the good news of one’s beliefs to those around you by shouting it out from the rooftops; *and by practicing the tenets of one’s religious beliefs*. [Emphasis added in italic].

Thus, when one talks of the right to freedom of religion, one argues that Christian institutions have the liberty of self-determination of religious precepts, have the freedom to practice such beliefs, and that they are given an opportunity to participate in the society with their values. That being the case, “section 15(1), read with sections 15(2) and 15(3), guarantee both the freedom of belief, and the freedom to practice that religion” (Mofokeng 2007:125). Section 15(3) following the limitation clause (Section 36) prohibits the Constitutional Court from

codifying religious laws or values which might be unconstitutional and the application of religious values or laws which infringe any Constitutional provisions. Section 15(3) and the limitation clause do not affect religious values or laws which are not contrary to any Constitutional stipulations. Nevertheless, for Mofokeng (2007:125), “the correct interpretation of section 15 is that freedom of religious belief and freedom to practise any law associated with any such religion or belief, should be regarded as protected in the Constitution”.

From the above it can be argued that Christian values which are consistent with Constitutional principles are infringed by the judicial system. While analysing the developments in the Constitutional Court judgements as far as religious freedom is concerned, Mofokeng (2007:125) argues that the Courts do not protect both the belief and practice of religious values even if such values are in line with the Constitution. If Mofokeng’s interpretation of the right to religious freedom is plausible, one may question the reason why the Constitutional Court sometimes does not recognise the practice or influence of religious values in South Africa. Why did the Court not permit Christian institutions to employ corporal punishment to their schools in *Christian Education of South Africa v Minister of Education*? If the Court does not allow Christian institutions to employ corporal punishment in their institutions based on Section 15(3) following the limitation clause (Section 36), then one may assert that the manifestation or practice of religious values are not fully protected in the South Africa case-law. In that regard, Mofokeng (2007:130) argues:

the courts have failed to protect the right of different peoples to practise their religion by not recognising that the right to freedom of religion includes not only the mental aspects of belief, but also freedom to practise and have legal protection of the rules of their religion.

To balance the internal and external aspects of religious freedom, the realisation on the part of the Courts that the “right to freedom of religion” and all other Constitutional provisions associated with it entails holding to a particular belief system and its application. The argument at hand is that the state ought to protect equally the freedom of Christian institutions to hold religious values and to manifest or practice them in the society to the extent of engaging with the society on that basis. A vital question arises here. Is the external aspect of religious freedom absolute?

### 3.2.4 The External Aspect of Religious Freedom as Limited

In *Christian Education of South Africa v Minister of Education*, Justice Liebenberg highlighted that under normal circumstances the Court may not intervene in doctrinal issues of Christian institutions by determining the soundness or logic or religious beliefs<sup>95</sup>. According to Currie (2013:341), Justice Liebenberg in *Christian Education of South Africa v Minister of Education* observed that:

in cases of this nature a court will in the first place consider whether the beliefs relied upon in fact forms part of the religious doctrine of the religion practiced by the person concerned. *Once it is found that the belief does form part of that doctrine, the court will not embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of that belief.* But the Court will then inquire into the sincerity of the person's claim that a conflict exists between the legislation and the belief which is indeed burdensome to the person [emphasis added in italic].

Based on the highlighted judicial sentiment, the logical essence of Christian values may not be considered by the legal system. If the judicial system can do so, then the right of Christian institutions to adhere to certain values based on their 'right to freedom of religion' is defeated. From this perspective, Martinez-Torron (2003:3) is justified in considering the internal dimension of the "right to freedom of religion" as absolute to a greater extent. However, limitations may not be made against the liberty of a particular Christian institution in terms of the regulation of its own values and affairs especially in cases that directly have to do with the appointment of religious leaders. The case would be slightly different in situations that deal with employment that is distant from doctrinal application and regulation such as employing a music teacher as in the *Strydom* case where the discrimination based on sexual orientation was overruled.<sup>96</sup> Nevertheless, this does not imply that religious institutions and organisations cannot be granted a significant degree of autonomy in matters of doctrinal regulation including their employment practices.

The court may not interfere with the internal affairs of religious groups especially in cases that deal primarily with religious education or the imparting of doctrine such as a priestly position. For instance, the ability of a religious organisation to ordain a minister would entail that the one who is to be ordained must abide by the requisite doctrinal stipulations and disciplinary proceedings of the concerned religious institution as was the case in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa*. However, the case would be different in a

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<sup>95</sup> *Christian Education of South Africa v Minister of Education* [1999 4 SA 1092 (SECLD) 1100I-J].

<sup>96</sup> *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [2008] ZAGPHC 269; 2009 (4) SA 510 (T).

situation where a religious organisation grants a person a job which is more distant from the doctrinal core of the religious group. In this case, the religious group cannot be granted absolute autonomy in its internal dealings to the extent of discriminating against an employee on the grounds of sexual orientation, especially if such a position is not ministerial and does not entail religious instruction.

In a democratic and pluralistic society, religious values cannot be unfairly ridiculed or curtailed as long as they are exercised in a manner consistent with the Constitutional values in its practice. Based on the Constitutional guarantees of freedom of religion discussed in the first chapter, the state grants Christian institutions protection given to other non-religious rights. Wherever the question of the right to religious freedom arises, one may question how far the influence of certain Christian values can go in the public sphere based on the internal and external aspects of the concept of religious freedom. This affirms the relevance of the Constitutional limitations on religious freedom. Pistorius (2013:525) highlights that:

the *forum externum*<sup>97</sup> dimension contrary to the *forum internum*<sup>98</sup> is not absolute and the practices and rituals of religion, whether physical or emotional, need to be exercised in such a way that they are not inconsistent with the specific provisions of religious freedom or with the other basic human rights contained in the Bill of Rights.

Pistorius's argument is in line with Freedman (2000:107-108) who argues that "while the freedom to adopt a belief would appear to be an absolute right, the freedom to manifest those beliefs in practice must be subject to limitation". While the internal aspect of freedom of religion has to do with beliefs and their private regulation, the practice of such beliefs both privately and publicly affects other citizens who might adhere to different values or convictions. This is because it is through the external aspect of religious beliefs that Christian values manifest to the extent of influencing the society. In this regard, the limitation of religious beliefs has been apparent in South African case-law as evident in cases such as *Christian Education South Africa v Minister of Education* and *Minister of Home Affairs and Another v Fourie and Another*.

As shown in the previous chapter, in both mentioned cases the Constitutional Court curtailed the influence of Christian values in society by ruling against arguments presented by the

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<sup>97</sup> *Forum externum* can be translated as "external sphere". In this case, it refers to the external aspect of religious freedom.

<sup>98</sup> *Forum internum* can be translated as "internal sphere". In this case, it refers to the internal aspect of religious freedom.

concerned religious institutions. However, in both cases the Constitution Court quite clearly emphasised the relevance and importance of Christian values both to Christians themselves and society. The same was the state of affairs in *Prince V President of the Law Society of the Cape and others*.<sup>99</sup> In this case, the Court found that unlike the freedom to religious belief, the notion of religious practice was not absolute given that Court's interests in restricting the use of a potentially harmful drug in line with the common good and international regulations precede the interests of the Rastafari to possess and use such drugs through religious practice<sup>100</sup>.

### **3.3 Three Strategies in the South African Model**

#### **3.3.1 Reconciling Christian Values with the 'Other'**

A closer look at the South African case-law show that in cases where certain Christian values conflict with other Constitutionally guaranteed rights, the Constitutional Court attempt to reconcile or find a balance between the two. South African Courts employ "the proportionality principle" or proportional analysis (Pienaar 2003:127) which is based on the "positive recognition model" (Bilchitz 2012:14). The model involves the balancing of rights based on the fact that the state recognises the rights and values of all citizens and attempt to reconcile them in cases where different Constitutionally protected rights conflict or clash. According to Bilchitz (2012:14), a "positive recognition model" is vital in "defining the importance of religion in many people's lives and seeks to find a manner in which the state can, in a positive and egalitarian manner, recognise the varied identities of its citizens".

The model of "positive recognition" captures the important relationship between religion and the state. The model is "rooted in the idea of the equal worth of individuals across their differences" (Bilchitz 2012:170). The state through legal systems ought to create conditions whereby religious institutions can express their identities and beliefs. Given that the affirmed rules out the strict separation between state and religion, certain values of religious institutions may be permitted to penetrate the public sphere as long as essential rights are not violated in the process. Central to the model is the equal recognition and treatment of both religious and non-religious values or the "the equal positive recognition of all differing identities".<sup>101</sup>

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<sup>99</sup> *Prince v President of the Law Society of the Cape and others* [(2002 2 SA 794 (cc)].<sup>99</sup>

<sup>100</sup> *Ibid.*, para 139.

<sup>101</sup> Bilchitz, D & Williams, A 2012. 'Religion and the Public Sphere: Towards a Model that Positively Recognises Diversity'. *South African Journal on Human Rights* (28), 145-175. pp. 170.

Using the “positive recognition model,” one can justify the place of certain Christian values in the society should they not violate the rights or freedom of the other. By balancing the influence of Christian values in society and other Constitutional rights and values that are violated by such an influence, the Court is said to employ proportionality analysis. As Coertzen (2010:12-13) highlights, balancing religious rights with other equally protected Constitutional values is based on the ability of the Court to find the *proportionality* between:

the fundamental rights of equality, human dignity, and non-discrimination on the one hand and the associational rights, which includes the freedom of association, freedom of religion, freedom of practice and use one’s language and culture and the right to associate in cultural, religious and linguistic communities, on the other hand.

If the Court restricts the influence of certain Christian values, then this ought to be based on the legitimate and proportionate ground rooted in the values and spirit of the Constitution. In that sense, the Constitutional Court is accommodationist. As Pierre de Vos (*Daily Maverick*, 2012) points out, “Courts have said that they will apply the principle of reasonable accommodation when balancing competing interests of the state and of religious communities”. Such accommodation depends on the influence of Christian values in both the private and public sphere based on religious freedom and other related rights. As highlighted in the first chapter, Christian institutions are guaranteed the freedom to exercise their religious values<sup>102</sup>, the freedom of religious association and assembly<sup>103</sup> and the freedom to religious autonomy<sup>104</sup> as legal bodies<sup>105</sup>. As Van der Vyver (2012:157) asserts, “the Constitutional Court, on several occasions, emphasised the vital importance of the state of religion as a component of South Africa’s Constitutional democracy”. Delivering a unanimous Court decision in *Minister of Home Affairs and Another v Fourie and Another*, Justice Albie Sachs made an important remark on the importance of religion in South Africa:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people’s temper and culture, and for many believers a significant part of their way of life. Religious

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<sup>102</sup> Section 15(1) of the South African Constitution.

<sup>103</sup> *Ibid.*, 17 & 18

<sup>104</sup> *Ibid.*, 31

<sup>105</sup> *Ibid.*, 8(4)

organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.

The above sentiments show the equality of secular and religious values before legal systems. In its attempt to accommodate and tolerate differing rights or freedoms, Pienaar (2003:119) argues that the Constitutional Court uses the principles of “equality and human dignity”. From this perspective, the South African legal system can be said to uphold “the even-handed treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting interests” (du Plessis 2001:450). The influence of Christian institutions through religious practice based on religious freedom are weighed against fundamental Constitutional rights such as non-discrimination, equality and human dignity. This is in line with the limitation clause whereby religious freedom may be limited “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”<sup>106</sup>.

The South African legal model advocates the elements of non-discrimination and equality before the law, whereby religious values and their influence in the society cannot be unfairly segregated. As Van der Vyver (2012:158) puts it, “equal protection and non-discrimination constitute the most basic norm of the South African Constitutional dispensation, and unfair discriminatory practices”. The equality principle shows why case-law in post-1996 South Africa has been that of accommodative in some instances. In 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 was promulgated to strengthen the Equality principle which states that “everyone is equal before the law and has the right to equal protection and benefit of the law”<sup>107</sup>. This entails that in reconciling Christian values with other Constitutional rights which might be unfairly infringed through the influence of certain Christian values, the Court in upholding the principles of “an open and democratic society” will have to consider principles such as human dignity, fairness, equality, freedom and justice<sup>108</sup>. In that sense, “equality legislation” (Pienaar 2003:122) is promoted in South Africa.

On the basis of equality and the Constitutional guarantee of religious freedom, Christian institutions are permitted like any other organisations to participate in issues of public policy

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<sup>106</sup> *Ibid.*, 36(1)

<sup>107</sup> *Ibid.*, 36(1)

<sup>108</sup> Pienaar, G 2003. ‘The Interaction Between Religious Freedom, Equality and Human Dignity’. *Potchefstroom Electronic Law Journal* (6)2, 119-131. pp.122.

with their values. What might be problematic would be how to determine circumstances where their influence is fairly or unfairly discriminatory. If a complaint of unfair discrimination is brought forward against a Christian institution by an appellant, the particular religious institution will be given an opportunity by the Court to demonstrate how the affirmed complaint did not unfairly discriminate against any of the Constitutional rights of the appellant. The religious institution will have to show that the supposed discriminatory act was not based on Constitutionally “prohibited grounds”<sup>109</sup> but that it was based on fair grounds. In *Harksen v Lane NO and Others*,<sup>110</sup> the Constitutional principles of equality and non-discrimination which underlie the accommodative feature of Courts were tested. According to Pienaar (2003:122), the procedure in *Harksen v Lane NO and Others*, was as follows:

The applicant has to prove that discrimination on any of the grounds prohibited in section 9 of the Constitution took place, whereupon the presumption of unfair discrimination may be rebutted by the respondent. Where the discrimination is based on any other ground that causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner,9 section 13(2)(b) stipulates that such discrimination is unfair, unless the respondent proves that it is fair.

The right to non-discrimination and equality are central when the Courts attempt to reconcile or balance religious rights with other rights that might be infringed upon in the process. The Constitutional guarantees of religious values are viewed in line with other equally Constitutionally protected rights and freedom. In *Christian Education South Africa v Minister of Education*, values such as human dignity were deemed more paramount than the Christian value of corporal punishment. In this case, having reconciled various conflicting rights, the Court upheld the rights to human security and dignity in line with Sections 10 and 12(1) of the Constitution which they perceived as fundamental that corporal punishment had violated. This conforms with Pienaar (2003:126) who asserts that “the unanimous decision of the Constitutional court in the Christian Education case was primarily based on effectuating equality through the balancing effect of the Constitutional value of the protection of human dignity”.

The “competing” and “overlapping” interests and Constitutional values in the case shows how much fundamental values of freedom, equality and human dignity are implicated where the

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<sup>109</sup> Section 9(3) of the South African Constitution.

<sup>110</sup> *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997).



influence of Christian values conflict with other Constitutional rights<sup>111</sup>. However, after balancing and reconciling different interests and values in question equitably based on the principle of human dignity, it was apparent that “the ban on corporal punishment formed part of a legislative scheme designed to establish uniform educational standards” (Pienaar 2003:127). Christian Education South Africa perceived the final pronouncements on the case as a discrimination against Christian values grounded on the Constitutional rights related to religious freedom. Rautenbach (2002:15) suggests that according to Freedman, “the state must be able to limit those practices, whether religious or not, which endanger the life and health of others or which limit the rights of others or which create public disturbances or undermine public morals”. Freedman emphasises the limitation of the influence religious values where they contravene the rights or freedoms of the other.

However, I perceive Freedman’s position as complex because it requires first and foremost the ability of the Courts to “strike a balance between religious liberty and the state’s duty to legislate for the common good” (Rautenbach 2002:15). Such a balance requires that the Constitutional Court channel the influence of Christian values in the society in line with other rights. In the three case studies explored in the previous chapter, one notices that Christian institutions attempt to influence the society with their values based on the Constitutional guarantees of religious belief and practice. Such institutions claim outright recognition of their values which they deem viable both from a religious and Constitutional perspective. On the other hand, the Constitutional Court recognises its duty to protect not only religious rights with regards to both belief and practice, but also non-religious rights which are claimed to have been violated by the influence of Christian values in each case.

In *Prince v President of the Law Society of the Cape and others*<sup>112</sup> where the Court upheld that “the Constitution does not call for different levels of scrutiny, but expressly contemplates the use of a nuanced and context-sensitive form of balancing in the s 36 proportionality analysis”. In this case, having balanced and reconciled different values and rights, the Court affirmed that the prohibition of the use of cannabis was the most appealing option since it exceeded the interests of the Rastafari community to practice the use of cannabis and that such a prohibition was for the common good of the general public<sup>113</sup>. The ability of the Constitutional Court to recognise the relevance of religious values indicates that “the Constitutional Court approaches

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<sup>111</sup>[2000 (4) SA 757 (CC)]. para.29 & 30.

<sup>112</sup> *Ibid.*, para.128

<sup>113</sup> *Prince v President of the Law Society of the Cape and others* [(2002 2 SA 794 (cc)]. Para.139.

matters relating to religious freedom with sensitivity and understanding” (Mestry 2006:60). Nevertheless, the influence of Christian values in the public sphere may not be unfairly limited, but have to be perceived from the perspective of other equally protected rights and freedoms especially human dignity and equality. In the Court’s attempt to balance or reconcile the influence of certain Christian values and the ‘other’ based on the discrimination claim, Pienaar (2003:129) argues:

in the case of discrimination based on a prohibition on the exercise of religious practices, the burden rests on the respondent to prove that a distinction is based on acknowledged church dogma or religious beliefs, and is of such a nature that it passes the test of a nuanced and context-sensitive form of balancing of these rights and the equality of affected persons.

In order to balance Christian values which might conflict with other rights which might be infringed or unfairly discriminated by Christian values, a concerned Christian institution in the Court of law ought to show that the discrimination is fair both on the grounds of the concerned Constitutional rights and fundamental values of freedom, human dignity and equality. In *De Lange v Presiding Bishop of the Methodist Church of Southern*, a strict balancing and reconciling of Christian Constitutional rights based on the internal aspect of religious liberty and sexual orientation made the Court refer the appellant back to the arbitration process of the Methodist Church. This was not the outcome in *Christian Education South Africa v Minister of Education* where the value of human dignity was upheld and in the *Prince V President* case where the interests of the community outplayed those of the Rastafarian community to use potentially harmful drugs. In line with that, Pierre de Vos (*Daily Maverick*, 2012) remarks:

when a court is called upon to make a decision on whether such limitations are reasonable and justifiable in terms of the limitation clause provided in section 36 of the Bill of Rights, it will have to balance the interests of the state and the community as a whole (including the interests of women and gay men and lesbians), on the one hand, against the interests of the religious community whose beliefs, teachings and practices are being limited, on the other.

The balancing of conflicting rights highlighted by Pierre de Vos depends on how much damage is caused or discriminatory a case is. Suppose that the case causes serious harm to the extent of violating the principle of human dignity, then the Court might be more robust in limiting the influence of the concerned Christian values in the society<sup>114</sup>. If the influence of Christian values is positive and in line with the Constitutional stipulations and values, then the Court will be less likely to issue bans on Christian values and influence in society. The “right to freedom of

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<sup>114</sup>In *Christian Education South Africa v Minister of Education*, corporal punishment was considered as dehumanizing and contrary to the value of human dignity by the Constitutional Court.

religion” is “a civil right and, therefore, the state should not advance nor inhibit religion but rather assume a position of fairness” Mestry (2006:58).

The Courts attempt to obtain a neutral stance in weighing religious rights against other rights which might be threatened by the influence of Christian values arising from the former. Recognising this duty, in *Minister of Home Affairs and Another v Fourie and Another*, the Court highlighted that “the hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner”<sup>115</sup>. The bitter pill for the Courts to swallow is just how far the influence of certain Christian values can be accommodated in society. This is especially difficult given that certain Christian values and practices might be harmful or considered as discriminatory. Based on this, in most cases balancing or reconciling such an influence with other rights that are violated has been the norm.

### **3.3.2 Religious Exemptions**

The question of exemptions in terms of granting some Christian institutions special respect and exceptions from generally applicable laws and moral norms is quite interesting in South African case-law. This raises the question of whether certain Christian institutions should be given exemptions or allowances should the influence of their values infringe upon the rights of others. The claim for exemptions might be based on the centrality of certain religious values to the life of a religious group, institution or individual or simply that a certain set of religious values deserves special respect to the extent of allowances or exemptions being sought. Such exemption involves being granted a special allowance to uphold certain practices, actions or beliefs which might be somewhat contrary to the general norm, but are nonetheless free from prohibition or are at least given an opportunity to exist.

The notion of exemption is linked to the principle of toleration which according to Leiter (2012:8) involve the fact that “one group must deem another differing group’s beliefs or practices ‘wrong, mistaken, or undesirable’ and yet ‘put up’ with them nonetheless”. From this perspective, religious exemption occurs when the judicial system tolerates the practices or influence of certain religious values by granting them special protection and freedom. For example, a Christian institution might have certain values which are contradictory to the

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<sup>115</sup> (CCT 60/04) [2005] ZACC 19) / [1 SA 524 [2006]. para 95.

Constitutional values, and which may infringe or violate other Constitutionally protected rights. Nevertheless, the Court might opt to grant such an institution a special exemption to practice and advocate such values in the society. This might occur when the Court cannot balance or reconcile the influence of certain religious values and other Constitutional rights that are violated in the process.

### **3.3.2.1 Exempting Christian Values**

In South Africa, Christian values are often treated as being equal to other Constitutional rights by the judicial systems, and religious convictions are considered part of the many liberties or human rights which are protected. As highlighted in the previous section, where religious freedom conflicts or collides with non-religious values, the state grants an equal limit of freedom, whereby one liberty may not override others. The stated position might be challenging because certain religious beliefs and values used by some Christian institutions in their attempt to influence the society are imperative in character. For example, Leiter (2012:36) notes that religious beliefs are sometimes regarded as obligatory, and beliefs in theories such as eternal damnation may force religious people to uphold certain values regardless of the consequences. The stressed element does not arise when Christian values and practices in question do not conflict with other equally protected Constitutional values. It arises when the values enacted by Christian groups clash with other rights and freedoms.

Religious values which might sometimes be understood as absolute make religious liberty non-negotiable and absolute to the extent of violating other liberties. This is clear in *Christian Education South Africa v Minister of Education* and *Minister of Home Affairs and Another v Fourie and Another* where religious values and their influence in the society infringed upon the rights of a third party and had to be curtailed by the Constitutional Court. Where the Court cannot balance or reconcile religious values with other rights without placing a limit on the influence of certain Christian values, a question arises. This concerns “whether religious claimants are ever entitled as a matter of right to exemptions from laws of general application” (Lenta 2012:303). Should the Court grant Christian institutions exemptions to adhere to religious values and practices that might be intolerable under normal circumstances and that are contradictory to the Constitutional values? Lenta (2009:37) considers the *Christian Education South Africa v Minister of Education* as “the first occasion in which the Court dealt with a claim for a religious exemption”. In this case, the significance of religion was explained by the Court in the following way:

for many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.<sup>116</sup>

The Court asserted how fundamental religious values are in society. Christian values provide a distinct setting for identity exploration and commitment through giving ideological, social, spiritual and political backing to many citizens<sup>117</sup>. Through its beliefs and practices, religion defines many people, giving them a sense of belonging and identity. Further, reasons that are given for ever considering religious exemptions are that religion imparts good moral principles and identity, contributes to the common good and welfare and that religious beliefs are categorical. Based on the centrality of religion, Judge Sachs in *Christian Education South Africa V Minister of Education*, held that “the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law”<sup>118</sup>.

The Court noticed a situation that might occur when religious or religiously motivated enthusiasts face a difficult dilemma of choosing either to follow the law of the state or their deeply religious convictions and religiously inspired categorical values. Such a predicament might make Christian institutions seek special toleration or exemptions. In line with this, du Plessis (2001:450) argues:

Tolerance of religious diversity goes beyond putting up with the free exercise of divergent religious beliefs and practices. It also entails the even-handed treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting interests.

The basis of granting toleration in terms of an exemption is the argument that Christian institutions intrinsically deserve special respect based on the Constitutional guarantees of religious freedom and that their views are central to Christian identity. However, given that “religious freedom is neither the only Constitutionally guaranteed liberty nor the highest one”

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<sup>116</sup> [2000 (4) SA 757 (CC)]. para 36.

<sup>117</sup> *Ibid.*, para 33.

<sup>118</sup> *Ibid.*, para 35.

(Grimm 2009:2375), the influence of Christian values ought not to do harm or violate other rights and freedoms protected by the Constitution. In deciding the case for exemption in South African, the Court discerns whether granting an exemption for corporal punishment to continue being exercised in the concerned Christian institutions would infringe other equally appealing Constitutional values. This would be beyond accommodation and requires the possibility of an exemption because:

the proportionality exercise has to relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption for which the appellant asked, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.<sup>119</sup>

When dealing with a case for exemption, the Courts consider not only the rights that are involved but also other essential principles of equality and human dignity. Christian values are equal and part of other Constitutional rights and liberties which ought to be protected by the Constitution. According to Lenta (2007:38), "in *Christian Education*, Judge Sachs dispensed with an objection that the principle of equality precluded the granting of exceptions". Based on the equality concern, in dispensing the appeal for exemption in *Christian Education South Africa V Minister of Education*, Judge Sachs held that "the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect"<sup>120</sup>.

From the asserted perspective, the Constitutional Court in some cases attempts to refrain from unfairly granting a religious institution preferential treatment while leaving out others who might also deserve the same exemption. As the Court declared in *Minister of Home Affairs and Another v Fourie and Another*, "it is one thing for the Court to acknowledge the important role that religion plays in our public life...it would be out of order to employ the religious sentiments of some as a guide to the Constitutional rights of others"<sup>121</sup>. The South African Courts are not ready to grant exemptions in cases that would infringe upon the rights of a third party. Such a problem does not arise in situations where the influence of certain Christian values do not conflict or clash with other Constitutional rights or general laws.

In *Prince v President of the Law Society of the Cape of Good Hope and Others*, the Court considered the possibility of granting an exemption on religious grounds. In this case, Prince

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<sup>119</sup> *Ibid.*, para 32.

<sup>120</sup> *Ibid.*, para 42.

<sup>121</sup> (CCT 60/04) [2005] ZACC 19 / [1 SA 524 [2006]. para 92

appealed to the Constitutional Court to declare Article 22A (10) of the Medicines Act and Article 4(b) of the Drugs Act unconstitutional on the basis that they discriminate against Rastafarians from using cannabis for religious purposes. The appellant contended that his right to religious observance or practice through the use of cannabis had been unfairly limited. Justice Ngcobo J highlighted:

should the Court find that any of these provisions limit the rights to religious freedom, one of the key questions which will have to be decided is whether a religious exemption to Rastafari would undermine the government's efforts to fight drug abuse and trafficking. In particular, the Court will have to decide whether there will be practical difficulties in policing such exemptions, and if so, whether they justify the denial of the religious exemption.<sup>122</sup>

### **3.3.3 The Appeal to Public Reason**

#### **3.3.3.1 Public Reason Model**

Public reason is an essential feature of a democratic society given that it underlines how people relate to each other in a pluralistic society. In South Africa, people are free to abide by their own convictions based on their liberty of conscience without being necessarily coerced to uphold someone else's beliefs or opinions. At the same time, citizens are expected to respect the beliefs and convictions of others, whether religious, political or moral. This freedom affirms the idea that individuals (or groups) are given the opportunity and the means to choose freely the belief or opinions to which they wish to adhere and the space in which to apply or practice it. This reaffirms a juridical framework which advocates legal plurality where a diversity of ideas and convictions flourishes. Based on the social diversity as the basis of the legal structure, Griffiths (1986:38-39) defines legal pluralism as:

the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields' [a] situation of legal pluralism ... is one in which law and legal institution are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all multifarious social fields present, activities which may support, complement, ignore or frustrate one another.

Legal pluralism is an essential component of the South African law especially because the Constitution recognises the right to freedom of belief and religion. The state cannot allow one group to freely express a certain practice and disapprove of another from expressing the same

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<sup>122</sup> *Prince v President of the Law Society of the Cape of Good Hope and Others* [(2002 2 SA 794 (cc)]. para. 10

practice. Nevertheless, although members of the society enjoy the liberty of their varying convictions and beliefs, there are certain regulations or stipulations which are generally applicable. From this perceptive, Quong (*Stanford Encyclopedia of Philosophy*, 2016) defines public reason as “those rules we sincerely believe can be justified by appeal to suitably shared or public considerations—for example, widely endorsed political values such as freedom and equality”. A closer look at South African case-law show that the pluralistic stance of the Constitution has given rise to contradictions among values.

Due to the irreconcilable nature of varying Constitutional values and rights, it is difficult to attain a consensus in some cases. Therefore, there is a need to come to terms with various reasons that may reasonably be applied should certain controversial issues of conflicting rights obtain. According to Rawls (1997:765), public reason “specifies at the deepest level the basic moral and political values that are to determine a Constitutional democratic government’s relation to its citizens and their relation to one another”. Public reason demands that beliefs and convictions held by individuals or institutions be compatible with the Constitutional principles of human dignity, freedom and equality which underlie public reason in the Constitutional spirit. This is because “the basic requirement is that a reasonable doctrine accepts a Constitutional democratic regime and its companion idea of legitimate law” (Rawls 1997:765).

### **3.3.3.2 The Subjective Appeal to Public Reason**

The Constitutional Court advocates an appeal to “public reason” (Rawls 1993:212-54) in extreme cases where the influence of certain values infringes upon the rights of a third party or on other Constitutional values. As highlighted, the Court avoids judging the reasonableness or consistency of religious values and beliefs. In the three case studies explored in the previous chapter, Christian institutions concerned justified the influence of religious values in society based on their stance on religious grounds and also on the Constitutional right to freedom of religion. Such a subjective appeal to public reason would require us “to address each person’s point of view” (Dorfman 2008:289) or to acknowledge the significance of different views in society. This conforms to Waldron’s (1987:149) stance that, “liberals demand that social order should in principle be capable of explaining itself at the tribunal of each person’s understanding”. This means that based on the principle of equality, different values and rights ought to be acknowledged as having equal worthiness in society.



However, the subjective appeal to public reason does not actually entail that the Courts accept the beliefs of everyone, but that the judicial system reasonably recognises the relevance of religious and non-religious values which are already Constitutionally protected. In so doing, the state is able to reach out to the belief systems or point of view of every citizen through which all reasonable citizens, religious or not are recognised. This is clear in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* where the Constitutional Court referred Ms De Lange back to the arbitration process of the Methodist Church of Southern Africa. This shows that the reasonableness of the rule regulated by the Methodist Church forbidding same-sex marriage for an ordained Minister based on doctrinal and biblical principles is justifiable. Their stance is based on reasons that require a Constitutional reading of religious freedom and not an examination of such values on the basis of their reasonableness.

In the three case studies, the Christian institutions required that the Constitutional Court to judge not on the basis of public evidence, but on the Constitutionality of such beliefs, to the extent of being granted exemptions. For example, in *Minister of Home Affairs and Another v Fourie and Another*, the Marriage Alliance of South Africa argued that same-sex marriages are forbidden on Christian grounds. The Marriage Alliance also maintained that religious institutions based on their freedom of religion are permitted disavow such marriages. The Marriage Alliance of South Africa did not argue that the unacceptability of same-sex marriage is based on common reason, such that even if such a belief would be subjected to public reason, the belief would remain unshaken. In this case, they are not appealing “to a common reason which is available to everyone and which can be invoked on behalf of everyone even though not everyone interprets its results in the same way” (Nagel 1987:235).

In post-1996 democratic South Africa, everyone is constitutionally guaranteed to base his or her convictions or values on foundations other than public reason. Although certain Christian values seem unreasonable if weighed against public reason, they may be reasonable in their own respect such as in the sense that they contain authority attached to a Supreme Being and given that they are constitutionally protected. This subjective appeal to public reason is based on legal plurality in South Africa as reaffirmed by Justice Sachs J in *Minister of Home Affairs and Another v Fourie and Another*:

The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying

a common citizenship depends on recognising and accepting people with all their differences, as they are.<sup>71</sup> The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation<sup>123</sup>

The above quote emphasises the appropriateness of all belief systems and values which are subjectively considered as appealing by reasonable citizens. Christian values which are incompatible with public reason and cannot validate their reasonableness publicly and which others are not allowed to weigh their sensibleness in line with public reason are what Meyerson (1997:16) calls “intractable” beliefs. For Meyerson (1997:17), public reason is neutral and independent of “particular intractable disputed religious views and those views own internal standards of justification”. Intractable values are those that are subjective and cannot be exposed to an objective appeal to public reason. In the three case studies explored in the previous chapter, Christian institutions appealed not because their views can be publicly proven to be reasonable, but based on the fact that they consider such values as central to their beliefs and that they are given liberty to hold such beliefs by the Constitution. In *Minister of Home Affairs and Another v Fourie and Another*, the Court affirmed:

the objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.<sup>124</sup>

From the stated perspective, South African Courts in some instances regard everybody’s reasons for holding a certain values as equal. In cases where the Constitutional Court limits certain religious values which are protected by the Constitution, then it has a sole duty of justifying such a limitation. In line with this sentiment, Meyerson (1997:17) argues:

if the reasons supplied by the state for limiting a Constitutionally protected right have to be such as to elicit the agreement of all reasonable citizens who matter equally, then any proposed justification will have to be framed in terms which each reasonable citizen would affirm as reasonable and justified *from his or her own point of view*.

Because of its respect of all constitutionally protected rights and freedom, the state is bound to take seriously all subjective values and beliefs. This is apparent in the Constitutional reading of religious values and the extent of their influence in the society. When limiting the influence of Christian values in the society in line with the values of the open and democratic Constitution, the Constitutional Court recognises the relevance of such values in society. The

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<sup>123</sup> (CCT 60/04) [2005] ZACC 19) / [1 SA 524 [2006]. para 60.

<sup>124</sup> *Ibid.*, para 92

idea of the subjective appeal to public reason explains why in cases such as *Christian Education South Africa v Minister of Education* “the Constitutional Court showed much genuine understanding for the religious entitlements...affording them the consideration of articulate conceptual analysis” (du Plessis 2010:29).

### 3.3.3.3 The Objective Appeal to Public Reason

As shown in *De Lange v Presiding Bishop of the Methodist Church of Southern*, the Constitutional Court can be said to have employed a subjective appeal to public reason by sending the appellant back to the legal process of her local Church. By contrast, in *Minister of Home Affairs and Another v Fourie and Another* and *Christian Education South Africa v Minister of Education* the Constitutional Court partly employed an objective appeal to public reason in dealing with the question of the influence of Christian values in the public sphere. An objective appeal to public reason entails that the Court goes beyond the respect for subjective values of Christian institutions and affirms values which are generally desirable in protecting the general or common interests of society. This is the case in situations where the Constitutional Court discerns whether or not certain Christian values which influence the society are justified in line with fundamental values of a democratic society.

In South African where all Constitutionally protected rights are respected, fundamental values of freedom, equality and human dignity are vital to public reason. From the perspective of an objective appeal to public reason, in some instances the Constitutional Court avoids justifying its stance “on grounds of religious doctrine” (Dworkin 1991:17)<sup>125</sup> or the subjective values of Christian institutions, but on “reasons accessible to all reasonable persons within the particular polity” (Dorfman 2008:282). Nevertheless, the Courts have been sensitive to the significance of Christian institutions and their values especially in accordance with the “right to freedom of religion” stipulated in the Constitution. As pointed out above, this was apparent in *Minister of Home Affairs and Another v Fourie and Another*<sup>126</sup> where the Court insisted on what I consider to be an objective appeal to public reason.

Seemingly, the Court affirmed an objective appeal to public reason whereby only generally appealing values should be upheld. By insisting on an objective appeal to public reason, the Court did not follow religious arguments based on Christian values but the Court had to weigh

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<sup>125</sup> Dworkin, R 1991. ‘The Right to Death’. *The New York Review of Books*, 14-17.

<sup>126</sup> 1 SA 524 [2006] para.92

them against equality, freedom and human dignity in line with public interest. The same was the case in *Prince v President of the Law Society of the Cape of Good Hope*. According to Pienaar (2003:128), in this case the Court found out that the “state’s interest in limiting the use of harmful drugs (in this case the possession of cannabis) in the interest of the public large and to honour international obligations exceeds the religious freedom of Rastafari to use cannabis in the exercise of religious practice”<sup>127</sup>.

The common interests which are based on the objective aspect of public reason were treated as more essential than the internal and external aspects of the religious freedom. In that way, “the need to respect the values of dignity, equality and freedom therefore supplements the requirements of reasonableness and justifiability” (Meyerson 1997:17). Although people might disagree about subjective values, the Constitutional rights ought to be interpreted in such a way that all people or citizens are treated equally. With reference to *Minister of Home Affairs and Another v Fourie and Another* case, Lenta (2007:28-29) argues:

in the course of debates concerning controversies, such as same-sex marriage, public reason precludes exclusive appeal to the truth of particular religious beliefs and doctrines or to the texts from which they may be derived. Arguments concerning the way in which rights should be interpreted should be formulated in terms of reasons that could be accepted by everyone.

In some cases, the legal justification of Christian values and their influence in the society cannot always be anchored on the intrinsic value of religion but on public reasoning. Although not clearly, in cases where the Constitutional Court has not been able to balance the influence of religious values with other rights which are violated by such values, the Constitutional Court has had to appeal to public reason. This was clear in *Minister of Home Affairs and Another v Fourie and Another* and *Christian Education South Africa v Minister of Education* where the Constitutional Court appealed to fundamental Constitutional rights in limiting the influence of certain Christian values in the society. From this perspective, parties in a disagreement can consider “themselves as appealing to a common, objective method of reasoning...they can therefore legitimately claim to be appealing not merely to their personal, subjective believe but to a common reason” (Nagel 1987:235). However, although the Constitutional Court emphasised an objective appeal to public reason over a subjective one in these cases, I maintain that the autonomy and the forcefulness of religious values in religious spheres.

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<sup>127</sup>[(2002 2 SA 794 (cc)], para 128 & (CCT 60/04) [2005] ZACC 19) / [1 SA 524 [2006], para 30.

### **3.4 Conclusion**

This chapter analysed the notion of religious freedom and the three strategies which serve as possible approaches to the predicament or clash of rights asserted in the previous chapters that arise from the influence of Christian values in society. The Constitutional Court's interpretation of religious freedom based on the case studies explored in the previous chapter and other Constitutional Court cases, and also thinkers such as Mofokeng, Freedman, Pistorius, Meyerson and Lenta were central to the discussion. The first part of the chapter discussed the "right to freedom of religion" in detail. The chapter categorised religious freedom into internal and external aspects. Given that the internal aspect of religious freedom concerns the freedom of belief and the regulation of religious doctrine and values within religious circles, this aspect is absolute in the sense that the state cannot interfere. The external aspect of religious freedom on the other hand concerns the actual practice or observance of religious beliefs or values. Although the chapter maintained that this aspect is not absolute, in which case a certain limit ought to be placed, to avoid other rights being infringed, it questioned whether this might cause an imbalance between internal and external aspects of religious freedom.

The second part of the chapter dealt with what this study identifies as the three strategies that seem to be used by the Constitutional Court and some thinkers in dealing with the problem where Christian values conflict with other rights and freedoms in society. Firstly, the chapter explicated the possibility of reconciling the involved Christian values with the rights that are violated. This model which some thinkers have dubbed the "positive recognition model" applies proportionality analysis in an attempt to balance conflicting rights. Secondly, the possibility of religious exemption was considered. The chapter asserted that the possibility of granting religious exemptions seems to be considered in cases where no rights or freedoms might be impinged upon. Finally, the significance of public reason was discussed in terms of subjective and objective senses. While the subjective appeal to public reason asserted the need to recognise and respect all values and rights existing in society, the objective appeal to public reason emphasised the centrality of generally applying values which are preminent to subjective values of a religious institution. The chapter demonstrated how current scholarly work and the legal system approach the question. The internal and external aspects of religious freedom and the three strategies discussed and analysed in this chapter will serve as the backbone of the attempt to overcome the predicament in the following chapter.

## **CHAPTER FOUR**

### **4. Overcoming the Predicament**

#### **4.1 Introduction**

This chapter explores the possibility of overcoming the clash of rights and values arising from the influence of certain Christian values in South Africa's post-1996 society from a personal perspective. Following discussions in previous chapters, this chapter firstly provides a summary on how selected thinkers and the Constitutional Court have attempted to deal with the predicament. The three Constitutional Court cases explored in the second chapter indicate that the freedom of Christian institutions to adopt or adhere to certain religious values is well-protected by the Constitution. The manifestation of such values in society, however, is problematic.

Although the Constitution stipulates freedom of religion generally, both internal and external aspects of religious freedom can be identified. When dealing with the external aspect of religious freedom, the Constitutional Court considers the possibility of reconciling the relevant Christian values with rights that are violated by such values. The possibility of exempting some Christian institutions so that they may be at liberty to influence society with Christian values is considered. Where the possibility of reconciling conflicting rights and exemption are not feasible, the Courts have affirmed the need to uphold democratic values of freedom, equality and human dignity as embedded in the objective appeal to public reason.<sup>128</sup>

In the second part of the chapter, I will attempt to overcome the predicament as a contribution to the formidable contemporary discourse on the subject. I will uphold the argument that in cases where the influence of Christian values infringes upon other rights and democratic values, then the Christian values in question ought to be limited. In such cases, neither the possibility of reconciling conflicting rights nor the granting of exemptions in terms of tolerance should be considered. Nevertheless, in cases where the exercise of Christian values in society does not necessarily infringe upon the right of others, then their influence in society would be justifiable.

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<sup>128</sup>According to Section 7(1) of the South African Constitution, the primary democratic values are "human dignity, equality and freedom".

## 4.2 Preliminary Considerations

The previous chapters have discussed the attempts of certain Christian institutions to influence society with Christian values. As highlighted in the second chapter, such attempts have in some instances caused a conflict of rights and freedoms in post-1996 South Africa. Certain Christian values infringe upon the rights of others by conflicting with the values of an open or free and democratic state of equality, freedom and human dignity and other legally protected rights and freedoms. The conflict is an indication that the role of Christianity and how far its values may be tolerated in influencing the general public or society in post-1996 South Africa remains unclear. How far can the impact of Christian values go in terms of influencing society with religious values? Should the influence of Christian values in society conflict with non-religious rights and democratic values, how can this difficulty be resolved?

This study has made it clear that the South African Constitution grants various freedoms and rights to South African citizens and institutions to which they are entitled<sup>129</sup>. The fact that the Constitution guarantees religious freedom has been the primary basis for the influence of certain Christian values in society. How the South African Constitution guarantees religious freedom of belief and observance<sup>130</sup> is stated in the first chapter. For instance, Sections 9(1) and 9(3) of the Constitution guarantees religious institutions the freedom to adopt and regulate their beliefs and values and by extension, to maintain them through practice or observances. Nevertheless, the Constitutional provisions on the rights of religious institutions and their place in society are not adequate in clarifying the extent to which Christian values can influence society in post-1996 democratic South Africa.

The same was the case in the apartheid era (1948-1990) and during the period of transition (1990-1995). During the apartheid era, Christian values held an awkward position. Using what it considered to be Christian values, the NGK justified apartheid segregative policies. Nsokovane (1989:39) affirms that, “for the Nederduitse Gereformeerde Kerk, the election victory of the Nationalist Party in 1948 – meant monitoring of the implementation of the general principles of separation with regards to its approach to race relations.” For example, they biblically supported the policy of separate development whereby different races had to reside in distinct homelands with their own healthcare and education facilities or institutions. Only after the 1980’s did the NGK begin to be critical of the apartheid policies and no longer

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<sup>129</sup> Different rights and freedoms are contained in the Bill of Rights.

<sup>130</sup> Sections 14(1), 15(2), 15(3), and 30(1) of the South African Constitution.

saw its role as justifying segregation policies. By contrast, other Christian institutions such as the SACC opposed the apartheid political dispensation as being against Christian values.<sup>131</sup> Anti-apartheid Christian institutions considered apartheid as evil and as something that had to be eradicated.<sup>132</sup> They did not only consider their task as confronting unjustified political structures but also to “help to direct national movements towards just and worthy ends” (Villa-Vicencio 1983:150) through resistance campaigns and submissions. The presence of both pro-apartheid and anti-apartheid Christian institutions during the apartheid era clearly indicates that the influence of Christian values in society was unclear. Similarly, although most Christian institutions were engaged in the activities of promoting peace and reconciliation during the period of transition (1990-1995), their influence in society remained uncertain. This was partly because of the changing political milieu, during which Christian institutions increasingly perceived themselves as facilitators of the political negotiations and reconciliation.

In the post-1996 democratic South Africa, the Constitution attempts to clarify the place of religion and its values in society but it has not succeeded very well in this regard. There have been problems concerning how to draw a line as to how far the influence of certain Christian values can be permitted in society. This has been clear through a number of Constitutional Court cases in which the basis for granting freedom to Christian institutions to influence society with their values has on several occasions been questioned. This has been apparent especially in the three case studies explored in the second chapter; namely, *The Christian Education South Africa V Minister of Education, Minister of Home Affairs and Another v Fourie and Another* and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*. These cases have also been explored by thinkers such as Pienaar, Lenta and du Plessis in their works. In these cases, the constitutional guarantee of freedom of religion is not only questioned but also reinterpreted.

The above Constitutional Court cases in the South African legal system presented the Court with the dilemma of how to reconcile Christian values and their influence in the public sphere based on the Constitutional guarantees of religious rights on the one hand and the rights or freedoms which the influence of Christian values infringes upon in the process on the other.

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<sup>131</sup> For example, when the government in 1953 forced the church to create separate schools for white, blacks and coloureds through the Bantu Education Act, the SACC strongly opposed the move.

<sup>132</sup> According to de Gruchy, soon after Nationalist Party came into power, Bishop Hennemann issued a statement in 1948 stating: “in recent years it (i.e., segregation) has reappeared in the guise and under the name of ‘apartheid’. A beginning has already been made to put into practice this noxious, unchristian and destructive policy... To make matters worse, all this is done in the name of Christian civilisation”. Cf., Gruchy, W J 1986. *The Church Struggle in South Africa*. London: Wm. B. Eerdmans Publishing Company. pp 98.



The Constitutional Court is cautious enough not to interfere with the freedom of religious belief which involves the regulation of religious doctrines and the right of Christian institutions to adhere to certain religious values without state or legal interference. This indicates that the internal aspect of religious freedom is fully protected. What the Constitutional Court and thinkers such as Lenta and van der Vyver have been grappling with however, is the observance or practice of religious values through which some religious institutions have been influencing society. Mofokeng (2007:130) is correct in contending that under South African law, the freedom of religious institutions to practice or observe their religious values by influencing society is not fully guaranteed.

The previous chapter discussed three strategies in the South African legal system especially based on the Constitutional Court's appraisal of freedom of religion and other related rights. In this discussion, thinkers such as Meyerson, Pienaar, Lenta, du Plessis and van der Vyver featured prominently. With regard to the 'proportionality principle', I argued that it is considered in cases where one attempts to balance differing conflicting rights or freedoms. Is it possible to reconcile certain Christian values with the rights on which they encroach? Although the process of reconciling conflicting rights might be helpful, what remains challenging is exactly how to maintain a fair balance in cases where Christian values violate the rights of others. The fact that the Constitutional Court and the acknowledged key thinkers have not reached agreement on the predicament or clash of rights concerning the extent of the influence of certain Christian values in society reaffirms the problematic and complex nature of the subject.

A closer examination of the Constitutional Court's interpretation of religious freedom based on the cases indicates that the Court tends to decide in favour of the influence of religious values on the condition that it does not overstep the rights and freedoms of others. Nevertheless, in cases where Christian institutions have tried to demand religious exemption or special allowances which would somehow lead to the contravention of the rights of others, the Court reaffirms its sole duty through the Constitutional principles of equality, freedom and human dignity to protect all legally protected rights without allowing one right or set of rights to unfairly interfere with third parties. But should the appeal to public reason be used to curtail the influence of certain religious values once they conflict with other rights? In cases such as *Minister of Home Affairs and Another v Fourie and Another*, the Constitutional Court affirmed the need for public reason based on the democratic values which take precedence over Christian

values prohibiting same-sex marriages. The same was the conclusion of the Constitutional Court in *Christian Education South Africa v Minister of Education* where democratic values such as human dignity centred on children were seen as more fundamental than the Christian values permitting corporal punishment on school children in the concerned Christian institutions.

### **4.3 Can the Predicament Be Overcome?**

The question of how to resolve the predicament or clash between the influence of certain Christian values and other constitutionally protected rights and freedoms in society remains contentious. As already highlighted, this demands creating a boundary regarding how far Christian values can be permitted to influence people in an open and democratic society. Responding to this predicament also requires examining the notion of religious freedom based on the Constitution encompassing religious rights, the Constitutional Courts reading of these rights, and the views of other thinkers on the subject matter as done in the previous chapter. On that basis, how can one transcend the predicament or clash of rights arising from the influence of certain Christian values in South Africa post-1996? Generally, I do not perceive a problem with the influence of Christian values and convictions in society which do not essentially conflict with other juridically guaranteed rights as long as such an influence is justifiable. The influence of Christian values in society is justifiable if its influence not only lies within the limits required by the legal system but also when the concerned values do not negatively impact other rights.

I identify a problem with Christian values that might be contrary to the legal stipulations such that they infringe upon the rights of others, though claim that their right to do so is legal or that it is protected by law. The Constitution as the supreme law of the land protects all citizens and institutions, both religious and non-religious. In South Africa's democratic context, every right recognised by the Constitution ought to coexist with other equally protected rights without necessarily unfair violations. I reaffirm the notion of justified respect for the equal liberty of conscience, or what Nussbaum calls "equal respect for conscience" (2012:59). The avowed idea of equal respect for all claims of conscience requires that no right is permitted to infringe upon other equally permissible rights. Should certain values or rights, whether religious or not violate other values and rights, then a restriction ought to be placed. The difficulty lies in determining the infringed right if both rights are constitutionally protected.

The difficulty is clear in the case studies explored in the second chapter of this study where certain Christian institutions in their attempt to influence society with religious values have ended up infringing the rights of others, and yet claim to be in accord with the law or justified under the Constitution. For example, like in pre-1996, the Constitution in post-1996 democratic South Africa has not been practically helpful in clarifying how far religious values can go in influencing society with their values. Nevertheless, the centrality of the Constitutional stipulations on religious freedom in the stressed regard cannot be underestimated. Based on what has been explored in the previous chapters, it is apparent that the Constitution is unclear on this matter, given that its stipulations on religious freedom in Sections such as 14(1), 15(2), 15(3) and 30(1) are articulated in vague terms in the sense of being too general.

However, like Pretorius and Mofokeng, I assert that the freedom of Christian institutions to regulate their doctrines and adhere to certain religious values which are based on the internal aspect of the “right to freedom of religion” is fully protected by the Constitution. In contrast, the exercise of such religious values through observance or practice in society is reasonably questionable, given that it is protected only to some extent. In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, the matter was referred back to the Methodist Church of Southern Africa for arbitration. The court’s decision indicates a certain level of autonomy granted to religious institutions as far as the internal aspect of religious freedom is concerned, since it necessitates the freedom of the adherents of a religious institution to deal with its internal religious affairs.

From this perspective, it is appealing to reaffirm the view of Sharma (2011:224) that given “internal religious freedom...the Christian community is able to enjoy relatively more religious freedom within itself”<sup>133</sup>, the view partly hinted in the previous chapter. I accept the Constitutional Court’s pronouncement in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* especially in terms of its emphasis on the fact that the legal system should not interfere with internal dealings of religious values as these are based on religious doctrine and its regulation. My basis of agreement is that such an aspect of religious freedom does not invade upon other constitutionally protected rights and democratic values. As pointed out above, I perceive the external aspect of religious freedom whereby certain Christian institutions attempt to influence society with religious values based

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<sup>133</sup> Shah (2012:59) affirm that most Western European states offer “democratically negotiated freedom of religion from state interference, and all of them allow religious groups freedom not only to worship privately but also to organize groups in civil society and political society”.

on the practice element of religious freedom as questionable. What is questionable is how to strike a fair balance between Constitutional stipulations of religious freedom on the one hand and the impact of that religious freedom in society on the others, especially in cases where such an impact negatively affects or harm others.

While I have maintained that the internal aspect of religious freedom is absolute, the fact that the external aspect of religious freedom is not absolute and “can be subject to certain limitations” (*Australian Human Rights Commission*, 2014)<sup>134</sup> requires emphasis. I support the assertion of Koshy (1992:28) that “the external aspects of religious liberty thus cannot be absolute, but must be seen in relation to other human rights and the human rights of all in a society.” The external aspect of religious liberty might affect the freedoms and rights of others in which case it would not be fully protected by the law and its parameters ought to be analysed. One may question whether the affirmed position demonstrates that Christian institutions are denied their rights to enjoy religious freedom in terms of practice guaranteed by the Constitution.

Does placing a limitation on the external aspect of religious freedom imply that the ability of Christian institutions to influence society with Christian values by virtue of the constitutionally conceded “right to freedom of religion” has been infringed? The difficulty that arises when certain Christian values based on the constitutionally protected right to religious freedom conflict with other rights is based on how the external aspect of religious freedom is interpreted by not only legal experts but also by Christians themselves. If the concerned Christian institutions in *Christian Education South Africa v Minister of Education* argued in the Constitutional Court that they had the right based on the Constitutional stipulations on religious liberty to employ corporal punishment in their schools despite the general prohibition, then this had to do with their interpretation of religious freedom.

Similarly, given that the Constitutional Court itself in the aforementioned case had to grapple with how to construe religious freedom, it is unclear just how far the external aspect of religious freedom goes in influencing society. What is clear is that the external aspect of religious freedom is not absolute but that it requires certain limitations. How can one determine the limitedness of the external aspect of religious freedom in society? Alternatively, how can one

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<sup>134</sup> Unlike the internal aspect of religious freedom which has to do with the liberty to hold or adopt certain religious beliefs or values, the external aspect of religious freedom which concerns the manifestation of religious values through teaching, observance and practice of such values can be limited.

determine how far Christian values should go in influencing society regardless of the Constitutional guarantees of religious freedom? What can be reaffirmed is the argument that the influence of certain religious values in society can be tolerated as long as these values do not conflict with other rights and freedoms. Christian institutions should be granted “justified toleration” in the sense that their values exist freely in society with other protected rights and democratic values.

I refer to the articulated sort of toleration as “justifiable” given that the influence of Christian values in society does not negatively affect the rights of others, in which case avoiding placing limits on the influence of its values would be reasonable. It is in this sense that an exemption can also be considered, though the concern raised above also applies in the case of exemptions. In line with the notion of justifiable toleration expounded above, I perceive the need for justifiable exemption as captured by the question: does granting a certain exemption to a particular Christian institution affect other rights? Such a question is also considered by Lenta who reasons in line with what I have considered to be justified exemption. Lenta (2012:328) argues:

would granting an exemption impose costs on third parties? This may be a reason to refuse to grant an exemption, or to grant an exemption more limited in scope than that claimed. We should, as Miller suggests, approach the issue of the costs that would be imposed by accommodating members of a group as a question of how the costs of cultural diversity should be distributed between the citizens that make up society.

If granting an exemption to a particular Christian institution would affect other rights and values warranted by the Constitution or perceived as equally appealing by legal systems by infringing upon their rights and values, then the possibility of granting an exemption should not be considered<sup>135</sup>. Justifiable exemption would be granted when the influence of Christian values does not cause any infringements of rights in society. In that regard, I maintain that Christian values may exist freely and influence society in South Africa’s post-1996 as long as such religious values do not conflict with the other constitutional rights or liberties. This view is in accordance with Mill’s Harm Principle “according to which the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Leiter 2012:23).<sup>136</sup> Under the Harm Principle, there are

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<sup>135</sup> Nussbaum (2012:59) affirm that all claims of conscience ought to be equally respected. This requires that only those values which freely exist alongside other constitutionally warranted values and rights should be permitted.

<sup>136</sup> Toleration fosters liberty, especially when varying views are not against the legal system or Constitutional principles. Where freedom and equality function harmoniously, tolerance becomes apparent.

allowances in terms of granting toleration to certain values in a democratic state as long as they do not cause harm or violate other rights.

Considering the Harm Principle, I agree with Arneson (1992:9) who argues that “one should be left free unless one’s action causes or threatens to cause harm to non-consenting others.” There should be clarity regarding the limits of the permitted rights and the extent to which such permission may be undertaken. With regards to the Harm Principle, I reiterate that the influence of Christian values ought to be permitted in society as long as they do not cause harm to others or overstep other rights and freedoms. However, even in cases where the influence of Christian values in society do not infringe upon the rights of others, the challenge is in how far the legal system can go in protecting the liberty of such values. One reasonable concern Novit (*Online Journal of Religion and Society*, 1998) raises is “that anyone with a religious objection to a law could simply refuse to obey it and demand an exemption as a constitutional right.” Given the plausibility of Novit’s concern, I maintain that some sort of restriction would be ideal even in cases where the influence of certain Christian values do not necessarily negatively affect other rights warranted by the Constitution.

In *Christian Education South Africa v Minister of Education and Minister of Home Affairs and Minister of Home Affairs and Another v Fourie and Another*, the concerned Christian institutions claimed to possess the Constitutional right to influence society with religious values regardless of the argument that such an influence threatened the rights of others and their Constitutional values. If in the abovementioned cases the observance or practice of religious values in society violated the rights of others, then tolerating the exercise of Christian values in society would be unjustifiable. It would be legally and sensibly unreasonable to permit Christian institutions to influence society in South Africa’s post-1996 with their values if such an influence would negatively affect other Constitutional rights and democratic values. In terms of unjustifiable permission, the possibility of accommodating the influence of Christian values in society through the proportionality principle explored in the previous chapter in society may not be considered.

The notion of balancing religious rights with other rights with which religious values conflict would not be ideal. However, one may bemoan what can and should be the way, in some cases religious institutions might have a moral obligation in the form of what Leiter calls “categoricity of commands” (Leiter 2012:36) to observe certain religious values even if they clash with the general laws and other lawfully protected rights and values. For example, this

was the case in *Christian Education South Africa v Minister of Education* where the concerned Christian institutions claimed that they were bound to employ corporal punishment to pupils in their schools based on their values which they perceived as categorical. Given that corporal punishment practically violates certain Constitutional rights such as children's rights and human dignity as found by the Constitutional Court, I argue that the influence of Christian values ought to be limited in such cases.

Permitting Christian institutions to apply corporal punishment in their educational institutions because they are categorically required to do so would be intolerable. Such a move does not diminish the fact that Christian values have served many South Africans in many ways throughout history, and have something positive to offer or contribute to the post-1996 democratic situation. Although Christian values are essential to the lives of many South Africans, it does not follow that should the influence of such values conflict with other rights they cannot be curtailed. In this regard, I find appealing Grimm's (2009:2375) claim that "religious freedom is neither the only constitutionally guaranteed liberty nor the highest one." Christian values are part of the many liberties or human rights which the Constitution and legal system seek to protect.

Following this reasoning, I consider the possibility of the objective appeal to public reason which has been explored in the previous chapter. With regard to the objective appeal to public reason, the values of equality, freedom and human dignity should be emphasised. Section 7 (1) of the South African Constitution under "Rights" states that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". I have already emphasised that where the influence of Christian values in society conflict with other rights, the three democratic values which are generally applicable should be considered. One ought to note that where Christian values conflict with other rights or freedoms of third parties, there is a need to reiterate the affirmation by Lenta (2009:27) that "public reason precludes exclusive appeal to the truth of particular religious beliefs and doctrines or to the texts from which they may be derived." The importance of certain values to Christians and even to society cannot undermine the centrality of democratic values as stipulated in Section 7(1) of the Constitution. But can the influence of certain Christian values be reconciled with democratic values without necessarily infringing upon the rights of the third parties or other constitutionally protected rights and freedom? If the influence of Christian values in society

undermines the democratic values or other constitutionally protected rights even minimally, then they have to be curtailed.

With regard to the affirmed, the decision of the Constitutional Court in limiting the influence of Christian values in *Christian Education South Africa v Minister of Education and Minister of Home Affairs and Another v Fourie and Another* where both democratic values and other rights seem to have been undermined is laudable. In that sense, I maintain the foregoing argument that only the influence of Christian values which does not infringe upon the rights of others and democratic values as stipulated in the Constitution ought to be permitted to exist in society. Where either the democratic values or the other Constitutionally protected rights and values are infringed upon, then the influence of Christian values ought to be restricted. I substantiate this position by emphasising that even in cases where Christian values do not violate other rights or democratic values, the extent to which religious values influence society ought to be clarified. Nevertheless, given the contentious and complex nature of the “right to freedom of religion” in line with the current discussion, clarifying the parameters the place of Christian and other religious values in society and how far they can go in influencing society is imperative in transcending the predicament or clash of rights.

#### **4.4 Conclusion**

Overcoming the predicament or conflict of rights arising from religious freedom through which some Christian institutions violate other Constitutionally guaranteed rights in the process of influencing society with their values is not straightforward. The first section of this chapter explored major arguments made in the previous chapters. It emphasised that the Constitutional guarantees of the “right to freedom of religion” and other related rights do not offer a clear basis for dealing with this predicament. The Constitution does not clearly stipulate to what extent religious values can go in society with regard to freedom of religion. The Constitutional Court through a number of cases it has dealt with, sheds light on how the predicament or clash of rights can be transcended to a greater extent. Apart from attempting to reconcile certain Christian values with the Constitutional rights they violate, there has been recourse to exemptions.

Should a case arise whereby the influence of Christian values in society does not violate Constitutional rights, the possibility of granting them an exemption should be considered. However, in cases where Christian values conflict with certain Constitutional rights or



democratic values, certain limits would have to be placed on the concerned Christian values. In that sense, Christian values can influence society in a way that such values do not negatively affect the free exercise of other legally protected rights and democratic values of equality, human dignity and freedom. From the perspective of an objective appeal to public reason, the chapter strongly maintained that where the influence of Christian values threatens the rights of others and/or democratic values, then a limit ought to be placed.

## CONCLUSION

This study was an attempt to critically understand and transcend the predicament or clash of rights arising from the influence of certain Christian values in society in South Africa post-1996. The study emphasised that the predicament arises when the influence of Christian values in society violates other constitutionally guaranteed rights and democratic values. In view of this aim, the study considered the Constitutional Court's interpretation of religious freedom and other key thinkers. As a foundation to the study, the first chapter discussed the Constitutional basis for religious freedom, which is the backbone of the influence of Christian values in society. Although Sections 14(1), 15(2), 30(1) and 15(3) of the Bill of Rights clearly stipulate the rights relating to religious freedom, these rights require interpretation given that as it stands it does not clarify what freedom of religion actually entails.

I maintained that the Constitutional stipulations on religious freedom are the foundation for any contemporary discussion of religious freedom as a Constitutionally guaranteed right. Furthermore, the first chapter drew attention to the State-Religion relations by affirming that the South African model is grounded on state neutrality and plurality. Christian institutions are guaranteed the freedom to participate in the makeup of society; and by implication, to influence society with their values. Nevertheless, I affirmed that such a model requires that the state treats all worldviews with equality and fairness. I also gave a historical overview on how Christian values affected society between 1948 and 1995, especially through pro-apartheid and anti-apartheid church organisations. In essence, the first chapter discussed the backbone of the study which was central in understanding the basis of the research.

The second chapter expounded on the Constitutional Court's construing of religious freedom. In its attempt to clarify the predicament or conflict of rights, the chapter upheld that certain Christian values conflict with other Constitutionally conceded rights in society. This was demonstrated by the three Constitutional Court cases which exposed instances where certain Christian values actually violated other rights and democratic values in South Africa post-1996. While discussing these Constitutional Court cases by pointing out the arguments and judgements concerned, I offered a brief analysis of each case. The chapter demonstrated that the complexity of how to determine the extent to which Christian values can influence society cannot be underrated. However, the Constitutional Court cases show how the legal system tries to approach and interpret rights relating to freedom of religion.

The third chapter examined the notion of religious freedom and the three strategies or approaches to the predicament or conflict of rights from the perspective of the Constitutional Court and selected thinkers. I categorised religious freedom into internal and external aspects and argued that the external aspect ought to be subjected to certain limitations. Unlike the internal aspect, the external aspect of religious freedom might affect third parties to the extent of infringing upon their rights. The chapter also identified three strategies that seem to be applied in legal systems and scholarly work, based on a personal reflection on the discourse. The chapter discussed the proportionality model whereby different conflicting rights can be reconciled without any rights being infringed. The second strategy I discussed is the notion of religious exemption, whereby certain Christian values might be permitted to exist in society. Under this strategy, I argued that only in cases where such an exemption would not violate other rights can the possibility of an exemption be considered. I concluded the third chapter by looking at what I characterised as the subjective and objective appeals to public reason. In this regard, it was emphasised that based on the objective appeal to public reason, the generally applying values should be considered as prior to subjective or particular values and rights.

The fourth chapter affirmed that Christian values which neither conflict with Constitutionally protected rights nor democratic values should be allowed in society through what I dubbed as justified toleration and Mill's Harm Principle. In contrast, Christian values which not only impact other rights negatively but which are also contrary to democratic values should not be permitted in society. This position would be feasible given that in an "open and democratic society" different rights ought to coexist without conflicting with each other. However, given that sometimes different rights might conflict, there is a need for clarification on how far religious values can be tolerated in the public sphere from a legal perspective; otherwise, there will be always be cases similar to those explored in the second chapter. Although the notion of justified toleration and the objective appeal to public reason I proposed would be viable, the complexity of the predicament or clash of rights indicates that new strategies ought to be put in place to address the issue.

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