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Religion in school

1. Introduction

Over the past decade, I have addressed the position of religion in school in various contributions.[2] Despite crystal clear provisions in the Constitution, religion in public schools has become a controversial issue, mainly for two reasons. First, earlier in this decade the state imposed on schools a humanist policy relating to religion that continues to violate religious freedom in various respects.[3] Second, there is an increasingly vocal lobby claiming that the state should not have any involvement with religion at all and, accordingly, that religion does not belong in public schools. In this contribution, I respond to this claim. I am well aware that religion is a sensitive matter, and that people do not want anyone to dictate to them about matters of faith. That is exactly why freedom of religion is protected in the Constitution as a fundamental right, and why we need to keep the Constitution in mind when we express ourselves on this issue. The Constitution is the supreme law of the Republic, and all other legal rules, policies, decisions and conduct are subject to the Constituton and invalid if inconsistent with the Constitution.[4] The Constitution is therefore the first and most important source to which I turn in developing my response to the so-called secularist claim in respect of religion. This may come as a surprise, as many regard the Constitution as a so-called secularist document favouring a humanist worldview.[5] However, the purpose of the Constitution is not to protect only the secularist or humanist worldview. The purpose of the Constitution is to protect all of us, also those of us for whom our religious convictionsare determining of our whole life, that we cannot disconnect, as it were, when we enter the public square, and that we take with us everywhere we go, also when we go to school. This accommodating feature of the Constitution can be overlooked only if one views the Constitution through an extremely subjective prism that allows the so-called secularist or humanist viewpoint as the only valid approach to the interpretation of the Constitution.[6]

2. The constitutional imperative

2.1 Section 15

If the Constitution is the supreme law of the Republic, and the Constitution contains provisions

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2 Malherbe "The constitutionality of government policy relating to the conduct of religious observances in public schools" 2002 *Tydskrif vir Suid-Afrikaanse Reg(TSAR)* 391-418, "The right to freedom of religion in South African schools: recent disturbing developments" 2004 *International Journal for Education Law and Policy* 248-257, "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" 2006 *Ned Geref Teologiese Tydskrif (NGTT)* 180-199, "Die impak van die Grondwet op godsdiens – 'n voorlopigewaarneming" 2008 *NGTT* 263-278.

3 I have commented extensively on the policy in some of the contributions referred to in n 1.

4 Section 2 of the Constitution of the Republic of South Africa, 1996.

5 I deliberately lump worldviews (or belief systems) such as secularism and humanism together, because at their core they share the fundamental belief that there is no God. (See n 36 about the incorrect use of the term "secular".)

6 I have commented on this tendency, which also permeates the views of our courts, in Malherbe "Die teorie en praktyk van die 1996-grondwet: 'n versigtige waardering" 2008 *TSAR* 425-448.

protecting religious freedom, it is imperative upon us to take heed of the Constitution. The two relevant provisions of the Constitution that we should take a closer look at are sections 15(1) and (2), which provide as follows:

> "15.(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
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> (2) Religious observances may be conducted in state or state-aided institutions, provided that—
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> (a) those observations follow rules made by the appropriate public authorities;
>
> (b) they are conducted on an equitable basis; and
>
> (c) attendance at them is free and voluntary."

Below I comment on section 15. Suffice to say at this point that when I sometimes hear quite heated objections against religion's lawful place in public schools, I marvel at the spectacular inability to take notice of these unambiguous provisions of the Constitution.

2.2 The American establishment clause

Before I discuss sections 15(1) and (2), distinguishing between the South African Constitution and the position in America may assist in our understanding of our own situation. The position in America is primarily based on the so-called establishment clause, which provides as follows in the so-called First Amendment to the Constitution:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"*

Although one runs the risk of over-simplifying the intricacies of the American legal position, the establishment clause has, under the influence of so-called secularism, more or less led to a perverted situation where virtually all forms of religious observances have systematically been banned from public institutions like schools.[7] In contrast, section 15 of our Constitution distinguishes South African from American law. The South African Constitutional Court has indeed held that the South African Constitution rejects the strict wall of separation doctrine that America applies to the relationship between religion and the state on the basis of the establishment clause.[8] Accordingly, section 15(2) acknowledges the public place and role of religion, and allows and expects some state engagement with religious matters. This corresponds with the traditional South African approach to religious freedom in terms of

7 See, eg, Chandler et al *Constitutional Law Deskbook: Individual Rights* (1993) 90 ff; Witte J & Green 'The American constitutional experiment in religious human rights: the perennial search for principles' in Van der Vyver JD & Witte J (Eds) *I Religious Human Rights in Global Perspective* (1996) 497 ff; Van der Vyver JD 'Introduction' in Van der Vyver& Witte xi-xlvii; Witte J 'The South African experiment in religious human rights' 1993 *Journal for Juridical Science* 1 ff; Valente *Law in the Schools* (1980) 109 ff; Underkuffler-Freund LS 'Religious guarantees in a pluralistic society: values, problems and limits' 1997 *SA Public Law* 32 ff. However, there are rather isolated cases and incidents contrary to this general trend – see eg. *Rosenberger v Rector and Visitors of the University of Virginia* (1995) 515 US 819; *Board of Education v Mergens* (1990) 496 US 226. For an overview of comparable developments in Canada, see Benson "The freedom of conscience and religion in Canada: challenges and opportunities" 2007 *Emory International Law Review* 111-166.

8 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) paras 100–102, 116–118.

which the state has always been actively engaged in the creation of favourable conditions for the exercise of religious freedom (without favouring a particular religion, as may have been the case in the past, because that would be inconsistent either with section 29(2) or section 9, the equality clause). In this respect, South Africa should rather be compared to the German Constitution, which imposes a positive duty on the state to promote and facilitate religious observances in schools.[9]

2.3 Interpreting section 15

Let us then have a closer look at section 15.[10] The provision contains two very clear and significant arrangements relating to religious freedom. It protects the right to freedom of religion, and it seeks to ensure fairness in the manifestation of religious beliefs.

2.3.1 The right to believe

Section 15(1) provides first of all that everyone has the right to freedom of conscience, religion, thought, belief and opinion. This means that every person has the right to *believe* according to their own convictions, and to choose which faith, worldview, religion, or set of beliefs to follow. No person may be forced to believe or not to believe, or to act against their convictions. No person may be subjected to any form of coercion, indoctrination or unfair discrimination in respect of or on the ground of their beliefs. In this regard, section 9(3) of the Constitution, which prohibits unfair discrimination on various grounds, including religion, is of particular significance. Every person has the right to the impartiality and protection of the state in respect of religion. As in the case of all other constitutional rights, the state must create a positive and safe environment for the exercise of religious freedom,[11] but may not promote, favour or prejudice a particular faith, religion or conviction, or coerce or indoctrinate anyone in respect of religion.

Religious freedom also entails the right to *manifest* those beliefs by expressing, confessing and observing them. This may happen privately or publicly. One may also individually profess and manifest one's beliefs, and may manifest them collectively by associating with others in worship, confession and other acts of observance.[12] In the school context, manifesting one's beliefs include, for example, individual and collective reading and discussion of religious texts, prayers, worship, messages by clerics and others, campaigns by religious organisations, the display of religious symbols and dress codes, and the observance of religious festivals and ceremonies. In respect of the manifestation of one's beliefs, section 15(2) goes a step further by expressly providing that one may observe one's beliefs in state or state-aided institutions. Such institutions include state departments, hospitals, prisons and, of course, public schools. It simply means that in these institutions one may manifest one's beliefs, and may organise, conduct and participate in religious observances. And one may follow one's dress codes. In this regard, at least two court cases illustrate the extent to which we may observe our religious beliefs in school.

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9 Malherbe. "Die grondwetlike beskerming van godsdiensvryheid" 1998 *TSAR*673, 703. See in respect of Germany Jarass HD &Pieroth P, *Grundgesetz für die Bundesrepublik Deutschland* (1995) 220 ff.

10 I have dealt quite extensively with section 15 as applied in an educational context in "The impact of constitutional rights on education" in Boezaart T (red) *Introduction to Child Law in South Africa* (2010) 420-455.

11 Section 7(2) of the Constitution provides that the state must not only respect and protect, but also promote and facilitate, the rights in the Bill of Rights.

12 See Malherbe (n 8) 679–681.

In *Antonie v Governing Body, Settlers High School*[13] a learner belonging to the Rastafarian religion came to school wearing her dreadlocks under a cap, but was suspended by the school governing body for serious misconduct on the ground that she violated the disciplinary code of the school which prescribed the dress code. The suspension was set aside because in the view of the court adhering to religious dress codes did not amount to serious misconduct under a school's disciplinary code. Although the case was rather decided on the basis of the equality principle instead of the right to religious freedom, a similar approach was followed in *Pillay v KwaZulu-Natal MEC for Education*, a leading case in which a school's ban on the wearing of a nose stud for religious purposes was held to constitute unfair discrimination in terms of section 9(3) on the grounds of religion and culture.[14] Incidentally, these decisions stand in stark contrast to the approach in several European countries, where no distinctive religious attire is allowed in public institutions.

The *Pillay* case ended up in the Constitutional Court.[15] The court followed an accommodating, even encouraging, approach to the cultural and religious differences in South Africa. Linking culture to religion, it stated that in this case religious belief informs cultural practice and cultural practice attains religious significance.[16] The fact that the learner wore the nose stud voluntarily was immaterial, as the Constitution protects both voluntary and compulsory expressions of culture and religion. Indeed, in the words of the Court, the Constitution "confirms, encourages and celebrates" diversity.[17] The court therefore held that the ban constituted unfair discrimination, for which there was no justification because the school's code of conduct did not accommodate cultural and religious differences in a reasonable way.[18] The school should have provided for exemptions, as it would expose learners to, and teach them respect for, cultural diversity. The court rejected several arguments, including the "slippery slope" argument that allowing the nose stud would open the door to a variety of undesirable adornments. The exemption would only be allowed for religious and cultural purposes. If an exemption encourages learners to express their faith or culture more freely, it should in any case be celebrated and not feared.[19]

The court concluded that the purpose of ensuring discipline is not promoted significantly by refusing an exemption and does not justify the restriction on the learner's right. A reasonable accommodation could have been reached by granting an exemption. The court accordingly

13 2002 (4) SA 738 (C). See the comments by Roos 'The physical appearance of learners in public schools: *Antonie v Settlers High School* 2002 (4) SA 738 (C)' 2003 *TSAR* 792.

14 2006 (6) SA 363 (EqC).

15 *KwaZulu-Natal MEC for Education v Pillay* 2008 (1) SA 474 (CC). See the discussion of the case by Malherbe "Kulturele en religieuse diversiteit moet gevier en nie gevrees word" 2008 *TSAR* 367–375, "Oor kopdoeke, neusknopies en taal: die uitdagings van diversiteit inonderwys" in Boezaart& De Kock (eds) *Vita perit, labor non moritur: Liber memorialis PJ Visser* (2008) 39 at 48–54.

16 Para 60.

17 Para 65.

18 As required by section 14(3)(*f*) of the Equality Act

19 Para 107. The court also rejected the defense that it is not supposed to interfere with the authority of the school governing body. Courts are duty bound to adjudicate alleged infringements of constitutional rights and whether a governing body fulfilled its constitutional duties (para 81; the fact that the code of conduct was adopted through a process of consultation also did not put the code beyond judicial scrutiny – para 83). This is significant, because the *Pillay* case has been criticized on the ground that the decision makes it difficult for schools to maintain discipline. Clearly, schools must ensure that their codes of conduct, and their actions in terms of those codes, are lawful; if so, they will be able to rely on the support of the courts in fulfilling their duty to maintain discipline.

found in favour of the learner and dismissed the appeal of the school authorities.[20] The court orderedthe school to provide in its code of conduct for the reasonable accommodation of deviations from the code on religious and cultural grounds, and for a procedure for granting exemptions.[21] The *Pillay* case is especially significant for the tolerant and accommodating spirit the court encouraged in respect of religious and cultural diversity.

Coming back to section 15(2), the provision does not refer directly to religious instruction, and the question is how the right to religious freedom affects religious instruction presented in schools as part of an official curriculum imposed in terms of ordinary law. Such religious instruction is subject to the Constitution, may not disregard the right to freedom of religion, and should be presented within the framework of the right. Therefore, should such religious instruction impose a limitation on the religious freedom of the individual (for example, by imposing or promoting religious neutrality, by denying or dismissing the differences among religions, or by offending the religious convictions of some learners), such limitation would be inconsistent with section 15 and unconstitutional if it does not comply with sections 36 and 15(2).[22] The further implication is that religious instruction that, in terms of the official curriculum, includes a study of the various religions of South Africa may be presented from the point of view and in terms of the tenets of a particular religion. This should be possible simply because religious freedom in South Africa does not mean the denial of religious differences. It also does not mean religious neutrality. Once again, the only condition in the educational context is that this happen equitably, freely and voluntarily.

2.3.2 Ensuring fairness

The second arrangement the Constitution makes in respect of religious freedom is to ensure fairness in the manifestation of religious beliefs. This is typically the function of legal rules – to regulate the affairs of society equitably and to make arrangements in sensitive situations that will ensure or promote equity. That is why the Constitution sets certain conditions for religious observances in schools – it must take place in accordance with the rules of the institution, and it must be fair, free and voluntary. Along with section 9(3), these conditions serve to protect learners who, in the context of the particular institution, belong to minority religions, or learners who are so-called non-believers.

1. First, the observances must follow the rules made by the school governing body.[23] Such rules may only regulate religious observances and may not prohibit them. The conduct of religious observances also does not depend on the existence of such rules and in the absence of rules one would still be entitled to conduct such observances. Otherwise, a school governing body could effectively prevent the exercise of the right by simply failing to make any rules.

20 Para 112.The court explained that its finding did not abolish school uniforms – "it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices" (para 114). It will depend on each case what grounds would justify the refusal of an exemption, but 'a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline' would not be a justification (para 114).

21 Para 119.

22 In *Wittmann v Deutscher Schülverein, Pretoria* 1998 (4) SA 423 (T) this issue was dealt with in the context of a private school, where the court enforced the contract between a mother and the private school in which she had put her daughter, and rejected the mother's application for her daughter's exemption from compulsory religious instruction.

23 According to section 7 of the SA Schools Act 88 of 1996, the "appropriate public authorities" referred to in section 15(2) of the Constitution is the school governing body.

2. *(b)* Second, religious observances must be conducted on an equitable basis. This does not mean neutrality as in the USA,[24] but requires the governing body to ensure that one religion is not put at an advantage or disadvantage *vis-à-vis* others. Of course, the preferences of pupils are decisive. It would not make much sense if a religion not practised at a particular school receives the same opportunity as those that are practised.

3. *(c)* Finally, attendance at religious observances must be free and voluntary. Nobody may be coerced into attending them, either directly or indirectly. Teachers may not be compelled to lead such observances or participate in them. Representatives of religious communities may lead observances, as long as a particular religion is not favoured or prejudiced in the context of that particular school. Once more, the preferences of those desiring religious observances should be the determining factor.[25]

It should be emphasised that section 15(2) accords constitutional protection to religious observances in educational institutions. It does not endorse any form of so-called religious neutrality as in the USA. Neutrality tends to lead to the absence of, if not hostility towards, religion in school and would be inconsistent with section 15(2). The provision presupposes that religious observances may be conducted in schools, and all it does is to prescribe the conditions that those observances shall be equitable, free and voluntary. For the same reason, nothing in the Constitution prohibits a school from subscribing to a particular religious ethos, as long as it is equitable, free and voluntary, so that learners with other convictions are not disadvantaged or discriminated against.

What should we make of all this? Religious freedom in South Africa does not mean freedom *from* religion, but freedom *for* religion. Society is not protected from religion; instead opportunity and space are created for people to manifest their beliefs freely and in all spheres of life. I repeat, the Constitution rejects the American approachwhich seeks to deny religion a place in the public square and to relegate religion to the private sphere. This approach has led to the grossly unfair treatment of everything religious, and even gives rise to hostility towards religion, as it allows in the public domain anything offending religion (or the religious beliefs of people), but denies religion fair entry onto the playing field.[26] On the contrary, the South African Constitution acknowledges that one's convictions are an integral part of who you are, that they go with you wherever you go, and that you don't switch them off artificially once you enter the public square. I repeat, the wall of separation between religion and state does not exist in South Africa; instead, like any lawful human endeavour, religion is welcomed in the public domain.[27]

24 See Judge O'Regan in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 116.

25 It is significant that in German case law the free and voluntary nature of observances has been taken as a strong indication whether the arrangements of the particular school were equitable(see BVerfGE 52, 223 (1979); BVerfGE 41, 29 (1975)).

26 Teaching evolution is, for example, lawful in the USA, but teaching creationism or intelligent design is not, on the basis that the latter is based on religious belief but the former is not (Hamilton *Family, Law and Religion* (1995) 310 ff).This is a false distinction, because evolutionism is as much based on a value system formed by people's beliefs as creationism. For a valuable contribution in this regard see Benson "The jurisdiction of science: what the evolution/creation debate is *not* about" 2007 *Tydskrif vir Christelike Wetenskap* 1-29. (I have commented at length on this phenomenon as it manifests itself in South Africa in my article mentioned in n 6.)

27 Unfortunately, in *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) paragraph 92 the Constitutional Court, after paying lip-service to the important role of religion in the South African society, itself departed from this sound approach when it held that religious doctrine or sentiments should not be allowed to determine the interpretation of the Constitution. This is wrong. The Court very expressly

3. What does the constitution mean for religion in public schools?

If it is still necessary to state it expressly, it means first of all that religious observances may take place in public schools. This is acknowledged and confirmed in the South African Schools Act.[28] Should a school (or the educational authorities in general) disallow religious observances for any reason, it will act inconsistently with the Constitution, and its actions may be struck down by the courts if they don't comply with the limitations clause in section 36. Such observances must, however, take place in accordance with the rules of the school governing body. These rules must ensure that religious observances take place equitably, and that members or supporters of different persuasions are reasonably accommodated within the school environment and program. Fair opportunity must be given to all to organise and attend their own religious or other observances. Those who choose not to do so, or regard themselves as so-called non-believers[29] and, therefore, choose not to participate in any religious observances, must also be reasonably accommodated and may not be unfairly discriminated against. Attendance at any religious observances must be voluntary and may not be imposed on anybody. (By the way, equity does not mean that children may be made to attend multi-religious observances, as envisaged in the Religion in Education Policy, as that denies the right to freedom of religion.[30]) Parents have the right to decide about these matters on behalf of their minor children, although it is increasingly recognised that the child's opinion carries increasing weight as they grow older.[31]

A brief comment on the Religion in Education Policy of the state which regulates religion in school should be in order here.[32] This policy is subject to the above arrangements in the Constitution and I have argued in the past that this policy is unconstitutional to the extent that it is inconsistent with the Constitution.[33] The policy provides for the compulsory inclusion in the school curriculum of the study of various religions, and imposes particular restrictions on religious observances in schools. The policy violates section 15, first because it imposes on learners a state-determined view of religious matters, thereby violating their freedom of religion, and second because it imposes unconstitutional limitations on religious observances guaranteed by section 15(2).[34] The official motivation advanced for the study of different religions is that to expose the child to different belief systems will promote understanding and national unity and, by implication, that religion education along these lines is in the best

allowed its own humanistic worldview to determine its interpretation of the Constitution. A religious worldview provides just as valid an approach to the resolution of public issues as any other belief system, and should at least be allowed a fair opportunity to compete in the resolution of public questions (see Malherbe "Die teorie en praktyk van die 1996-grondwet: 'n versigtige waardering" 2008 *TSAR* 425-448).

28 Section 7 of Act 88 of 1996.

29 Benson "The freedom of conscience and religion in Canada: challenges and opportunities" 2007 *Emory International Law Review* 111-166 at 117, citing various authors, shows convincingly that belief, whether acknowledged or not, is a necessary part of life, and that not even atheists and agnostics are really "non-believers".

30 See the references in n 29 and 30, and see below.

31 Malherbe "The constitutional dimension of the best interests of the child as applied in education" 2008 *TSAR* 267-285.

32 'National Policy on Religion and Education' Government Notice 1307 *GG* 25459 of 12 September 2003.

33 See Malherbe "The constitutionality of government policy relating to the conduct of religious observances in public schools" 2002 *TSAR* 391-418.

34 See, eg, Malherbe 'The constitutionality of government policy relating to the conduct of religious observances in public schools' 2002 *TSAR* 391–418; 'The right to freedom of religion in South African schools: recent disturbing developments' 2004 *International Journal for Education Law and Policy* 248–257.

interest of the child. This reflects precisely the so-called secularist and humanist value system underlying the policy and the way in which religion education is offered in schools. Religion education pursues a secular objective and enforces on learners a particular worldview determined by the state, and in the process violates their religious freedom.[35]

In respect of religious observances, I believe that whenever such observances that comply with the requirements of the Constitution take place in a public school, such observances hare completely lawful and no policy or decision may restrict or abolish it. I find it difficult to contemplate a situation where it is possible to come up with lawful restrictions (in other words, restrictions that fulfil the requirements of the limitation clause in section 36), that can rightfully be imposed on religious observances that comply with section 15(2) of the Constitution. Mere objections from those who do not like it cannot justify such restrictions. An approach calling for a ban on all religion in school because it offends so-called non-believers would be in conflict with the Constitution. Where that has been allowed to happen, it only opened the door for the activities of so-called non-believers to flourish, to the exclusion of anything related to religion.[36] In other words, this approach sweeps religion off the table, and reserves the playing field only for the so-called secularist and humanist worldviews to dominate.[37] This is unfair because it favours one particular belief system above all others, is inconsistent with the letter and spirit of section 15, and is therefore unconstitutional.Some commentators expressed doubt whether religious observances could ever be equitable from the point of view of minorities or so-called non-believers,[38] but this contention must be rejected. It is the very purpose of rules of law to find equitable solutions between conflicting rights or interests, and this is the point of departure underlying section 15(2) as well. It would therefore not be a solution to ban religion from school simply because equity does not seem easy to obtain, or because it is too difficult to satisfy everybody. It is an escapist approach that would lead to the same result – it would only benefit the so-called secularist belief system. It is a cowardly attempt to flee from a situation about which the Constitution challenges us to make equitable arrangements. It is in any case inconsistent with section 15(2) and unconstitutional because it denies the right to do so of those who have the desire to manifest their religious beliefs in school. Therefore, every institution has the duty to devise mechanisms and procedures

35 See in this regard art 5(2) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief: 'Every child shall enjoy the right to have access to education in the matter of religion and belief in accordance with the wishes of his parents … and shall not be compelled to receive teaching on religion or belief against the wishes of his parents … the best interests of the child being the guiding principle …' See also art 2 of Protocol 1 of the European Convention, art 5(b) of the Convention Against Discrimination in Education, and art 18(4) of the International Covenant on Civil and Political Rights.

36 This is exactly what has happened in the Canadian province of Ontario – see Buckingham "Advocacy for religious freedom in Canada" 2011 *International Journal for Religious Freedom* 65 69.

37 This distinction between the secular realm and religion is in any case invalid. Benson "Considering secularism" in Farrow (Ed) *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (2004) 83-98 correctly points out that the term secular actually includes all human endeavours, including religion. (See also Benson "Notes towards a (re)definition of the 'secular'" 2000 *University of British Columbia Law Review* 519-549.) This correction in popular philosophical thinking is important, because by prolonging the incorrect definition of secular, one leaves open the door for a (wrong) conclusion leaving atheists and agnostics on the inside of the so-called secular realm while so-called believers find themselves on the outside! From there it is a small step to shunting believers out of the public domain altogether.

38 See, eg, Smith N 'Freedom of religion' in Chaskalson et al *Constitutional Law of South Africa* 19-10; Meyerson D *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) 10 ff.

that will ensure that this right can be exercised as fairly as possible within the context of the particular institution. Every school should go out of its way to prevent minorities or so-called non-believers to feel discriminated against or to be victimised, but whatever action the school takes can never include the banning of religious observances for those who desire to do so.

The approach of the Constitution is actually completely the opposite of this cop-out attitude. It acknowledges the multi-religious nature of our society. It strives to teach all of us to live together in a spirit of tolerance.[39] Freedom of religion gives no-one (believers and so-called non-believers alike) the right to impose their beliefs on others or to deny others theirs. The fairness provided by section 15 is that it allows everyone the scope and opportunity to have and manifest their own convictions anywhere. The judgment of the Constitutional Court in the *Pillay* case endorses this approach in resounding terms when it stated that our diversity should be celebrated and not feared. I am convinced that the accommodating spirit and creativity prevailing in our schools will enable them to make fair arrangements for the manifestation of religious beliefs without offending reasonable people of other persuasions.

As a final thought I refer to the draft South African Charter of Religious Rights and Freedoms, which aims to explain and give effect to the right to freedom of religion in the Constitution.[40] In paragraphs 4.4 and 7.2, the Charter reiterates section 15(2) of the Constitution, and explains that it includes the right for a school to adhere to a particular religious ethos, with due regard for the rights of minorities. These provisions read as follows:

> "4.4. Every person has the right to conduct single-faith religious observances, expression and activities in state or state-aided institutions, as long as such observances, expression and activities follow rules made by the appropriate public authorities, are conducted on an equitable basis, and attendance at them is free and voluntary.
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> 7.2. Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities."

The latter provision follows logically from the right to conduct religious observances in a public school. There is no institution without any ethos (even so-called neutrality is an ethos), and if there is a particular majority religion in a school, that school will in all probability naturally adopt and reflect that ethos. The Bill of Rights, in particular section 15(2), acknowledges this.

I am confident that the Charter reflects the proper, constitutional approach to religion in public schools, and will go a long way in regulating this issue equitably. In the final analysis it is about the right to believe and to manifest those beliefs everywhere, also in the public square. The only condition is that it happens equitably, freely and voluntarily. To restrict this freedom, and to ban religion from the public square, is unnatural, impracticable and untenable. And it is ultimately extremely illiberal and intolerant. Instead, the South African society is realistic, broad-minded and tolerant. We accommodate differences, we don't reject and ban them. That

39 See the plea in this regard by Malherbe "Some thoughts on unity, diversity and human dignity in the new South Africa" 2007 *TSAR* 127-133.

40 For a copy of the Charter, and a brief discussion, see Malherbe "The background and contents of the proposed South African Charter of Religious Rights and Freedoms" 2011 *Brigham Young University Law Review* 101-123. See also Benson "South African Charter of Religious Rights and Freedoms: constitutional framework, formation and challenges" 2011 *International Journal for Religious Freedom*125-134.

is why we are succeeding in building a new united South Africa despite vast cultural and other differences, and that is why we will succeed in protecting religious freedom effectively, also in our schools.