IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

GNP Case No.: **29847/2014**

In the matter between:

ORGANISASIE VIR GODSDIENSTE-ONDERRIG EN DEMOKRASIE	Applicant
and	
LAERSKOOL RANDHART	First respondent
LAERSKOOL BAANBREKER	Second Respondent
LAERSKOOL GARSFONTEIN	Third Respondent
LAERSKOOL LINDEN	Fourth Respondent
LAERSKOOL OUDTSHOORN	Fifth Respondent
LAERSKOOL GIMNASIUM	Sixth Respondent
MINISTER OF BASIC EDUCTION	Seventh Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Eighth Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	*Amicus curiae*
CAUSE FOR JUSTICE	*Amicus curiae*
COUNCIL FOR THE PROTECTION AND PROMOTION OF RELIGIOUS RIGHTS	*Amicus curiae*
SUID-AFRIKAANSE ONDERWYSERSUNIE	*Amicus curiae*

HEADS OF ARGUMENT FOR *CAUSE FOR JUSTICE* (*AMICUS CURIAE*)

INTRODUCTION

1. Under the Constitution of the Republic of South Africa, 1996 ('**the Constitution**'), South Africa is a country united in its diversity. Extensive constitutional provisions on linguistic, religious and cultural rights reflect the high premium the drafters placed on diversity.

2. In *MEC for Education KwaZulu-Natal v Pillay*[1] Langa CJ stated that our '*constitutional project ... not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains*' and also that '*our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation*'. The recognition is important to ensure that the principle of equality is not collapsed into one of '*sameness, devaluing difference and endorsing assimilation and conformity*'.[2]

3. Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3] put it thus:

> *'[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.'*

[1] 2008 (1) SA 474 (CC) at paras 65 and 92.

[2] JL Pretorius 'The *Use of Official Languages Act:* Diversity Affirmed?'2013 (16) 1 *PER/ PELJ* 281 ('**Pretorius *Diversity***') at 289.

[3] 1999 (1) SA 6 (CC) at para 132.

4. The balance required under the Constitution is aptly described in the article '*Equal educational opportunities in South Africa: The constitutional framework'*[4]

> '*Clearly, equality cannot be pursued in isolation from human dignity and freedom. That is why equality can never mean "uniformity", and should be interpreted to mean "of equal worth", and why people have to enjoy the freedom to be themselves in order for everybody's dignity and equal worth to be respected and upheld. The quest for equal education opportunities is therefore as much a challenge to balance and harmonise the values of dignity, equality and freedom, to respect and accommodate people's "otherness", and to build the South African nation <u>on</u> and not separately from its diversity.'*

5. Part and parcel of that rich diversity is diversity in belief systems, encompassing both religious and other ideological views.

6. Against this backdrop, the applicant ('**OGOD**') seeks orders declaring public schools to be in violation of the Constitution and the National Policy on Religion and Education No. 25459 of 19 September 2003 (the '**National Religion Policy**') if they associate themselves with any particular religion, adopt, promote or observe certain religious practices, require identification of learners' religious persuasion, divide learners according to religious persuasion for purposes of religious activity and/or conduct themselves in a manner

[4] R Malherbe, TSAR 2004 – 3 427 at 429.

informed by religious persuasion.[5] OGOD also seeks interdicts against various identified practices at the six respondent schools ('**the Schools**').[6]

7. The Schools oppose the application for reasons comprehensively dealt with in an answering affidavit (together with annexures) that spans thousands of pages[7] and a supplementary affidavit.[8] The Schools also raise a constitutional challenge to the National Religion Policy by way of counter-application, which the State Respondents oppose. A number of *amici curiae* have been admitted in the proceedings.[9]

8. On 19 April 2016, Cause for Justice ('**CFJ**') was admitted by the court as *amicus curiae* in this matter, in accordance with Rule 16A of the Uniform Rules of Court and with the permission of all of the parties to the litigation. It was given leave to make both written and oral submissions to the court. These submissions are presented in consequence of CFJ's admission and in accordance with the directives of this court on the filing of heads of argument by the *amici curiae*.

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[5] NoM prayers 1.1. and 1.2 Vol 1 pp 2 - 3.

[6] NoM prayer 1.3 Vol 1 pp 3 - 14.

[7] AA Vol 2 p 95 - Vol 22 p 2097.

[8] Supp AA Vol 26 p 2399 - Vol 28 p 2574.

[9] The names of the *amici* are reflected in the heading insofar as they are known to CFJ.

THE POSITION ADOPTED BY CFJ

9. In its application for admission,[10] CFJ revealed its position that:

9.1. religious teaching and the incorporation of certain religious practices is constitutionally sound;

9.2. religious expression in schools constitutes expression that is integral to human dignity rights;

9.3. tolerance for diversity is promoted when religious expression and teaching forms part of learners' experience in schools; and

9.4. learners are prepared for engagement with fellow citizens who hold both the same and different religious views as their own if they are exposed to religious expression and teaching within the school system.[11]

10. In that application, CFJ foreshadowed that it intended to persuade the court that appropriate account was to be taken of the domestic law of foreign jurisdictions (foreign law) and international law.[12] It promised to present to the court submissions on the experience in selected jurisdictions, for consideration in the development of an appropriate

[10] Amici curiae applications Vol 3 pp 254 - 316

[11] CFJ FA para 12 Amici curiae applications Vol 3 pp 263 - 264.

[12] CFJ FA para 15 Amici curiae applications Vol 3 p 265.

response in South Africa to the efforts of OGOD.[13] Moreover, CFJ indicated its intention to take the position that the Constitution demands the promotion of diversity and plurality, not least because individual and collective expression of religious beliefs, and the acceptance of such religious expression and diversity of belief is integral to the human dignity right that is a foundational principle of the South African Constitution. It contended that enforcing any one ideological stance (at the expense of all other) has the potential to create a pattern of religious discrimination.[14]

11. In describing the content and relevance of CFJ's then proposed submissions, CFJ identified certain topics that it intended to cover, including:

11.1. the Constitutional injunction to adopt pluralistic liberalism as a response to an oppressive past where a single ideological stance was enforced universally, and the Constitutional Court's positive treatment of the exercise of religious freedoms and reasonable accommodation being made for the exercise of diverse religions;[15]

11.2. the promotion of equality through the adoption of pluralistic religious practices in public schools;[16]

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[13] *Id*.

[14] CFJ FA para 16 Amici curiae applications Vol 3 p 266.

[15] CFJ FA paras 20 - 22 Amici curiae applications Vol 3 pp 268 - 269.

[16] CFJ FA para 24 Amici curiae applications Vol 3 pp 269 - 270.

11.3. the appropriate distinction to be drawn between the South African constitutional position and the one prevailing in a jurisdiction such as the United States of America ('**the US**'), where a strict separation between religion and state is constitutionally provided for;[17]

11.4. appropriate guidance to be drawn from jurisdictions that adopt a pluralistic and inclusive approach to religion in public schools, whilst promoting neutrality and equality;[18] and

11.5. the appropriate application of the intersection between the religious freedom right, the equality right, the dignity right, the freedom of association rights, education rights and the best interests of the child as enshrined in the Constitution.[19]

12. In these written submissions, these topics will be covered under the following headings:

12.1. The South African Constitutional Context;

12.2. Law and Policy;

12.3. The Constitutional Court's treatment of Religion and Religious Rights;

12.4. Foreign and International Law;

[17] CFJ FA Amici curiae applications Vol 3 p 269.

[18] *Id.*

[19] CFJ FA Amici curiae applications Vol 3 p 271.

12.5. Principles to be Applied in the Assessment of the Parties' Positions; and

12.6. Conclusion.

13. CFJ refrains from making specific submissions regarding the position at the Schools. Its approach is one aimed at assisting the court in the identification and application of the applicable principles. Where reference is made to specific practices or conduct at the Schools, it will be done only by way of example or illustration. The constitutional challenge raised by the Schools is not dealt with in these written submissions. Equally, CFJ does not engage with the submissions of CFJ's fellow *amici curiae*. The submissions of the *amici* are all made for the assistance of the court, and CFJ does not consider itself to be in litigation with or against these *amici*.

14. Before dealing with the topics highlighted above, CFJ analyses the position adopted by OGOD in its written submissions. This analysis informs the submissions on which emphasis is placed in these written submissions.

OBSERVATIONS ON THE OGOD WRITTEN SUBMISSIONS

15. In the written submissions, OGOD invokes the equality right,[20] the dignity right,[21] the right to freedom and security of the person,[22] privacy,[23] religious freedom[24] and freedom of association.[25] These are the constitutional rights said to be invoked on behalf of learners.[26]

16. What OGOD does not do, is to engage in any form of analysis of the balancing of rights to be undertaken: so, for example, there is no consideration of the religious freedom rights or associational rights of learners who do not share OGOD's agnostic, alternatively atheist, world view. Nor is there any consideration of the religious freedom right or freedom of association rights of teachers employed by the state in public schools. The one-sidedness of OGOD's submissions (with exclusive focus on the rights asserted by it in favour of those who share its world view) fails to engage with constitutional balancing exercise that is required in the interpretation of all rights. There appears to be no consideration in the OGOD written submissions of the effect of the general limitations clause nor the internally limiting effect brought about by the balancing of competing rights and interests under the Constitution. As

[20] Constitution s 9. See OGOD HOA paras 6.1 and 12.

[21] Constitution s 10. See OGOD HOA paras 6.2 and 13.

[22] Constitution s 12. See OGOD paras 6.3 and 14.

[23] Constitution s 14. See OGOD paras 6.4 and 15.

[24] Constitution s 15. See OGOD paras 6.5 and 16.

[25] Constitution s 18. See OGOD paras 6.6 and 18.

[26] OGOD HOA para 6 pp 4 - 5.

the Constitutional Court observed in *Barnard*[27] '*balancing important constitutional imperatives can give rise to tensions*'[28] and made the point that such tensions must be addressed in the resolution of a case, by reference to a framework that '*permits ... constitutional goals to be read harmoniously*'.[29] What cannot be done is to assert rights without recognition of the interaction of the asserted rights with the rights of others.

17. After stating what rights are relied upon, OGOD provides a series of statements about religious practices,[30] attributed to a variety of judgments of the Constitutional Court, the SCA and High Courts. This is followed by a series of statements ostensibly taken from the National Religion Policy.[31] No argument is offered on the content of these statements, and neither is any contextual observation made regarding them. So, for example, extensive reliance on comments of the Constitutional Court on religious observances in publics schools in *Lawrence*[32] gives no recognition to the fact that the observations were made in the context of a case concerning the sale of liquor on Sundays, and that there is no South African case law directly dealing with the questions raised in OGOD's application to this court. No analysis is offered of how these observations might relate directly to the practices of the Schools or to religious observances in public schools more generally.

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[27] *SAPS v Barnard* 2014 (6) SA 123 (CC).

[28] At para 77.

[29] At para 77.

[30] OGOD HOA paras 19 - 75 pp 10 - 21.

[31] OGOD paras 76 - 95 pp 21 - 25.

[32] See OGOD HOA.

18. In what follows these '*statements*', OGOD offers a summary of what it considers to be the Schools' '*offending conduct',*[33] without presenting any analysis on why the listed practices '*offend*' in the manner contended for. The high-water mark of the submission after listing the series of practices complained of is that '*the Schools' conduct self-evidently does not comply with our Constitution and legal framework and in fact offends it*'.[34] In the absence of argument underpinning the conclusion, it is well neigh impossible to be responsive to the conclusion by way of properly reasoned argument. CFJ *qua amicus* must make assumptions on the legal argument understood to inform OGOD's position. It is not axiomatic that observance of religious practices offends against the Constitution in circumstances where specific provision is made for such observances. The practices and observances must be tested against the appropriate legal framework under the Constitution in order to come to meaningful conclusions on whether or not they are constitutionally sound.

19. After offering a summary of the perceived position of the Schools,[35] OGOD contends that the Schools had failed to engage with the application '*and the relief sought in context*'.[36] The written submissions assert that OGOD has made suggestions on the means of accommodating religious observance in public schools '*that would not affront the pupils' constitutional rights and the religion and education policy*'.[37] These suggestions, they say,

[33] OGOD HOA section D2 paras 96 - 172 pp 26 - 39.

[34] OGOD HOA para 173 pp 39 - 40.

[35] OGOD HOA para 175 pp 40 - 44 and para 177 pp 44 - 45.

[36] OGOD HOA para 178 p 45.

[37] OGOD HOA para 179 p 45.

have not been meaningfully answered,[38] but it is evident from the footnote that virtually all of the '*suggestions*' were raised in the reply.[39] The only cited example of an '*alternative*' raised in the founding papers is to be found in the conclusionary part of the founding papers. There it is suggested that '*religious observances*' may be a '*moment of silence ... during assemblies during which pupils may pray, meditate or day dream if they choose*'[40] and '*voluntary religious services may be held during break times or before or after school*'.[41] Absent from the submission is any legal argument explaining why specific religious observances currently practiced offend, or the respects in which the proposed practices differ from the ones being objected to. There is no reason to offer alternative religious observances if the court does not reach the conclusion that the observances and practices currently in place do not offend against the statutory and constitutional provisions that are in place.

20. In a further statement of conclusion, the OGOD written submissions assert that '*pupils have an equal right to education and in a pluralistic society it may be expected that the criteria of objectivity and pluralism would be taught in their education in such a way to respect all pupils' religious or philosophical convictions (conscience, thought, belief and opinion) and not exclusively from one religious point of view*'.[42] Why that assertion should translate into a

[38] *Id.*

[39] See OGOD HOA fn 203 p 45.

[40] FA para 86.1 Vol 1 p 85.

[41] FA para 86.2 Vol p 86.

[42] OGOD HOA para 188 p 48.

conclusion that religious observances and practices at South African public schools are to be treated as unconstitutional, is not explained.

21. The argument on behalf of OGOD appears to be that, if *all* persuasions and beliefs cannot be accommodated in a public school (irrespective of the size of support for such persuasions and beliefs), then none ought to be accommodated.[43] This, despite the section 15(2) recognition that religious observances must comply with the requirement that they are '*equitable*.' How it would be '*equitable'* to deprive the vast majority of students in a school from the opportunity to participate in religious observances, simply because a (tiny) minority does not wish to be exposed to religious observances, is no explained. OGOD's position appears to be that the majority may not dictate to the minority, but that the minority may dictate to the majority.[44] In that vein, OGOD rejects solutions based on volunteerism, on the basis that '*being different from the majority*' will make learners feel excluded.[45]

22. Although OGOD accepts that schools must prepare learners for life in a '*multi-cultural, multi-faith, pluralistic, open-minded democracy',*[46] it considers as objectionable the exposure of

[43] OGOD HOA paras 202 - 203 p 53.

[44] OGOD HOA para 206 p 55 and para 210 p 56.

[45] OGOD HOA para 217 p 58.

[46] OGOD HOA para 221.

those adhering to minority views to the religious views of the majority.[47] It treats religious views as private,[48] rather than as a conviction that is shared in the community.

23. OGOD considers that the practice of religious observance amounts to proselytising or evangelisation.[49] This, without any engagement with the legislative and policy sanction of religious observance that falls short of evangelisation and/or proselytising. If no distinction were to be drawn, the National Religion Policy (on which OGOD purportedly relies in its application) would not have sought to make it.

24. In the final sections, OGOD deals with more technical aspects of the Schools' position not relevant to the position adopted by CFJ.

THE SOUTH AFRICAN CONSTITUTIONAL CONTEXT

25. With the adoption of the Interim Constitution in 1993, South Africa turned its back on a society characterised by societal fissures responsible for suffering and injustice and pursued a new order founded on the recognition of human rights. Those rights are now enshrined in the Constitution. As the disputes in this case evidence, however, there may be conflicting views of the content of the protection or entitlement provided for under particular

[47] OGOD HOA para 225.

[48] OGOD HOA para 223.

[49] OGOD HOA para 227.

provisions. In addition, the matter triggers a need to engage in a balance between rights, and to engage in an appropriate limitations analysis.

26. This court is called upon to analyse the various rights and freedoms relied upon and to determine their purpose by reference to the character and the larger objects of the Bill of Rights, the language chosen to express them, their historical origins and their inter-relation so as to not give these rights legalistic meaning, but rather meaning aimed at fulfilling the purpose of the rights and at securing appropriate benefits under the Bill of Rights.[50]

27. The dispute, concerned as it is with the claimed entitlement to be free from religious influence and practices in public schools, requires the court to interpret the content of the religious freedom right as contained in section 15(1) and the limits of the section 15(2) recognition of the entitlement given to state-aided institutions to practice religious observance. The interpretation and application of these rights, which stand central in the dispute, cannot be divorced from the intersection with the equality and dignity rights, cultural rights, the rights of children and even labour rights under the Constitution. What is called for, is for the court to strike an appropriate balance in the interpretation of the various reinforcing rights.

28. No provision of the Constitution stands in isolation. The freedom of religion right, and the recognition that religious observances may be conducted at state or state-aided institutions

[50] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 9.

must be evaluated in the constitutional context as a whole. The context particularly includes considerations of diversity, referred to in the introduction to these written submissions.

LAW AND POLICY

The Constitution

29. The Constitution clearly stipulates the protection of the right to freedom of religion, [51] and it allows for the accommodation of religious '*observances*' in '*state-aided*' institutions. [52] State-aided institutions are understood as including '*government schools*',[53] so that '*public schools*' are to be regarded as state-aided institutions within the contemplation of the Constitution. There is thus explicit constitutional provision made for religious observance in public schools, subject to compliance with the constitutional requirements. Contrary to what OGOD asserts in its written submissions,[54] there is no express prohibition of further accommodation of religion in public schools. Neither the Constitution nor the Schools Act 84 of 1996 ('**Schools Act**') contains a specific prohibition against having a particular '*ethos*',

[51] Constitution s 15(1): *'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*'

[52] Constitution s 15(2) states that religious observances may be conducted at state or state-aided institutions provided that such observances follow the rules made by the appropriate public authorities, they are conducted on an equitable basis, and attendance to them is free as well as voluntary. Section 7 of the Schools Act is in accordance with this, stating that, '*Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary*'.

[53] I. Currie and J. de Waal, *The Bill of Rights Handbook* 6 ed Juta 2013 at pp 330-331. See also Schools Act s 34.

[54] OGOD HOA para 187 pp 47 - 48.

whether religiously informed or otherwise. The fact that express provision if not made for it, does not translate into a prohibition.[55]

30. The equality right is enshrined in section 9 of the Constitution. Section 9(1) guarantees equality before the law, and equal protection and benefit of the law. Section 9(2) makes plain that equality includes '*full and equal enjoyment of all rights and freedoms*' and section 9(3) prohibits unfair discrimination by the state, *inter alia* on the basis of religion. It is important to note that it is clear from the constitutional jurisprudence on equality, as reflected in the standard setting *Harksen* case[56] that differentiation *per se* is not unconstitutional - only '*unfair*' discrimination is prohibited. Moreover, equality in the South African context is not '*formal equality*', as the affirmative action provision in section 9(2) illustrates. What is envisaged is not sameness of treatment for all; rather, differences in treatment are tolerated. The quest for substantive equality requires attention to context. Equality has been said to mean '*equal concern and respect across difference*' and it has been held that it '*does not presuppose the elimination or suppression of difference'.* Equality does not entail homogenisation.[57]

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[55] It appears that this is what OGOD contends. It states in para 187 that the Constitution only allows religious observances, but does not envisage a right to religious instruction. Just because there is not a right to religious instruction, this does not mean that it is prohibited to offer religious instruction. Insofar OGOD adopts a contrary analysis, it has adopted a wrong position in law.

[56] *Harksen v Lane NO* 1998 (1) SA 300 (CC) paras 50-53.

[57] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) at para 60.

31. For present purposes, the religious freedom rights and the equality rights also stand in a relationship with the dignity right in section 10, freedom of expression rights in section 16, the associational right in section 18, educational rights in section 29 and religious and cultural community rights in section 31. None of these rights stand in isolation, and none of them can be asserted by one party without recognition of another's equally valid claim to these rights.

The Schools Act

32. Section 7 of the Schools Act provides that, subject to the Constitution, and applicable provincial laws, religious observances may be conducted at a public school under rules issued by the School Governing Body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is voluntary.

33. Under section 20(1)(*b*), the School Governing Body must adopt a mission statement for the school in respect of which they serve.

The Gauteng Education Act

34. The School Education Act (Gauteng) 6 of 1995 ('**the Gauteng Education Act**') provides in section 21 that the religious policy of a public school is to be made by the School Governing Body. This includes religious practices at the school.[58] In its formulation, provision must be

[58] Definition of '*religious policy*' in s 1.

made for diversity and religious freedom rights must be respected. The power of the School Governing Body is subject to oversight by the Member of the Executive Council for Education, who may direct its re-formulation.[59]

35. Section 22, for its part, prohibits indoctrination and denigration of religion.

The National Religion Policy

36. The National Religion Policy recognises that South Africa is not a secular state, and that there is no strict separation between religion and state. It professes to adopt a co-operative model that recognises the rich and diverse religious heritage of the country. The National Religion Policy is professedly not hostile to religion or faith and does not impose narrow prescriptions or ideological views regarding the relationship between education and religion. The '*distinctive contribution*' of religion in education is recognised and promoted. Accordingly, the National Religion Policy advocates '*a broad range of religious activities in the school*'.

37. After dealing with religioun education (which forms part of the curriculum and which is not the subject of CFJ's submissions in the context of this case), the National Religion Policy deals with '*religious instruction*'. This section contains two important statements of policy:

[59] See s 21(3).

37.1. *'Religious Instruction may not be part of the formal school programme, as constituted by the National Curriculum Statement, although schools are encouraged to allow the use of their facilities for such programmes, in a manner that does not interrupt or detract from the core educational purposes of the school. This could include voluntary gatherings and meetings of religious associations during break times.'*[60]

37.2. *'This policy encourages the provision of religious instruction by religious bodies and other accredited groups outside the formal school curriculum on school premises, provided that opportunities be afforded in an equitable manner to all religious bodies represented in a school, that no denigration or caricaturing of any other religion take place, and that attendance at such instruction be voluntary. Persons offering Religious Instruction would do so under the authority of the religious body, and would not be required to be registered with the South African Council for Educators.'*[61]

38. In respect of religious observances, the following relevant extracts are to be taken note of:

38.1. *'Voluntary religious observances in which the public participates should be encouraged.'*[62]

[60] At para 55. Emphasis supplied.

[61] At para 57. Emphasis supplied.

[62] At para 60.

38.2. *'School Governing Bodies are required to determine the nature and content of and religious observances for teachers and pupils, such that coherence and alignment with this policy and applicable legislation is ensured. It may also determine that a policy of no religious observances be followed. Where religious observances are held, these may be at any time determined by the school, and may be part of a school assembly. However an assembly is not necessarily to be seen as the only occasion for religious observance, which may take place at other times of the day, and in other ways, including specific dress requirements or dietary injunctions. Where a religious observance is organised, as an official part of the school day, it must accommodate and reflect the multi-religious nature of the country in an appropriate manner.'*[63]

38.3. Appropriate and equitable means of acknowledging the multi-religious nature of a school community may include *inter alia*:

38.3.1. *'The separation of learners according to religion, where the observance takes place outside of the context of a school assembly, and with equitably supported opportunities for observance by all faiths, and appropriate use of the time for those holding secular or humanist beliefs;'*[64] and

[63] At para 61. Emphasis supplied.

[64] At para 62 first bullet.

38.3.2. *'Rotation of opportunities for observance, in proportion to the representation of different religions in the school'.*[65]

38.4. *'A school assembly has the potential for affirming and celebrating unity in diversity, and should be used for this purpose. Public schools may not violate the religious freedom of pupils and teachers by imposing religious uniformity on a religiously diverse school population in school assemblies. Where a religious observance is included in a school assembly, pupils may be excused on grounds of conscience from attending a religious observance component, and equitable arrangements must be made for these pupils.'*[66]

39. Accordingly, the National Religion Policy concludes that it *'upholds the principles of a cooperative model for relations between religion and the state, by maintaining a constitutional impartiality in the formal activities of the school, but encouraging voluntary interaction outside of this*'.[67]

THE CONSTITUTIONAL COURT'S TREATMENT OF RELIGION AND RELIGIOUS RIGHTS

40. The Constitutional Court has had occasion on a number of occasions to opine on the religious freedom right and its interaction with other fundamental rights and freedoms. In

[65] At para 62 second bullet.

[66] At para 63. Emphasis supplied.

[67] At para 71.

what follows, a selection of points made by the court in that context is presented. It is not intended to be a comprehensive summary of the court's position on the religious freedom rights, but it highlights certain principles that have been expressed and from which guidance may be taken in the assessment of the present case. No case before the Constitutional Court has dealt with a set of facts that activated direct consideration of the constitutionality or otherwise of particular religious practices and observances by schools. To the extent that comments have been made on religious practices and observances in education in matters outside the educational sphere, some guidance may be taken, but it is submitted that these observations are not binding.

41. In *S v Lawrence*[68] the Constitutional Court adopted the definition of the '*essence of the concept of freedom of religion*' that had been offered by the Canadian courts:

'*the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear or hindrance of reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*'.[69]

42. That must be read with the observations in *KwaZulu-Natal MEC for Education v Pillay*[70] (referred to above) that the Constitution '*promotes, encourages and celebrates*' diversity.[71]

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[68] 1997 (4) SA 1176 (CC).

[69] At para 12, quoting *R v Big M Drug Mart* [1985] 1 SCR 295 at 336.

[70] 2008 (1) SA 474 (CC).

[71] At para 65.

43. In the educational context particularly, Justice Sachs held in *Christian Education South Africa v Minister of Education*[72] that:

43.1. the right to freedom of religion also includes the right to have a belief and to express that belief in practice;[73]

43.2. religion is not always a matter of private conscience or communal sectarian practice as many religious persons see it as part of their duty to be part of the society as a whole;[74] and

43.3. '*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 a way of life, of a people's temper and culture*'.[75]

44. Read together, it may be said that religious freedom right entails the right to:

44.1. have a belief;

44.2. express that belief publicly; and

44.3. manifest that belief by worship and practice, teaching and dissemination.[76]

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[72] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

[73] At para 19.

[74] At para 33.

[75] At para 33. These words and sentiments were repeated in the case of *Minister of Home Affairs and Another v Fourie* 2006 (1) SA 524 (CC) at para 90.

45. The right as guaranteed also prohibits coercion or constraint that might force people to act or refrain from acting in a manner contrary to their religious beliefs.[77]

46. OGOD makes extensive reference to *S v Lawrence*[78] in its heads of argument.[79] However, it does not include reference to:

46.1. paragraph 103, in which Justice Chaskalson held:

> *'It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. I doubt whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school … But whatever section 14(2) may mean, and we have heard no argument on this, it cannot in my view be elevated to a constitutional principle incorporating by implication a requirement into section 14(1) that the state abstain from action that might advance or inhibit religion.'*

46.2. paragraph 122, in which Justice O' Regan makes clear that:

> *'The requirement of even-handedness too may produce different results depending upon the context which is under scrutiny. For example, in the context of religious observances at local schools, the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group. But for religious*

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[76] See *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) para 38; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 19.

[77] *S v Lawrence* para 92.

[78] 1997 (4) SA 1176 (CC).

[79] See, for example, paras 21 - 24 and paras 29 - 33.

observances at national level, however, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others.'

FOREIGN AND INTERNATIONAL LAW[80]

Introduction

47. In engaging in the exercise of interpreting and applying the various constitutional rights implicated by the dispute between the parties, the court may be guided by foreign and international law.

47.1. The Constitution explicitly authorises courts to consider foreign law when interpreting the Bill of Rights,[81] and the Constitutional Court has intimated that foreign constitutional law will be a useful point of departure in instances where no local constitutional principles have emerged as yet.[82]

47.2. The interpretation of foreign constitutions with a content different from our own cannot dictate the adoption of principles that are inconsistent with the rights and

[80] We give specific recognition to the work of Georgia du Plessis of the University of Antwerp and the University of the Free State, who has done a significant body of research for purposes of her PhD on the topic of religion in South African public schools and has made this available to CFJ for consideration in the preparation of these heads of argument. Her research included a research paper named '*A Country Study for the ORED case*', and she is due to publish an article (potential title '*Religious distinctiveness and the dissemination of religious knowledge in South African Public Schools*'). She has kindly made early versions of the article available to aid in the drafting of these heads of argument.

[81] Constitution s 39(1)(*c*).

[82] *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) para 3.

values enshrined in the South African Constitution, against which all law and conduct must be tested for validity. Recognising the constitutional similarities and differences between particular foreign jurisdictions and South Africa is an important part of determining the usefulness of case precedent to the present analysis. For this reason, the court must be satisfied that foreign precedent on which reliance is placed is appropriate, in the sense that the constitutional context in which the precedent arises is comparable.[83]

47.3. Of course, it is trite that foreign law is not binding in any sense, and that it merely to be used to keep the judicial mind open to a variety of ideas, arguments and solutions. Ultimately judgment must depend on the proper interpretation of the South African Bill of Rights in its context. Whether the adoption of a religion-based ethos or the practice of certain religious observances in public schools in South Africa can withstand scrutiny must ultimately be informed by the specific constitutional and legislative provisions. The regulation of religious practices and observances in public schools must be case-specific. Accordingly, the wholesale importation of foreign precedent (especially foreign precedent based on very different regulation of religious observances by the state) cannot be tolerated.

[83] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 175*ff*.

The US

48. <u>The position in the US is distinguishable from South Africa</u>

48.1. The first amendment of the US Constitution provides that '*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press...'*. The first part of this provision, known as the '*establishment clause',* forms the basis of keeping religion out of schools.

48.2. Paul Farlam makes the point in *CLOSA*[84] that the text of section 15 of the Constitution is '*conspicuously different from that of the First Amendment to the United States Constitution. The US Constitution forbids laws "respecting the establishment of religion or promoting the free exercise thereof". ... While guidance and interpretation can profitably be sought from the decisions and analysis from the United States, the Constitutional Court has sounded its usual cautionary note that the South African Constitution "deals with issues of religion differently to the US Constitution".'*[85]

48.3. This is correct: in *S v Lawrence*[86] the Constitutional Court pertinently made the point that the Interim Constitution (under which that case was adjudicated) did not contain

[84] Woolman *et al* Constitutional Law of South Africa 2ed Original Service 12-03 at 41 - 11.

[85] Footnotes omitted.

[86] 1997 (4) SA 1176 (CC).

an establishment clause similar to the US Constitution.[87] That position is no different under the Constitution.

49. Conclusion

49.1. It is of no assistance to OGOD to place reliance on the position in the US and case law from that jurisdiction, without explaining why it might be that the case law of that country might be applicable in South Africa.

Nigeria

50. It is useful to consider the position adopted elsewhere in Africa. Nigeria is the largest African country by population and it is nearly equally divided between Christianity and Islam, with a growing population of non-religious Nigerians.[88] It is distinguishable from countries such as Angola and Botswana (which proclaim secular states), Ethiopia (where religion is separated from the state) and Democratic Republic of the Congo (which claims religious neutrality).[89] The Nigerian position has been described as one of multi-religiosity or pluralism,[90] which is submitted is similar to the position prevailing in South Africa.

[87] At para 101.

[88] https://en.wikipedia.org/wiki/Religion_in_Nigeria.

[89] Oloyede IO, Egbewole YO and Oloyede HT 'The Operational Complexities of "Free Exercise" and "Adoption of Religion" Clauses in the Nigerian Constitution' - an Abstract Submission - 2015 Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations Conference, obtained electronically at https://www.aclars.org/content/events/103/2025.pdf at pp 8 - 9.

[90] *Id* at p 17.

51. Section 10 of the Nigerian Constitution provides that the '*Government of the Federation or of a State shall not adopt any religion as State Religion*'. This non-establishment clause may lead one to conclude that Nigeria is to be treated as a secular nation. However, section 10 must be read with section 38 of the Nigerian Constitution. It provides that:

51.1. Everyone shall be entitled to freedom of thought conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) or belief in worship, teaching, practice and observance;[91]

51.2. No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian;[92] and

51.3. No religious community or denomination shall be prevented from providing instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.[93]

[91] Nigerian Constitution s 38(1).

[92] Nigeria Constitution section 38(2).

[93] Nigerian Constitution section 38(3).

52. The position adopted in the Nigerian Constitution illustrates that it is possible to not adopt a state religion and yet provide for and accommodate religious instruction and observance in the educational system. The Nigerian Constitution is distinguishable from the South African Constitution, since the former contains a non-establishment clause. It is arguably for that reason that the entitlements to religious instruction and observance in education are more clearly spelt out than they are in the South African context. What may be taken from the Nigeria Constitution, nonetheless, is the principle that allowance for religious instruction and observance in the education system need not be treated as inconsistent with even an establishment clause.

Germany

53. Germany as a useful comparator

53.1. The Constitutional Court has acknowledged the relevance of German jurisprudence to the interpretation of the core values of human dignity, equality and freedom.

53.2. In *Du Plessis v De Klerk*[94] Ackerman J pointed out that the '*German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less a powerful response to totalitarianism, the*

[94] 1996 (3) SA 850 (CC)

degradation of human dignity and the denial of freedom and equality than our Constitution'.[95]

53.3. The German Basic Law does not mandate separation of church and state in the US sense, and therefore it is an appropriate comparator in the context specifically of religious practices and observances in public schools. There is a similarity with the South African position in the sense that the Basic Law does not foresee, or mandate, neutrality that is ultimately exaggerated into absolute non-concern with religion that may have the effect of (inadvertently or advertently) favouring anti-religious outlooks, thereby becoming an unacceptable type of passive intervention in religious freedom.

54. Relevant provisions

54.1. Article 7(1) of the German Basic Law provides that the entire school system shall be under the supervision of the state.

54.2. Article 7(2), for its part, states that parents and guardians shall have the right to decide whether children shall receive religious instruction. Teachers may not be obliged against their will to give religious instruction, and religious instruction is to be given in accordance with the '*tenets of the religious community concerned*'.[96]

[95] At para 92.

[96] German Basic Law Article 7(3).

55. The approach of the German Constitutional Court generally[97]

55.1. The German Constitutional Court promotes the view that a policy of equal respect and concern for the values of each student in the educational context requires not the suppression of a devotional exercise reflecting those values, but rather tolerance in the face of such expression, particularly when it is performed voluntarily and outside the teaching curriculum. It is accepted that there is a tension between competing rights and interests, but this must be dealt with appropriately and does not require excising religion from public schools.

55.2. In that jurisdiction, a useful analysis has been done to recognise both the negative and positive character or religious freedom. Negative freedom, in this context, includes the freedom of unbelief and the freedom to not disclose one's religious beliefs. Positive freedom, on the other hand, includes the right to express one's belief in public. Thus, freedom of religion in the negative sense means that the state must respect those inner convictions that belong to the domain of the self. In the positive sense it means that there is an obligation on the state to create a social order in which it is possible for a person's religious personality to develop and flourish.

[97] Observations on the German position generally are taken from Kommers, Donald P *et al* *The Constitutional Jurisprudence of the Federal Republic of Germany* 3ed Duke University Press 2012.

56. The School Prayer case

56.1. The *School Prayer case*[98] concerned the permissibility of school prayer (separate from religious instruction) when a student's parents object. Two cases were combined: in one, a parent held out that a prohibition against prayer violated his constitutional rights and in the other, the complainant complained that being forced to pray in school over an objection thereto violated his fundamental rights.

56.2. The Federal Constitutional Court found that the incorporation of Christian references is not forbidden when establishing public schools, even though the minority of parents may not desire religious instruction for their children and may have no choice but to send their children to the school in question. Moreover, the court considered that completely voluntary participation in school prayer (not part of teaching) is allowed. Even though the offer of school prayer may be said to constitute a form of encouragement of a religious element, it was constitutionally appropriate to permit it for so long as the safeguard of voluntary participation was in place. The court considered that this was so even when the fundamental rights of those professing other beliefs were brought into account. This, because the freedom of belief includes the '*external freedom*' publicly to acknowledge one's belief. Accordingly it was considered that when a state school permits prayer, it does nothing more than establish a school system within which pupils who wish to do so may acknowledge

[98] (1979) 52 BVerfGE 223.

their religious beliefs. There is to be a balance between the freedom of worship (expressed by permitting school prayer) with the negative freedom of others to be opposed to school prayer, and this may be achieved by guaranteeing that participation remains voluntary. The court considered that a pupil is able to find an acceptable way to avoid participating in prayer so as to decide with complete freedom not to participate. This may be achieved by the pupil staying out of the room where the prayer is said, entering the room only after the prayer is said or leaving the room prior to it being said (in the case of a closing prayer). It is also acceptable for a pupil holding different beliefs to remain in the classroom during the prayer but not to say it along with others.

56.3. The German Federal Constitutional Court accepted that, when the class prays, each of these alternatives will have the effect of distinguishing the pupil in question from the praying pupils - especially if only one pupil professes other beliefs. The court also accepted that this distinction could be unbearable for the person concerned if the practice operated to discriminate against him or her. Nonetheless, the court recognised that one cannot assume that abstaining from school prayer will force a dissenting pupil into an unbearable position as an outsider. What is required, according to the German Federal Constitutional Court, is *inter alia* a case-based assessment of the conditions under which the prayer is to occur and the actual conditions of the school. What is not sufficient, is a broad assumption of discrimination based on the identity of difference.

57. Interdemoninational School case[99]

57.1. Parents asserted a violation of the religious freedom right under the Basic Law when a German state amended its constitution to establish Christian interdenominational schools as the uniform type of public grade school within the state. The German Federal Constitutional Court upheld the constitutionality of the Christian interdenominational school.

57.2. In doing so, the court recognised the rights of parents to raise their children in accordance with certain ideological or religious principles. However, the court declined to hold that this right was an exclusive claim, and considered that the state, which supervises the school system, exercises a constitutional mandate in the area of school education on the same footing as parents. The right of the state legislature to make democratic decisions concerning the organisation of the school system was recognised, and accordingly the legal possibility of establishment of schools of a religious or ideological nature.

57.3. It was considered that parents' request to keep the education of their children free from all religious influence necessarily came in conflict with the desire of other citizens to afford their children a religious education. This was recognised as a tension between '*negative'* and '*positive'* religious freedom. The court expressed the view that

[99] (1975) BVerfGE 29.

the elimination of all ideological and religious references would not neutralise the existing ideological tensions and conflicts, but would disadvantage parents who desire a Christian education for their children. The court considered also that life in a pluralistic society makes it practically impossible to take into consideration the wishes of all parents in the ideological organisation of public schools.

57.4. The religious freedom right cannot be asserted without limitation and therefore the assertion of rights by an individual is limited by the countervailing rights of persons with different views. A compromise must be sought that is reasonable for all, and by due consideration of all views. So, for example, there must be recognition of the permission given to ideological and religious influences in school matters whilst also heeding the obligation to eliminate ideological and religious coercion in the school context. These values must be appropriately harmonised, by bringing into account a constitutional commandment of tolerance.

57.5. Taking into consideration these matters, the German Federal Constitutional Court considered that a public school was not absolutely prohibited from incorporating Christian references, even though a minority of parents have no choice but to send their children to such a school and may not desire religious education for their children. That said, the school adopting such a religious ethos must contain only a minimum of what may be seen as coercive elements. The school must accordingly remain open to other ideological and non-religious ideas and values and no one may

be forced to attend religion classes. It was considered that the affirmation of Christianity and confrontation of non-Christians with such affirmation does not cause discrimination against minorities who are not affiliated with Christianity or who are opposed to the Christian ideology. Thus, the court considered that a school that permits an objective discussion of all ideological and religious views, even if based on a particular ideological orientation, does not create an unreasonable conflict of faith and conscience for parents and children under constitutional law. This, because parents have sufficient freedom to educate their children religiously and ideologically and to communicate to them why they have rejected or affirmed commitments of faith and conscience.

58. Classroom Crucifix II case[100]

58.1. A German state ordinance required the display of the crucifix in every elementary school classroom. The parents attending one of these schools objected to the display, on the basis that the display offended their children's religious beliefs. The conflict was sought to be resolved by the display of smaller crucifixes absent the figure of Christ, but when this was not complied with, parents approached the court. The constitutional complaint in that case was considered to be well-founded.

[100] (1995) 93 BVerfGE 1.

58.2. In assessing the case, the court held that the state must neither prescribe nor forbid a religion or religious belief. It recognised that freedom of belief includes the freedom to possess the faith, but also to live according to one's convictions. In a society that tolerates a wide variety of faith commitments, the individual does not have a right to be spared exposure from religious manifestations or religious symbols, but the state exposing an individual to such influence must give the individual a chance to avoid such influence or the symbols through which a faith represents itself. The state must accordingly treat various religious and ideological communities with an even hand and an acceptable compromise must be reached. Nonetheless, the court affirmed that confrontation with a Christian world view will not lead to discrimination and that Christianity's influence on culture and education may be affirmed and recognised. It also restated the position that room may be left for religious instruction, school prayer and other religious events, for so long as these activities are conducted on a voluntary basis, students who do not wish to participate are excused and such students are not discriminated against because of their election not to participate.

58.3. The minority held a different view, particularly because it considered that the negative freedom of religion must not be allowed to negate the positive right to manifest one's own religious freedom. It held that the principle of religious freedom does not imply a right to have religious expression of another banned. In the spirit of religious tolerance, it was considered by the minority that the display of the cross did not place an unacceptable burden on non-religious students. Given that students were going to

be confronted with displays of the cross elsewhere in their life, it was not unusual for them to be confronted with the sight of the cross in school. The minority also took into account that, unlike the situation with school prayers, the students did not have to reveal their religious or ideological convictions through non-participation and therefore that there was not an affront to their religious freedom.

58.4. It has been reported that, in the wake of outcries following the decision, it has been interpreted and applied to provide only for the removal of the crucifix in the presence of students particularly objecting to the display.

Belgium and The Netherlands

59. Belgium[101] and the Netherlands[102] place a duty on states to provide for free education, irrespective of the religious ethos of the school. Also, in Belgium parallel confessional religious instruction and non-confessional religion education are provided for and paid by the state.[103]

[101] The *Schoolpact Act* of 28 May 1959 s 2. Article 24 § 3 of the *Belgian Constitution* states: *'Everyone has a right to education in respect of the fundamental rights and freedoms. Access to education is free until the end of compulsory education*.'

[102] The *Primary Education Act* of 1920 details the government's responsibility for state and non-government schools. In the Netherlands, the freedom exists to establish schools, to give them a distinctive ethos, and even to request government-funded religious education in otherwise "neutral" schools.

[103] Article 24 of the *Belgian Constitution* also states that there can be a choice between the teaching of one of the recognised religions and non-confessional moral teaching. This is to be in public and private schools and to be paid by the state.

60. Belgium[104]

60.1. Officially the relationship between the church and state in Belgium is defined by the freedom of religion proclaimed in article 19 of the Belgian Constitution. Separation between church and state is provided for, and no religion is favoured. However, the state is not neutral, in the sense that it actively supports a plurality of world views. Public schools are compelled under the Belgian Constitution to offer religious courses in the officially recognised religions.

60.2. The Belgian system under section 24 of its Constitution allows for freedom of choice for parents, a right to instruction that respects fundamental freedoms and rights, an entitlement to religious education and equality.

60.3. Belgium allows the wearing of religious symbols in public schools.

60.4. In general, religious or philosophical symbols (like a crucifix on a classroom wall) are forbidden in the schools run by the Flemish community. However, this ban is left to the discretionary power of the educational authorities of the public schools run by the municipalities and provinces[105] This indicates some form of decentralisation where

[104] Deroitte H *et al 'Religious Education at Schools in Belgium'* in Rothnagel M, Jackson R & Jäggle M *Religious Education at Schools in Europe: Part 2 Western Europe* Vienna University Press.

[105] Fabrice Martin and Willy Fautré. Religious education in Belgium. In Derek H. Davis and Elena Miroshnikova (eds). The Routledge International Handbook of Religious Education. Routledge: Oxon. 2013. 54-61. 59.

power is given at the local level to schools to determine their position regarding religious or philosophical symbols.

61. The Netherlands

61.1. The Netherlands is a country famous for its tolerance and active pluralism.[106] It is an unwritten principle of its law that religion and the state are to be separated. Nonetheless, religion is actively allowed in the public sphere, on an equitable basis. The emphasis is placed on diversity. Provision is also made for subcultural compartmentalisation of education on the basis of different religious or philosophical world views. [107] In primary education parents also have the right to ask for certain religious or philosophical lessons in public schools and the school board must provide it. These lessons can be offered by a religious church or philosophical organisation independent from the public school, but are funded by government.[108]

61.2. The Dutch Constitution, as revised in 1983, article 6 of section 1: everyone has the right to manifest his or her religion or belief freely. However, this should be done

[106] Wijnen, L. & S. Miedema (2013). '(On)mogelijkheden voor levensbeschouwelijke educatie in het Franse en Nederlandse openbaar onderwijs: Over de scheiding van kerk en staat, neutraliteit van de staat en godsdienstvrijheid' In: P.Zoontjes & J. de Groof (Red.). O*nderwijsrecht en Onderwijsbeleid*. Tilburg University Press (in print).

[107] Johan Sturm, Leendert Groenendijk, Bernard Kruithof and Julialet Rens. Educaitonal Pluralism – a hisoticla study of so-called 'pillarization' in the Netherlands, including a comparison with some developments in South African education. Comparative Education. Volume 34, Number 3. 281-297. 1998. 283.

[108] See Article 50 of the Primary Education Act of 1998 (WPO). See also, Paul J.J. Zoontjens and Charles L. Glenn, The Netherlands. Belgium (Flemish Community). Charles L. Glenn and Jan de Grood (eds), Blanacing Freedom, Autonlmy and Accountabilityh in Education, Volume 2, Wolf Legal Publishers, The Netherlands. 339. 333-362. 2012.

without prejudice to his or her responsibility in law. And possible limitations on the freedom of worship – rules may be laid down by Acts of Parliament

61.3. Thus, public spaces, such as public schools can be open to the freedom to exercise religion, as long as it is done under specified conditions[109]

62. There are no clear lines marking the precise boundaries of schools' freedoms of *'stichting, richting, en inrichting*'.[110]

International Law

63. The Constitution in section 39(1)(*b*) obliges the court to bring international law into account in the interpretation and application of the Bill of Rights. This, in contradistinction to the consideration of foreign law, which it may elect to consider.

64. There is a rich body of international law instruments in place that guarantee the rights of children, educational rights, religious freedom rights, privacy rights, freedom of expression rights and the like. It does not fall within the scope of these written submissions to present a full analysis of the international law instruments, but some must be recorded.

64.1. Notably, Article 18 of the International Covenant on Civil and Political Rights ('**ICCPR**) guarantees freedom of thought, conscience, religion or belief.

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[109] *Dr. Sophie C. van Bijsterveld*, Freedom of Religion in the Netherlands, 1995 BYU L. Rev. 555-583. 1995. 558.

[110] Ibid, 571.

64.1.1. Bieleveldt argues[111] on the interpretation of this provision that allegations of harmful religious practices must always be based on clear empirical evidence (which OGOD does not present in the present case) and that they should not be presented as mere conjectures or negative projections that often turn out to reflect existing stereotypes and prejudices (which OGOD does offer). In the same vein, restrictions can only be permissible if they are legally prescribed and if they are clearly needed to pursue a legitimate aim such as the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others. In addition, the author comments that restrictions must meet the requirements of proportionality: they must be limited to the minimum interference ad furthermore must be enacted in a strictly non-discriminatory manner.

64.1.2. The author makes the point also that, although negative freedom of religion is indispensable,

> '*... it does not mean that people could legitimately claim protection against being confronted with religion in the general public sphere, since the right to publicly manifest one's religious or belief-related convictions, either alone or in community with others, is unambiguously enshrined in all international guarantees of freedom of religion or belief, including Article 18 of the ICCPR. A policy of enforced privitization of religion would indeed require an authoritarian regime at odds with human rights, and it would also mean the death of a free an pluralistic society*'.

[111] Bieleveldt H 'Misconceptions of Freedom of Religion or Belief' in *Human Rights Quarterly* 35 (2013) 33 - 68 at 38.

64.2. The CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion) makes the point that the right as enshrined is far-reaching and profound. It confirms that the freedom to manifest religion or belief may be exercised either individually or in community with others and in public or in private. Appropriate provision must be made for exemptions from religious instruction in schools.

64.3. The Universal Declaration of Human Rights ('**UDHR**') recognises the '*inherent dignity*' of all human beings with equal and inalienable rights in terms very similar to those adopted in the South African Constitution. Bieleveldt expresses the view that '*without due account of the spirit of freedom underlying human rights in general, equality could easily be mistaken for uniformity or sameness, a misunderstanding that has often appeared in the writings of conservative critics of human rights*'.[112] But, as he correctly observes, rather than making the world uniform, '*human rights represent the aspiration to empower human beings - on the basis of equal respect and equal concern for everone's freedom - to develop and pursue their own specific life plans, to freely express their most diverse opinions and convictions, and to generally enjoy respect for their irreplaceable personal biographies, alone and in community with others.*'[113] He continues: '*There is not the slightest tension, let alone an inherent antagonism,*

[112] At pp 50 - 51. Emphasis supplied.

[113] At p 51. Emphasis supplied.

between equality and diversity. Instead, working for an equal implementation of human rights for everyone will make societies more diverse and more pluralistic.'[114]

65. The golden thread that runs through the international law instruments is that there is to be allowance made for confessional religious instruction, for so long as there are opt-out clauses.

66. One such example of the application of this principle is to be found in the *Case of Folgerø And Others v Norway,*[115] a case which concerned the refusal to grant full exemption from instruction in Christianity, religion and philosophy in primary schools.

66.1. The applicants, all members of the Norwegian Humanist Association, had children in primary school at the time of the events complained of. In 1997 the Norwegian primary-school curriculum was changed, with two separate subjects – Christianity and philosophy of life – being replaced by a single subject covering Christianity, religion and philosophy, known as KRL. This subject was to cover the Bible and Christianity in the form of cultural heritage and the Evangelical Lutheran Faith (the official State religion in Norway, of which 86% of the population are members); other Christian faiths; other world religions and philosophies; ethics, and philosophy. Under the previous system, parents had been able to apply for their child to be exempted from Christianity lessons. Under the 1998 Education Act however a pupil could be granted

[114] At p 51.

[115] *[GC]* - 15472/02. Judgment obtainable at http://hudoc.echr.coe.int/eng#{"appno":["15472/02"],"itemid":["001-81356"]}.

exemption only from those parts of KRL which the parents considered amounted to the practising of another religion or adherence to another philosophy of life, from the point of view of their own religion or philosophy of life. The applicants and other parents made unsuccessful requests to have their children entirely exempted from KRL.

66.2. The objection was upheld, on the basis that sufficient care was not taken to ensure that information and knowledge was conveyed in an objective, critical and pluralistic manner.

66.3. The court considered that the safeguarding of pluralism in society was essential for the preservation of a democratic society, but that parents' religious and philosophical convictions were appropriately to be respected. This, as part of recognition of parents as being primarily responsible for the education and teaching of their children. It also considered that a balance must be achieved that ensures the fair and proper treatment of minorities. In setting this standard, the court nonetheless explained that parents do not have the right to insist that no knowledge of a religious kind be imparted to their children. The restriction on imparting religious instruction was limited to prohibiting indoctrination. The reason for this is that there is no right for parents that their children be kept ignorant about philosophy and religion in their education. And even where, for example, Christianity represented a greater part of

that which was imparted to children than other philosophies and religions, this did not in and of itself constitute a departure from the principles of pluralism and objectivity.

66.4. As regards participation in religious observances, the court observed that this would be appropriate, and that it would be reasonable for parents simply to notify the school of their intention that their children not participate in such activities.

66.5. On the facts, the partial exemption would prove too onerous, but that was because the instruction was integral to the school curriculum. Given the particular requirements set for exemption, the parents would be required to impart detailed information for the reason for such exemption, which would offend against a privacy right. The implication is that where exemptions do not require such detailed disclosure and where exemption was easily arranged, the difficulties identified by the court would not operate against religious activity within the school context.

67. Excerpts from reports by the Special Rapporteur on Freedom of Religion or Belief recognises that many countries include religious instruction in the public school system. It is said that such practice may reflect the interests and demands of large parts of the population, since many parents may wish that their children be familiarized with the basic doctrines and rules of their own religion or belief and that the school take an active role in that endeavour. It is explained that, in the understanding of many parents, the development of knowledge and social skills of their children through school education would be incomplete unless it includes a sense of religious awareness and familiarity with their own religion or belief.

Hence the provision of religious instruction in the public school system may be based on the explicit or implicit wishes of considerable currents within the country's population.[116] In the face of that, it must nonetheless be accepted that appropriate provision must be made for those who hold different beliefs.[117] Non-discriminatory provision must be made for exemptions or alternatives.

68. The Special Rapporteur has also explained that the use of religious symbols in school is to be evaluated according to the specific circumstances.[118]

PRINCIPLES TO BE APPLIED IN THE ASSESSMENT OF THE PARTIES' POSITIONS

The Constitution is not to be directly invoked

69. OGOD seeks, amongst others, a declaratory order that it is unconstitutional for public schools to associate themselves with any particular religion and/or to observe certain religious practices and/or observances and/or to make accommodation for learners not subscribing to the religion of the majority through identification and separation. It does so by way of invoking a series of constitutional rights.

70. It is trite law that *'a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right*'.[119] Therefore,

[116] At para 49.

[117] At para 50.

[118] At para 59.

'*absent a direct challenge*' to the statute, '*courts must assume that the [statute] is consistent with the Constitution and claims must be decided within its margins*'.[120] This is because of the principle of adjudicative subsidiarity, which entails that, where it is possible to decide a case without reaching a constitutional issue, this must be done.[121]

71. In the present case, OGOD is confronted with a hierarchy of regulation of religious instruction and observances in schools. It is common cause that School Governing Bodies of public schools adopt religion policies for the public schools that they serve, and that they do so under the provisions of the Schools Act, which grants the power. That power must be interpreted within the context of the Constitution, but OGOD, an organisation that makes claims of unconstitutionality must base its case on the legislation, and not directly on the Constitution. If the legislation does not fully protect the constitutional rights it relies on, the constitutionality of the legislation should be challenged, but the legislative provisions cannot be bypassed by invoking the Constitution directly:[122] the '*Constitution is primary, but its*

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[119] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para 40. *Cf* also the judgments cited therein: *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae*) 2006 (2) SA 311 (CC) at paras 96 and 434 – 437; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para 51; *NAPTOSA and Others v Minister of Education, Western Cape and Others* 2001 (2) SA 112 (C) at 123I – J.

[120] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para 40.

[121] *S v Mhlungu* 1995 7 BCLR 793 (CC); 1995 3 SA 867 (CC) para 59.

[122] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 paras 44 – 66. The rationale for the principle is that, where Parliament has given a particular meaning to a basic right in the form of legislation, it is not for courts to reinterpret that same right.

influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first'.[123]

72. In the present case, it cannot be ignored that School Governing Bodies adopt religious policies that are accepted by the relevant Department of Education, in accordance with the Schools Act and/or provincial legislation (where such legislation is in place). Unless the policies are challenged for want of compliance with the statutes under which they were issued, or the statutes under which they were issued are challenged for want of constitutional compliance, it is not for OGOD to challenge the practices and observances directly.

Section 15 demands '*equitable*' treatment, not '*equal*' treatment

73. Currie & De Waal opine that section 15 of the Constitution '*does not prevent the state from recognising or supporting religion, but does require it to treat religions equally*'.[124] This statement is inconsistent with the language used in the Constitution, which does not demand equality, but rather the conduct of religious observances on an '*equitable*' basis. The distinction is important.

[123] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 para 52.

[124] I Currie & J De Waal *The Bill of Rights Handbook* 5ed p 337.

73.1. It is trite that '*equitable*' means that which is '*just*', what is '*reasonable*' and '*right*', that which possesses the attributes of equity – ie '*fairness in dealing*'.[125] That which is '*appropriate*' is what is fitting in the circumstances. That which is '*equitable*' must be determined by reference to a consideration of relevant factors (rational considerations).

73.2. The distinction is carefully explained in the reasoning of Justice O'Regan in *S v Lawrence:*

> '*at times giving full protection to freedom of religion will require specific provisions to protect the adherents of particular religions as has been recognised in both Canada and the United States of America. The requirement of even-handedness too may produce different results depending on the context which is under scrutiny. For example, in the context of religious observances at local schools, the requirement of equity may dictate that the religious observances should reflect, if possible, the religious beliefs of that particular community or group. But for religious obervances at national level, however, the effect of the requirement is to demand that such observances should not favour one religion to the exclusion of others.'*[126]

73.3. Equality, on the other hand, requires the same treatment of everybody.

73.4. The difference is important. The experiences of the different schools that are reflected upon in the answering papers illustrate how it is possible to make equitable

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[125] Webster's New International Dictionary of the English Language Second Edition Unabridged with Reference History Merriam-Webster Springfield 1935 – see definitions of '*equitable*' and '*equity*'.

[126] At para 122.

accommodation for different religious views that are reflected in a particular school community.[127] This, because the different religions have different observances. Where a belief system does not make provision for '*observances*', there is no possibility of providing an equitable opportunity for '*observances*' of that belief system. What OGOD is contending for, is not equitable allocation of time for agnostic or atheist '*observances*', it is contending for an absence of religious observances. This is not what section 15 of the Constitution envisages. (It is also not what the National Religion Policy envisages.)

73.5. Put differently, section 15(1) protects adherence to non-religious thoughts and beliefs (such as agnosticism and atheism), but section 15(2) makes provision only for '*religious observances*' on the basis provided for. If a belief system does not provide for '*religious observances*', there is no need to make provision for the '*equitable*' allocation of time or opportunity for observances associated with that belief system. Because a particular belief system does not entail religious observances cannot operate as a bar to the constitutional exercise of rights granted under section 15(2).

73.6. The overarching call to unity in diversity is not equivalent to a call for homogenous neutrality on religion and religious observances by the state and in state-aided

[127] This is the case at Pinelands North Primary School, for example, where Monday morning assemblies open with a prayer and a reading from a sacred text, alternating between the Old Testament of the Bible, the Quran and Buddhist texts. In this way, students get a sense of the values espoused by different religious groupings. It is also the case at Golden Grove Primary School in Cape Town, where Eid, Diwali and Easter are all respectively celebrated in assembly.

institutions. What is called for is mutual accommodation. That, we submit, requires balance and proportionality. It is in this exercise that equity is to be found. This may mean that a school that serves an almost exclusively Muslim student body will have Muslim religious observances, appropriate to that community. It may result in a school with a largely Christian student body with a policy that reflects Christian observances as being appropriate in the context. Of course, minority groups must be appropriately accommodated, but the minority preference should not dictate the absence of religious observance, when such observance is constitutionally mandated.

The religious freedom right includes the right to practise religion

74. OGOD, in its efforts to create a public school system where learners are shielded from experiencing the observance of religion, fails to appreciate that the *practise* of religion has been recognised as having constitutional importance. In *Prince v President, Cape Law Society*[128] the Constitutional Court held that the '*constitutional right to practise one's religion is of fundamental importance to an open and democratic society. It is one of the hallmarks of a free society*'.[129] Religious rights may accordingly be manifested in worship, observance, practise and teaching, and the Constitutional Court has been considered that it is of little relevance that section 15(1) does not directly refer to religious practice. There is no reason, given the constitutional context and the content of section 15(2) why religious

[128] 2001 (2) SA 388 (CC).

[129] At para 24.

practice and observance ought to be excluded from the public school system in the manner contended for by OGOD.

The role of the School Governing Body

75. The German Federal Constitutional Court has held that parents do not have a right to demand that a school allow prayers or a right to demand that the state establish schools of a particular religious or ideological character. It is submitted that the same holds true in South Africa: neither parents adhering to any particular religious persuasion nor parents who do not subscribe to (what is traditionally viewed as) religious beliefs are in a position to demand adoption of a particular ideological character (*eg* Christian character or secular character).

76. However, in the South African context, parents are able to influence the ideological character of the school through the School Governing Body, on the basis that the School Governing Body is mandated through national and/or provincial legislation to regulate certain matters pertaining to religious observance and practice. The National Religion Policy also gives expression to this, in that it provides for that role to be performed by the School Governing Body with due recognition to the interests of the community.

CONCLUSION

77. It is constitutionally appropriate to adopt a state neutrality in respect of religion that is similar to the situation prevailing in Belgium and The Netherlands. The South African constitutional structure allows for the state to support and promote a variety of religions and irreligious views fairly and equitably. Like her German counterparts in the Federal Constitutional Court, Justice O'Regan in *S v Lawrence* spoke of '*even-handedness*', and not of scrupulous or rigid secularism, or complete neutrality.[130] The National Religion Policy on which OGOD relies also speaks of a co-operative model. It is therefore perfectly legitimate under the South African constitutional order for the state to support both schools where the School Governing Bodies adopt a secular ethos and those where some religious ethos is adopted. Given that School Governing Bodies, representing broadly the interests of the community that they serve, are legislatively empowered to determine religious policy and ethos, it would be inappropriate for the court to interfere in their policy decisions in the absence of a clear basis to do so.

78. The only basis upon which there ought to be interference with or limitation of religious practices ought to be if harm is caused to others.[131] The adoption by a School Governing Body of an ethos or mission statement that is extracted from religious belief does not automatically mean that non-adherents to that religious belief will be harmed. If harm is

[130] See also Currie I and De Waal J *Bill of Rights Handbook* 6ed Juta p 327.

[131] Currie I & De Waal J *The Bill of Rights Handbook* 6ed Juta pp 322 and 324, and the authorities there cited.

contended for, it ought to be done by reference to specific instances, and not in a general and non-specific sense rooted only in '*otherness*'. It must be accepted that no ethos is completely neutral, since values always have their roots somewhere. Democracy requires that reasonable accommodation be made for difference (minorities), but it does not require that minority views can overtake the majority interest. It is for this reason that assertions of harm made by OGOD must be critically assessed.[132]

79. The court may follow the lead of the German Federal Constitutional Court in recognising the place of religious instruction and observance in public schools. In doing so, it will also be giving effect to the sentiments expressed by the Constitutional Court in *Pillay,* where it was said that the expression of culture and religion by learners in public schools:

> '*is something to be celebrated, not feared. As a general rule, the more learners will feel free to express their religions and cultures in schools, the closer we will come to the society envisaged by the Constitution. The display of religion and culture in public is not a 'parade of horribles' but a pageant of diversity which will enrich our schools and in turn our country*'.

80. Of course, the practice of religion by a collective must not be carried out in a manner that is inconsistent with any provision of the Bill of Rights. This goes without saying. Learners and teachers have the right <u>not</u> to be forced to act in a manner that is contrary to their own religious views. Schools must take steps to reasonably accommodate those who do not wish to participate in or attend at religious observances that are conducted. But the mere presence of religion and the conducting of religious observances within the school

[132] See OGOD HOA paras 197.1 and 197.2, 207, 211 and 230 to 234.

environment do not automatically imply that the right to freedom of religion of individuals who do not subscribe to religion are violated or that they are coerced. As the European Court of Human Rights has held, '*the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions*"[133]

81. CFJ accepts that accommodating religion in schools in a manner that ensures that the dignity and beliefs of all involved is respected, may at times not be an easy task. But the answer is not to jettison religion - and along with it the enriching role that religious belief and practice plays within the school environment. As the Constitutional Court explained in paragraph 113 of its judgment in *Pillay*, these difficulties need to be welcomed. They are '*the complexities that have to be overcome in order to achieve a fully religiously and culturally sensitive society*'.

82. In the circumstances, CFJ supports the position adopted by the Schools that the application of OGOD falls to be dismissed.

MJ Engelbrecht

A Montzinger

Chambers, Sandton and Cape Town

28 February 2017

[133] *Dojan v. Germany*, obtainable from http://hudoc.echr.coe.int/eng#{"itemid":["001-106382"]}.