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I Benson

The University of Notre Dame Australia, iain.benson@nd.edu.au

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WHAT CAN BE LEARNED FROM THE EXPERIENCES OF VARIOUS SOCIETIES IN DEALING WITH THEIR PRINCIPAL TROUBLE SPOTS?*

Can there be a legitimate pluralism in modes of protecting religions and their freedom? The cases of Canada and South Africa

■ IAIN T. BENSON**

Introduction

In both South Africa and Canada religions *per se* have not been principal trouble spots for a very long time. What has been very much at issue is the treatment of religious communities and religious believers by the State and from time to time disputes between rights claimants of one sort in relation to rights claimants of another. There are many differences between the two countries but in this paper I shall look for some common themes to evaluate a few of the more significant areas of conflict that engage religious pluralism. *Most importantly, however, I shall examine a change to the proper understanding of the 'secular' in the law which, it is hoped, will indicate a new direction for thinking about religion in relation to the public sphere.*

Religions have been and continue to be recognized as important to both societies. In Canada, the question of Catholic and Protestant accommodation was central to many of the Confederation debates in the 19th century with, for example, Section 93 of the *British North American Act of 1867* (providing for recognition of religious minority rights in education). This set of negotiated compromises continued (and continues in some provinces) until recently when that originating constitutional compromise was abolished in two provinces (Newfoundland and Quebec) by referenda in the late 1990s.¹ The *Canadian Constitution Act 1982* in the *Charter of*

* ©Continuity Committee of the South African Charter of Religious Rights and Freedoms, 2010.

** Professor Extraordinary, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa; Senior Associate Counsel, Miller Thomson, LLP, Canada. The opinions expressed are those of the author and not necessarily those of his faculty or firm.

Rights and Freedoms contains recognition in its Preamble that Canada is founded on principles that recognize ‘the Supremacy of God and the Rule of Law’ though this has not yet been seen to have particularly foundational relevance. The right to the freedom of ‘conscience and religion’ in Section 2(a) and the reference to religion as an enumerated ground protected from non-discrimination has been the subject of many judicial decisions since the Canadian *Charter* was re-patriated from the United Kingdom in 1982.

This paper is divided into three parts. First the framework for understanding religion and the public sphere as developed by the important decision of the Supreme Court of Canada in the *Chamberlain* decision. Second, the actual Constitutional provisions that recognize religious rights in both Canada and South Africa. Third, the experience of inter-faith co-operation in litigation and the development of a South African *Charter of Religious Rights and Freedoms* as examples of civil society initiatives that are outside legislation and litigation as such but which inform both politics and law in relation to religious pluralism.

Part 1. The framework for understanding religion and the public square

Can there be legitimate pluralism in modes of protecting religions and their freedoms?

The answer to this question whether religious pluralism may be protected by constitutional law and social initiatives in both Canada and South Africa is, as experience has shown in recent years, ‘yes’. The legal/political has been informed, in both South Africa and Canada by social developments in relation to litigation and civil society initiatives that will inform and should inform the legal and political developments in relation to protecting religious diversity. The key word, however, is ‘may’ and as I shall set out in this paper, there are some worrying examples of very real threats to religious liberty particularly in Canada at the moment.

¹ A detailed discussion of this history and various constitutional foundations and contemporary issues may be found in Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, *Emory International Law Review*, Vol. 21, No. 111, 2007 at 111-165. See also: Elizabeth Shilton, Chapter 13: ‘Religion and Public Education in Canada After the Charter’, in John McLaren and Harold Coward eds., *Religious Conscience, The State and the Law: Historical Context and Contemporary Significance* 206 (New York: SUNY, 1999). This volume also includes essays on the Canadian treatment of the Doukhobor and Hutterite communities.

That protection may be given to religious individuals and their communities, however, must be qualified by a recognition that sometimes the *foundational presuppositions* that are employed in relation to the nature of the public sphere and belief, cause a great deal of confusion and may pre-dispose to certain outcomes that cut against the public sphere as being religiously inclusive. Principal amongst these confusions is the use of terminology to describe the public sphere and it is for this reason that I would like to begin with this language to create what I hope is a stronger base upon which to analyze religious liberty in our contemporary period.

The nature of the ‘secular’: what do we mean by it and is it religiously inclusive or exclusive?

This section offers a critique of some of the common terminology that is frequently used to describe religion in relation to the state. In various ways these terms tend to assume that all ‘faith’ is religious and that religion is or should be *private*. In addition, the terminology tends to be both bifurcative, driving a wedge between religions and the public sphere and inaccurate by failing to view agnosticism and atheism as belief systems. The combined effect of these two tendencies is to leave religious belief systems at a public disadvantage (in terms of such things as public funding) in relation to the unexamined faiths of atheism and agnosticism.

Recent legal cases in Canada and South Africa suggest that, for the reasons just given, we are at a time when the settled understanding of ‘secular’ as ‘non-religious’ needs to be revised. A very important legal decision occurred in Canada in 2002. In the *Chamberlain*² decision the Supreme Court of Canada upheld the unanimous Court of Appeal from British Columbia which had determined that the meaning of ‘secular’ in Canadian law must be *inclusive* of religious believers (and by inference their communities) rather than excluding them from participation. Perhaps because this shift in understanding has been so radical, it is the case that, even now, some eight years later, the new interpretation of ‘secular’ for the purposes of Canadian law is not widely known in Canada and frequently missed by counsel who should be using this in legal arguments and by judges in making their decisions.

In addition, the fact that there is and should be no such thing as a non-religious secular can be somewhat threatening to those who have assumed this unquestioningly. The recognition that all positions, including atheism

² *Chamberlain v Surrey School District No. 36* [2002] 4 S.C.R. 710 (SCC) (‘*Chamberlain*’).

and agnosticism, are positions of 'faith',³ even though not of religious faith, can prompt a re-understanding of the public sphere in a more accurate manner. How this happens depends on the definition of the public sphere as this determines how we eventually accommodate or fail to accommodate differing beliefs, regardless of whether these beliefs are religious or non-religious in nature. The principles of accommodation and diversity, both well established and recognized in the law, are of practical importance in terms of how they work out in culture and politics.

Much of the language that is used to characterize the public sphere virtually insulates it from religion and insulates religion from its proper public influence. Thus, if 'secular' is equivalent to 'non-religious' and 'secular' means all those public things like government, law, medical ethics, public education and so on, then these major aspects of culture are outside religion and religion is outside them. This important aspect of the foundational language is rarely commented upon and shows the dominance of the exclusivist (religion excluded from the 'secular' as public) position.

But what about the beliefs of the citizens who are in government, law, medicine and public education? When the 'secular' is read as 'non-religious' in its exclusivist position, then the beliefs of atheists and agnostics, who define themselves as 'non-religious', are accorded representation, but those who define themselves as 'religious' are not. This is neither representative nor fair, yet it is the dominant and largely unexamined result of assuming the 'public' as 'secular', and the 'secular' as 'non-religious'.

This article is a counter-reading to this common and, I have argued, erroneous construction of the public sphere. If 'secular' means 'the opposite of religious' or 'non-religious', and if the public realm is defined in terms of the 'secular', then the public sphere has only one kind of believer removed from it – the religious believers. I suggest that this way of using 'secular' is deeply flawed and will tend to lead us in the direction of religious

³ John Henry Cardinal Newman recognized that everyone who acts must take matters on faith and wrote: 'Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith' see: Newman, John Henry Cardinal, 'Tamworth Reading Room Letters', in *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295. Closer to our own day, a philosopher who spent a considerable part of his working life in South Africa, R.F.A. Hoernlé, wrote that 'every bona fide judgment is characterised by belief...[and] if "faith" is firm belief, conviction of truth, then faith in this context is indistinguishable from knowledge', 'Knowledge and Faith', in *Studies in Philosophy*, Daniel S. Robinson. Ed. (Cambridge: Harvard University Press, 1952) at 55-61.

exclusivism. An express meaning to ‘secular’ or ‘public’ that rules out religion without arguments based on fairness and justice leaves those realms distorted in relation to principles of accommodation. If we start off with an implicit idea that the public is secular, thus ‘non-religious’, then it is difficult to balance or reconcile the various interests held by religious claimants and others in a public setting.

In contrast to this exclusivist position, this article suggests a different approach, that of ‘religious inclusivism’. Only within an inclusive approach can accommodation and diversity have their proper application and meanings. Proper understanding of the public sphere requires a more explicit acknowledgment of the beliefs of those within it, whether these beliefs come from religion or not.⁴ A decision by the Canadian courts is an illustrative example of the new way in which the term ‘secular’ can be understood since it shows the development from the common definition of ‘secular’ to one that is more accurate and fair. At the same time, however, the decision handed down by the Supreme Court of Canada in the case of *Chamberlain* still failed to address properly the concept of ‘secularism’, a term it seemed to endorse when doing so was inconsistent with how it reconfigured the understanding of the term ‘secular’.

In an attempt to achieve a fairer and more accurate result, the Supreme Court of Canada unanimously endorsed the reasoning of the British Columbia Court of Appeal which had overturned the reasoning of a trial judge who had espoused what for many would be the common use of the term ‘secular’ as meaning ‘non-religious’: this involved re-understanding and, in effect, re-defining the meaning of the term ‘secular’. In *Chamberlain*, the Supreme Court of Canada drew on a definition of the ‘secular’ that had been put forward by Justice McKenzie, for the first time in any legal judgment, in the appeal ruling by the British Columbia Court of Appeal. This definition succinctly encapsulated the pluralist or inclusive sense of the ‘secular’:

In my opinion, ‘strictly secular’ in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense (paragraph 33).⁵

⁴ See: Iain Benson, ‘The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Response to Lenta. Case Comment’, *Constitutional Court Review*, 1, pp. 297–312 (2008).

⁵ *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181; reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.).

Understood in this manner, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public access and respect to those beliefs of others that do not emanate from religious convictions. The Supreme Court of Canada majority agreed with the reasoning of Justice Gonthier in dissent on another aspect of the decision as to the religiously inclusive meaning of 'secular'. The term in Canadian law, therefore, now means religiously inclusive, not exclusive. Justice Gonthier gave the following reason for his position:

In my view, Saunders J. [of the British Columbia Supreme Court where the case was heard at trial] below erred in her assumption that 'secular' effectively meant 'non-religious'. This is incorrect since *nothing in the [Canadian] Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy*. I note that the preamble to the *Charter* itself establishes that '...Canada is founded upon principles that recognize the supremacy of God and the rule of law'. According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has 'belief' or 'faith' in something, be it atheistic, agnostic or religious. To construe the 'secular' as the realm of the 'unbelief' is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism (paragraph 137, emphasis added).⁶

As a result, the term 'secular' now in Canada means, legally speaking, religiously inclusive, not exclusive. The approach of the Supreme Court of Canada that a public school must accommodate a variety of beliefs is at stark variance with the approaches taken where the 'secular' is defined as excluding religion and religious communities.

The Constitutional Court of South Africa has also recognized different spheres but, in common with general usage and the all too common judicial

⁶ *Chamberlain*, footnote# 2 above, at 749.

dicta, placed ‘sacred’ and ‘secular’ in unhelpful opposition. Despite this, *Fourie*, in understanding the public realm as an area of ‘co-existence’ between different spheres, moved towards a richer and more nuanced understanding. In the words of Justice Sachs:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other [...]. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.* [...] It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity (paragraphs 94–98, emphasis added).⁷

In line with the argument above, however, it would have been better to describe the relationship between the state (law and politics) and religious believers as part of a relationship in which, despite the jurisdictional separation, there is co-operation within ‘the same public realm’ without reference to the ‘secular’ and the ‘sacred’.

⁷ *Minister of Home Affairs and Another v. Fourie and Another (with Doctors For Life International & Others, Amici Curiae) and Lesbian & Gay Equality Project & Eighteen Others v. Minister of Home Affairs* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (‘*Fourie*’) In *Fourie*, Justice Sachs’s conception of differing beliefs co-existing within the public realm is of signal importance and sets the stage, along with the approach of Justice Gonthier in the *Chamberlain* case, for a redefinition or, better yet, *re-understanding* of what might be termed central public terminology.

The need to move away from ‘religion and the secular’

For many people, including politicians and religious leaders, the phrase ‘religion *and* the secular’ contains the implicit assumption that whatever the ‘secular’ is, it is somehow completely separate from religion. Yet, if religions (religious persons and their communities) are to have a role in the public sphere (that includes, at the very least, public education, medical ethics, politics and law themselves), then a bifurcation of this sort is destructive to the idea of a interpenetration between religion and the wider culture that we have seen in the legal decisions just referred to, that the law has begun to recognize.

Certainly, the original and older uses of secular as *saeculorum* meaning in relation to ‘the age’ or ‘the times’ or ‘the world’, did not necessarily import a desacrilized conception of the public sphere; but this has certainly changed in commonly understood usage today. Indeed, in Roman Catholic usage, both the clergy and certain sorts of institutes have been understood to be properly ‘secular’ in this earlier use. Thus the clergy are divided between ‘secular’ and ‘regular’ clergy and there can be ‘secular institutes’ none of which are non-religious. This shift from a former religiously inclusive secular to a religiously exclusive one, therefore, is of the utmost importance at a time when the term secular is being used so widely in relation to the public sphere. We would do better, in fact, to banish the use of the term secular entirely when what we really mean is the public sphere and the relation of religion to the sphere. The term ‘secular’ with its deeply ambiguous usages in our contemporary age simply confuses our analysis at the outset.⁸

Prior to *Chamberlain*, it was not uncommon (and still is not in general usage) to see comments from the judiciary that drew a sharp line between the ‘secular’ and the sacred and between intellect and faith. Consider the following passage from a leading decision on Catholic denominational rights from 1999:

A non-believer would necessarily teach the subject *from an intellectual rather than a faith-based perspective*. Separate [religious] schools do not aim to teach their students about these matters from a neutral or objective point of view. Separate schools explicitly reject that secular approach...⁹

⁸ I have written about this in ‘*Towards a (Re) Definition of the Secular*’, University of British Columbia Law Review (2000) 33 at 519–549 (cited with approval by Gonthier J. in *Chamberlain*).

⁹ *Ontario (A.G.) v. Daly* (1999) 38 O.R. (3d) 37 at para. 65 per Sharpe J emphasis added; upheld by [1999] 172 DLR (4th) 241 (Ont. C.A.), leave to appeal to refused 21, Oct. 1999, S.C.C.A. No. 321.

Note how faith here is viewed as distinct from ‘intellectual’ and the secular is insulated from the religious perspective. *Chamberlain*, if its implications are worked out consistently therefore, will mark a revolutionary paradigm shift with major legal and cultural implications.¹⁰

Religion not just a private right; the public place of religion in both South Africa and Canada; ‘separation of church and state’ and laicism rejected; co-operation of religions and the state affirmed in both Canada and South Africa

It had been commonly understood, at least since the *Big M Drug Mart* decision of the Supreme Court of Canada (1985), that the essence of the freedom of religion was not just the right to have a religion in private but ‘...the right to declare religion openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching in dissemination’.¹¹

Note that the words employed are active, public words – ‘declare’, ‘manifest’, ‘practice’, ‘teaching’, ‘dissemination’.

Further insight about the public nature of religious freedom may be found in South African jurisprudence. There it has been recognized that religion is not always merely a matter of private individual conscience or communal sectarian practice. Thus, Justice Sachs has stated that:

Certain religious sects do turn their back on the world, but major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytize through the media

¹⁰ A good example of a learned exchange that fails to show any appreciation of even the possibility of the religiously inclusive secular is a recent one between Professors Sajó and Zucca (though many other authors could provide illustrations of the point): See, András Sajó ‘Preliminaries to a concept of constitutional secularism’, *I•CON*, Vol. 6, Number 3 & 4, 2008 pp. 605–629 and Lorenzo Zucca, ‘The crisis of the secular state—A reply to Professor Sajó’ *I•CON*, Vol. 7, Number 3, 2009, pp. 494–514. Professor Zucca’s generally strong rejoinder to Professor Sajó would have been much more effective had he not accepted the former’s (and most people’s) discussion of ‘...conflicts between religion and the secular state...’ (at 514). We do need, as Professor Zucca suggests ‘...to modify the attitude with which the secular states respond to diversity and the fact of pluralism’ (at 514) but, ironically, the most likely way of doing this is to stop characterizing the public spheres and states as ‘secular’ when they are very much something else – *states made up of competing belief systems* that can and should expressly include the *public* dimensions of religions. Until these deeper epistemological waters are navigated we shall never properly deal with the relationships between law and religion or the state and beliefs including the religious.

¹¹ *R. v Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (SCC).

and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.¹²

In another decision, the same judge stated:

One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Judaism, Islam or Hinduism. These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections.¹³

Neither country accepts the American conception of 'separation' (as that has come to be defined) nor the French conception of *laïcité*. This does not mean, however, that arguments based in whole or in part on these concepts are not made in courts or heard in political or popular rhetoric; they, and comments regarding the equally misunderstood concepts of 'secularism', are as ubiquitous as they are confused and confusing.

Neither South Africa nor Canada has been subject to the kind of inter-religious battles that one observes in other countries. This is not to say, however, that religious persons and their communities are sanguine about their position within contemporary Canadian or South African culture. The litigation examples, upon which I shall draw, below, show that here, as in other areas eternal vigilance (and litigation) have often been the price of religious liberty.

Religion is recognized as being important to society more in South African case-law than Canadian

The legal judgments in South Africa have recognized the importance of religion to South African society. They have done so in a language far more encouraging of the importance of religion than one would find in legal judgements elsewhere in the world, such as Canada. A judgment exemplifying a positive conception of the role of religion to South African

¹² *Christian Education*, 2000 (10) BCLR 1068.

¹³ *Prince v. President of the Law Society of the Cape of Good Hope and Others*, 2002 (3) BCLR 289.

society is a decade-old decision from the Constitutional Court of South Africa in the case of *Christian Education v. The Minister of Education*. Though it was referred to more recently in a Supreme Court of Canada decision touching on religious rights, the following critical passage was not referred to by the Canadian judges:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.¹⁴

Note here that religion is recognized as having a social dimension as well as a personal or individual dimension. This is important as some commentators (and a few Canadian legal decisions) have suggested that the right of religion is essentially individualistic. The passage above shows a greater awareness of the social importance of religion.

Nowhere can a passage be found in a Canadian Supreme Court decision, or any other Canadian decision with which the author is familiar, that says the sort of thing referred to above from the *Christian Education*-decision in South Africa. Canadian judges, and those in other countries, are much less confident about the important cultural role of religion or, alternatively, do not speak in such encouraging terms about it. This hesitance does not assist the public respect for religions or a richer conception of pluralism including religious pluralism.

Confusions regarding secularism

As with secular, the term 'secularism' is conspicuous by its general non-definition. Almost everywhere the term is used at variance with its origins in the work of George Jacob Holyoak, the man who is credited by the *Oxford English Dictionary* with defining the term in 1851. In Holyoak's under-

¹⁴ *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54. For the scope of freedom of religion in South Africa, much of which was based on Canadian decisions, see Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 5th ed. 2005) at 336-357.

standing, secularism was a project designed to reconstruct the public order on a ‘material’ basis to free it from the non-empirical risks inherent in any projects in which metaphysical claims that were not empirical would have a place. In particular, Holyoak sought to replace religious understandings with ‘material’ ones.¹⁵

Like the term ‘secular’ ‘secularism’ has been used by others in a bewildering variety of ways some open to religious involvement and some diametrically opposed. As with the term ‘secular’, therefore, ‘secularism’ is not a particularly helpful term to use in discussing the role of religions in the public sphere. Joining ‘secularism’ with such terms as ‘open’ further confuses the matter. Given its origins and the purpose of the man who founded the movement and his followers, it would be wiser to limit secularism to the ideology that is, in fact, anti-religious and speak of an *open public sphere* as the framework within which a contemporary political order is best grounded.

The terms ‘secular’ and ‘secularism’ and to a lesser extent ‘secularization’ are useful only if properly and clearly defined within their context but, it is suggested, would be better *left unused* if clarity and engagement are the purposes of our analysis since their clear definitions seem well beyond capture now that the uses are so confused.

Part 2. Constitutional provisions recognizing the freedom of religion in Canada and South Africa and the provisions limiting those rights:

In South Africa, the formation of the *Interim Constitution (Act 200 of 1993)* and the *Constitution (Act 108 of 1996)* also incorporated significant recognition of religious participation and involvement as an aspect of personal and community rights. Religion is one of the rights enumerated in the equality provision (Section 9) from which the right is said to be ‘non-derogable’ with respect to unfair discrimination. As with the Canadian *Charter*, therefore, the frequent mistake of pitching religion *against* equality is a failure to understand that in both countries the text lists religion as *itself* one of the equality rights.

¹⁵ See Iain T. Benson ‘*Considering Secularism*’ in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) at 83–98. See also, Iain T. Benson ‘*That False Struggle between Believers and Non-Believers*’; ‘*Le faux combat entre croyants et non-croyants*’; ‘*Quella falsa lotta tra credenti e non credenti*’ Invited Article in the English, French, Italian, English-Urdu and English-Arabic editions of *Oasis* (Venice, Marcianum Press, 2011) Year 6 No. 12, December 2010.

The Freedom of ‘conscience, religion, thought belief and opinion’ is guaranteed (S. 15.(1)) and ‘Religious observances may be conducted at state or state-aided institutions’, provided that they follow rules made by appropriate authorities and they are conducted on an equitable basis and that attendance is voluntary (Sections 15 (2) (a – c)). Similarly, the education provision provides ‘...state subsidies [may be provided] for independent educational institutions’ (Section 29 (4)).

Further, and in a provision for which there is no exact parallel in the Canadian Constitution, the South African *Bill of Rights* provides, that: S. 31 (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the *Bill of Rights*.

In both Constitutions the limitation provisions (Canada, Section 1; South Africa, Section 36) the rights may be limited by such ‘reasonable limitations’ as are ‘demonstrably justifiable’ in a ‘free and democratic society’ (Canada) and ‘reasonable and justifiable’ in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

The South African language reflects the Canadian ‘*Oakes test*’¹⁶ which set out similar proportionality and least restrictive means approach in Canadian jurisprudence.

¹⁶ *R. v. Oakes* [1986] 1 S.C.R. 103 (SCC). The Court presents a two-step test to justify a limitation based on the analysis in *R v. Big M. Drug Mart* (cited elsewhere). First, it must be ‘an objective related to concerns which are pressing and substantial in a free and democratic society’, and second it must be shown ‘that the means chosen are reasonable and demonstrably justified’. The second part is described as a ‘proportionality test’ which requires the invoking party to show: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.

Recent experience with religious accommodation and including some threatening developments from Quebec and Ontario:

In Canada, many religious believers and groups speak openly about feeling excluded and threatened by developments they see around them.¹⁷ In recent decisions in both countries, religious symbols have been accommodated in relation to public schooling. Thus the wearing of a nose stud (in South Africa) in the *Pillay* decision¹⁸ and a kirpan (for a Sikh student in a Quebec school) in the *Multani* decision¹⁹ have been found to be required aspects of the freedom of religion (or culture and religion) in both countries.

In addition, both countries have developed jurisprudence that, as set out above in the reference to the passage from *Amselem* (Canadian Supreme Court) that the Courts must be careful not to get beyond a simple sincerity test when determining if a person's religious beliefs have been infringed. The courts do not, on one level, want to 'get inside' religion. So far so good.

What has happened, though, is that in some cases Human Rights Tribunals and on occasion courts have shown insufficient regard for the religious ethos of religious projects. Where they have been able to see the importance of religious garb or practice for individuals (*Pillay*, *Amselem*, or *Multani*) they have been rather less successful in understanding the importance of an overall religious ethos to religious *projects* for religious groups.

One way this manifests itself is the desire for courts to parse job functions in relation to complaints against religious employers to see whether in the tribunal or court's eyes the job in question is 'connected to religion' but this is a dangerous enquiry if it overlooks the importance of an overall project to a religious community. From the religious community's point of view, a janitor or a clerk who have no religious teaching duties may play an integral part in the overall religious ethos of an organization – taking part in religious services and so on. This failure to respect the overall project of religions is something that needs to be understood more in the years ahead by tribunals and courts in both countries.

One particularly worrying development involved a decision from an Ontario Human Rights Tribunal which determined that the special exemption provision which shelters religious employers from claims of discrimination when they hire co-religionists, would only apply when

¹⁷ C. Lafferty, 'Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-sex Marriages?' (2007) 85 *Canadian Bar Review* (2007) 287, at 307–312.

¹⁸ *Mec for Education: Kwazulu-Natal v. Pillay* (2008) (1) SA 474 (CC).

¹⁹ *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 30.

religions served their own members. Such an extreme narrowing of religious work in the world was strongly resisted on judicial review and various groups including the Ontario Assembly of Catholic Bishops intervened in court to ensure that this significant narrowing of the meaning of 'religion' was corrected on appeal. In major ways it was so corrected with the Human Rights Tribunal's interpretation of the Statute found to have been 'absurd'.²⁰

The most recent decision of the Supreme Court of Canada to date touching on the freedom of religion has been widely criticized for failing to give much weight to the minimal impairment aspect of the limitation provision of the Canadian *Charter* (see above). In the *Hutterian Brethren* decision, the court ruled that Hutterites who do not believe, for religious reasons, in having their photographs used for identification purposes, must nonetheless comply with a provincial law for reasons related to the public interest in identity in relation to driving licences. Critics have said that the Court should have considered that other means (such as finger-prints) could have been used to achieve the state's purpose without ignoring the concerns of the religious community. The decision was a very narrow majority with three justices of the seven in dissent.²¹

Quebec mandatory curriculum on ethics and religious culture and refusal to grant exemptions or opt-outs for parents opposed on the ground of conscience and religion

compulsory course on ethics and religious culture with refusal to grant exemptions to students of objecting parents

Most recently, in Quebec, a province known for its particular concerns about religion during and since 'the quiet revolution', a mandatory course entitled 'Ethics and Religious Culture' (ERC) has been created for all schools, public and private, confessional and non-confessional. Despite many hundred (some have said as many as two thousand) requests for exemptions from parents and from at least one Catholic High School, the Province has refused to grant exemptions.

The case involving the parents and the public school setting is to be heard in May 2011 at the Supreme Court of Canada.²²

²⁰ *Ontario Human Rights Commission et al. v. Christian Horizons* (2010) 102 O.R. (3d) 267-298 (Ont. Div. Ct.) (May, 2010).

²¹ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567.

²² *S.L. and D.J. v. Commission scolaire des Chênes and Attorney General of Quebec*, Supreme Court of Canada File 33678. Prior to this it was settled law in Quebec that no child

Failure to grant exemptions from mandatory ERC course to Catholic high school overturned

In parallel proceedings a Catholic High School has successfully overturned the Province's failure to grant it an exemption from the course when the Minister failed to consider a Catholic course on world religions and ethics 'equivalent' to the required course.²³ In various statements, the Assembly of Quebec Bishops adopted a conciliatory 'wait and see' approach and said that it had 'some concerns' about the curriculum. The Assembly, however, failed to make any statements about the importance of exemptions or alternative delivery of valid program goals and, in so doing, was taken by the trial judge to have endorsed the matter from a Catholic perspective. Statements by a Catholic theologian (also not referring to parental exemptions) bolstered the judge's view that the Catholic Church endorsed the program. A much stronger statement citing the importance of parents as primary educators and the Province's duty to consider exemptions or acceptable compromises (i.e. alternative delivery to valid Provincial goals) was in order but was not forthcoming).

Recently a Directive from the Quebec minister de la Famille Mme. Yolande James, has instructed all subsidized religious day-cares in the Province to cease giving any religious instructions in religious day-cares. The Minister has indicated that for reasons of socialization those between 0 and 5 years of age will no longer be permitted to be exposed to any religious activities '...par exemple, la récitation répétée de prières, la mémorisation de chants religieux ou l'apprentissage de gestuelles religieuses'.²⁴ The justification rests upon the

could be forced to attend religious instruction contrary to the wishes of his or her parents. See: *Chabot c. School Commissioners of Lamorandière* (1957), 12 D.L.R. (2d) 796 (Que. C.A.). See, for a South African comparison respecting the denominational nature of religious schooling and a rejection of three leading Canadian cases (a rejection the author believes is justifiable) *Wittmann v. Deutscher Schulverein, Pretoria and Others* 1998 (4 SA 423 (T) (Transvaal Provincial Division) per. van Dijkhorst J. who distinguished *Adler v. Ontario* (1996) 3 SCR. 609, *Canadian Civil Liberties Association v. Ontario* (1990) 46 CRR 316 and *Zylberberg v. Sudbury Board of Education* (1988) 34 CRR 1 all of which rejected exemptions as satisfactory in the face of religious education and opening exercises.

²³ *Loyola High School v. Courchesne*, Superior Court (S.C.) Montreal, QC, Canada, 500 – 17 – 045278-085, Justice Gérard Dugré (June 18, 2010) Reported at 2010 QCCS 2631. This matter has been appealed to the Quebec Court of Appeal but at the time of writing no date has been set for the hearing.

²⁴ Centre de presse. Quebec Met fin A L'Enseignement Religieux Dans Les Services de Garde Subventionnées, Monreal le 17 decembre 2010 see: www.mfa.gouv.qc.ca/fr/ministere/centre-presse/communiqués-famille. Press reports have pointed out the public con-

claim that there is a difference between teaching religion and celebrating a cultural tradition. Christmas trees and the songs of Bing Crosby may be allowed to remain as long as the songs are of a non-religious sort.

The breadth and depth of this concern is not something that any citizen should take lightly given the important role that religious beliefs play in society. It remains to see what the Assembly of Bishops of Quebec, or any individual Ordinary will say publicly in relation to this most recent overreach by the Province of Quebec.

Inter-faith religious co-operation as a social good enhancing pluralism

Canadian philosopher Charles Taylor has noted:

Judicial decisions are usually winner-take-all; either you win or you lose. In particular judicial decisions about rights tend to be conceived as all-or-nothing matters... The penchant to settle things judicially, further polarized by rival special-interest campaigns, effectively cuts down the possibilities of compromise.²⁵

Religious communities cannot fail to be concerned about the effects of legal decisions on their rights. The Constitution (in common with most countries) does not focus on 'the Christian religion' but on 'religion' and what happens to one religion in terms of interpretation of the law will have an influence and impact on other religions. It is not surprising, therefore, that inter-faith religious coalitions have become a part of the litigation scene in Canada and (to a lesser extent) South Africa. It is necessary for those concerned about the role of the law to recognize that all religions ought to be concerned how other religions are treated by politics and the law.

Canada as a matter of fact has had a history of 'inter-faith' coalitions making successful attempts at intervention in some of the major court cases of the day where religious rights and freedoms are at issue.

cerns about the government's new Regulations and noted the irony that manger scenes may still be allowed but that those who run the schools may not name the figures. In addition the Minister explained that while Imams, rabbis or ministers may visit the religious day-cares they may not speak about religion. See: Lysiane Gagnon, 'Lose Religion or the Subsidy' *Globe and Mail*, Tuesday December 28, 2010 p. A17; Editorial, 'Religion in Retreat' *The National Post*, Thursday December 30, 2010 p. A10; Ingrid Peritz, 'Quebec Curbs Religion in daycare; Policy triggers emotional debate over how inspectors will differentiate between religious conviction and cultural values' *The Globe and Mail*, Wednesday, December 22, 2010 page A4.

²⁵ C. Taylor, *The Malaise of Modernity* (Toronto: Anansi Press, 2001), at 116.

Inter-faith coalitions intervened first, in relation to the status of the unborn in a case dealing with abortion (*Borowski*,²⁶ late 1980s). Then, a few years later, in relation to statutory conjugal language in statutes dealing with 'sexual orientation' in the early to mid 1990s, (*Egan and Nesbit*,²⁷ 1994) similarly, with respect to same-sex marriage (*Barbeau*,²⁸ *Halpern*,²⁹ and the *Marriage Reference*,³⁰ 2002 – 2006) all had inter-faith interventions.

Inter-faith, and sometimes expressly Christian groups (such as the Evangelical Fellowship of Canada or the Canadian Conference of Catholic Bishops or Provincial Assemblies of Bishops or lay-led Religious Civil Rights groups), have also made frequent representations to House and Senate Committees on a wide variety of constitutional and social justice issues over the years.

The expressly inter-faith (as opposed to simply Christian) coalitions that emerged in the 1990s in Canada were in part responsive to the fact that the concerns on the cases were shared across religious divides (such as the 'sanctity of life' in relation to the abortion issue). In addition, Canada, like South Africa, understands itself to be multi-cultural and pluralistic thereby lending a particular 'fit' to any application before the court that claims to speak to multi-cultural and inter-religious cooperation.³¹

In the same-sex marriage litigation in Canada, various groups including the Evangelical Fellowship of Canada (representing some 30 or so Protestant churches), joined together with the Canadian Conference of Catholic Bishops to form a coalition to argue that pressure on the 'traditional' definitions of marriage would eventually put pressure on the place of religions themselves. A Marriage Alliance in South Africa (not inter-religious but cross-denominational) also argued on behalf of certain religious concerns in the same-sex marriage litigation in South Africa.

The initial concern, over inclusion of same-sex couples into the definition of 'spouse' in the federal *Old Age Security Act* was that the recognition of same-sex relationships within a conjugal category such as 'spouse' would lead, in-

²⁶ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

²⁷ *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 SCC 49.

²⁸ *Barbeau v. British Columbia (A.G.)* 2003 BCCA 406.

²⁹ *Halpern v. Canada*, [2003] O.J. No. 2268.

³⁰ *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79.

³¹ Section 27 of the *Canadian Charter of Rights and Freedoms* requires to the Courts to interpret the provisions of the Constitution so as to enhance Canada's 'multi-cultural heritage'; Sections 30 and 31 of the *South African Constitution* refer to the rights of 'language' and 'cultural life' and the importance of 'culture', 'religious' and 'linguistic' communities.

evitably, to a claim for same-sex marital recognition putting pressure on those communities that wished this recognition to be only for opposite sex couples. Though this concern was dismissed by counsel for the claimant couple (and interveners on their side of the case) as spurious, history showed that it was, years later, justified. It was not much more than eight years later that the challenges to the common-law recognition of marriage as ‘male/female’ arose in three Canadian provinces – British Columbia, Ontario and Quebec.

Again, an ‘inter-faith coalition for Marriage and the Family’ responded, retained counsel and went into court arguing that pressure on the national definition (the federal constitutional power dealing with the capacity to marry) of ‘marriage’ could put pressure on religions to maintain their own understandings about the nature of marriage.

In the event, whether inter-faith or simply Christian, these coalitions failed to maintain a heterosexual only recognition of marriage in both countries. Still, their expressed concerns about pressure being brought to bear on religious groups and individuals if the law changed was heard and due to the involvement of religious groups arguing that their perspective be respected, decisions of the highest courts in both countries made express mention of religious protections.³²

The Court rejected the arguments made by certain religious groups stating that the recognition of same-sex marriages would discriminate against them.³³ The Canadian Supreme Court, in explaining its position, stated:

The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.³⁴

In answer to concerns that civil access to ‘same-sex marriage’ would create a ‘collision of rights’ in the culture, the Canadian Supreme Court said:

The protection of freedom of religion afforded by [§] 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under [§] 1 of the

³² See the decision of the Supreme Court of Canada in *Reference re Same-Sex Marriage* 2004 3 SCR 710 (Can) (*the Marriage Reference*) and the Constitutional Court of South Africa in *Fourie* note # 7, above.

³³ *Ibid.*, 718.

³⁴ *Ibid.*, 719.

Charter and will be of no force or effect under [§] 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.³⁵

On the third question posed in the Canadian *Marriage Reference*, ‘[d]oes the freedom of religion guaranteed by Section 2(a) of the *Charter* protect religious officials from being compelled to perform same-sex marriages contrary to their religious beliefs?’³⁶ the Court pointed out that the compulsion which the question envisages is by the state.³⁷ It also stated that such compulsion for officials or for ‘sacred places’ would violate the guarantee of freedom of religion under § 2(a).³⁸ Most significantly, the Court held this guarantee to be ‘broad enough to protect religious officials from being compelled by the state to *perform civil or religious same-sex marriages* that are contrary to their religious beliefs’.³⁹

Justice Albie Sachs formerly of the Constitutional Court of South Africa, made the following thoughtful comment regarding the search for equality:

[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 presuppose 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.⁴⁰

³⁵ *Ibid.*, 721.

³⁶ *Ibid.*, 721.

³⁷ *Ibid.*, 721.

³⁸ *Ibid.*, 722–23.

³⁹ *Ibid.*, 723 (emphasis added); see also Iacobucci, “Reconciling Rights” The Supreme Court of Canada’s Approach to Competing Charter Rights’, 20 *Supreme Court Law Review* (2003) 137, at 137–167. The argument here is that ‘reconciling’ has advantages to ‘balancing’ as an analytical and practical tool in certain types of cases. The article reviews where reconciliation might be the best approach to what could, at first blush, appear to be a clash or conflict of rights. Of course the judgment left unanalyzed an equally practical question: whether this protection for ‘religious officials’ would apply to the accommodation of civic officials say, Marriage Commissioners operating under state licenses who base their objections on the constitutional grounds of ‘conscience and religion’. That matter is now before the courts in several Canadian provinces and academic opinion is divided how they should be resolved.

⁴⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 1574–1575 (Sachs J.).

Of course, one has to be careful in taking this approach that an unrealistic standard of human interaction is not adopted, lest ‘hurt feelings’ be elevated to a constitutionally-protected category, thereby watering down to an unacceptable degree the rigour of our conceptions of equality and dignity.⁴¹

Many religious bodies and inter-faith groups have intervened in important cases touching on religious liberty over the past decade and a half in Canada. They have seen first-hand, in situations such as the eradication of denominational education rights in Newfoundland and Quebec⁴² that, in their view religious communities and individual believers are often not being accorded the respect they deserve and to which they are entitled.⁴³

As referred to above, in South Africa, many religious believers were also concerned where changes to the legal understanding of marriage would take their own communities. Thus, in *Fourie*, religious groups sought, and obtained, status as *amicus curiae* based on an Affidavit by Cardinal Wilfred Napier, of the Roman Catholic Church.

In *Christian Education*, as we saw above, the majority of the Court was quite willing to comment on the importance of religious beliefs to South African society; we see the same openness in other more recent decisions of the same Court.⁴⁴

In *Fourie*, the majority of the Court found religious beliefs and their associations to be socially important in these terms:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the gen-

⁴¹ The following decision of the Supreme Court of Canada has been subjected to just this criticism. *Law v. Canada (Minister of Employment and Immigration)* 1999 1 SCR 497 (Can) and *Granovsky v. Canada* 2000 SCJ No. 28. For a review discussing both decisions see: Benson and Miller, ‘Equality and Human Dignity’, 39 *Lex View* (2000), at www.cardus.ca/lexview/article/2261/.

⁴² *Constitution Act* 1867 § 93A.

⁴³ See MacDougall, ‘Refusing to Officiate at Same-Sex Civil Marriages’, 69 *Saskatchewan Law Review* (2006) 351, at 353–354. In favour of accommodating the right of officials not to perform same-sex marriages on the basis that tolerance allows for disagreement, see C. Lafferty, above, note # 17 at 307–312.

⁴⁴ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para. 36. See, generally, Currie & De Waal *Bill of Rights* 5th ed (2005) 336–357; Farlam *Freedom of Religion* chapter 41. See further *Bruker v Marcovitz* 2007 SCC 54.

eral public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life. Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.⁴⁵

Important to note here is the fact that the Court finds religion not simply to be an 'individual' matter but something important for the community and the whole society.⁴⁶ The Court continued, however, with this observation setting out a limitation on the public use of religious argumentation:

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others ... Whether or not the Biblical texts support his beliefs would certainly not be a question which this Court could entertain. From a constitutional point of view, what matters is for the Court to ensure that he be protected in his right to regard his marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his views in an appropriate manner both in public and in Court. Further than that the Court could not be expected to go.⁴⁷

What the court wishes to see is co-existence within difference. If the experience in Canada is anything to go on, however, it is reasonable to suggest that such co-existence is going to require a considerable amount of litigation in order for the genuinely 'open' nature of the public sphere to be ensured. In the process of such litigation, a *Charter* of the sort that has now been signed in South Africa could be of considerable guidance to the courts and legislatures in terms of the key principles to be applied. This

⁴⁵ *Fourie*, note #7, above paragraphs 90-93 and 98.

⁴⁶ I have written about the tension between the right of religion and belief to be viewed 'individualistically' rather than in its (preferred) dimension – associationally; both aspects should be kept in view. See Iain T. Benson, 'The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Reply To Lenta', 1 *Constitutional Court Review* (2008) 297, at 297-312.

⁴⁷ *Fourie*, note #7, above, paragraphs 92, 93 and 98. The decision is referred to above.

brings me to more particular questions about the creation of the *South African Charter of Religious Rights and Freedoms*.

The creation of a South African Charter of Religious Rights and Freedoms

The role that religions could play in relation to the ongoing formation of the South African Constitution was understood early on by Justice Albie Sachs when he wrote:

Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities. ...it would be up to the participants themselves to define what they consider to be their fundamental rights.⁴⁸

Section 234 of the *Constitution* of South Africa stipulates as follows:

In order to deepen the culture of democracy established by this Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

Section 234 gives South Africans a means to offer guidance to both politics and the courts though, since it has not been used until now, it is not certain what the political process will do to the work that civil society (in terms of the major religions) has already done.

In principle Section 234 gives those who come up with such Charters, emerging from civil society, the chance to specify in greater detail what they think are important principles under the general rubrics of the Constitution (such as ‘the freedom of religion’). The location of Section 234 in the Constitution suggests that legislation passed under this provision will be accorded a kind of ‘super statutory’ or constitutional status by virtue of that inclusion.

The formation of the *South African Charter of Religious Rights and Freedoms* began with a group of legal and theological academics who met in Stellenbosch in October 2007. That original group (primarily Christian at the beginning though this changed over time) met to discuss whether it would be advisable to develop such a document. The author spoke about the Canadian experience of ‘inter-faith cooperation’ in relation to litigation and of the reconfiguration of the ‘secular’ recognized by the Canadian courts in *Chamberlain*.⁴⁹ As indicated, attempts to form such an interfaith approach

⁴⁸ A. Sachs, *Protecting human rights in a new South Africa. Contemporary South African Debates* (1990), at 46–47.

⁴⁹ Both terms admit of a variety of interpretations. Whatever interpretations are given, however, extension of cooperation beyond simply one racial or religious group is implied and important.

in litigation in South Africa had not been carried forward in relation to the same-sex litigation that culminated in the *Fourie* decision.

One conclusion of that meeting was that representation had to be extended further afield to invite all the major religions (including African customary religions) to attend to comment upon a basic Draft that was to be prepared prior to that meeting and that particular care should be taken to invite all religions to the table. The Draft was prepared by a small working group and further meetings called between February 2008 and its eventual signing in October 2010.

It was understood by those involved in the process that by leaving the right to religious freedom undefined in the Constitution, one actually accepts that the content of the right will be determined through court decisions and other measures on an *ad hoc* basis, in other words, as issues and difficulties occur. This is a process over which religious institutions have little control.

The existence of Section 234 in the South African Constitution, created the possibility for the creation of a charter of religious rights in which the content of the right is spelled out fully in a single charter. There were ample international examples that provided support for such a Charter approach. For example, all the primary international Bills of Rights protect the right to freedom of religion, but not a single one elaborates on the content of the right. (See for example Article 18 of the *Universal Declaration of Human Rights*, Article 18 of the *International Convention on Civil and Political Rights*, Article 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and Article 1 of the *African Charter for Human and Peoples' Rights*. That was why the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, which spells out the content of the right to freedom of religion much more extensively, was adopted in 1981. (See also the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1992). Domestically as well as internationally there were, in other words, precedents for such a charter of religious rights.

What eventually occurred, through all the meetings (some group and many individual) and in spectacular fashion, was that the major religions which had participated – Hindu, Christian (including Catholic, Orthodox, Zion Christian Church and Reformed branches), LDS, Jewish, Muslim and others gave one hundred percent support not only to the need for a document but to the process being used and the terms of the document itself.

Those that drove forward the drafting (this was all outside of 'government') represented theology and law and were drawn as well from the various religious traditions and included members of the Constitutional

Commission for Culture, Religious and Linguistic communities. The process allowed for very broad and deep consultation across a wide spectrum of Religions in South Africa and some of the key groups involved in religion and human rights.

Key meetings involved, amongst others, those with The House of Traditional Leaders (Pretoria) (including all but two of their regional representatives); The Steering Committee for the Roman Catholic Bishops of South Africa (including Cardinal Napier); The Central Committee of the Dutch Reformed Church; The South African Human Rights Commission; the Editorial Committee for the Religion Hub (Television) of the South African Broadcasting Corporation; The Executive of the National Religious Leaders' Forum; The General Secretary of the South African Council of Churches; a Representative of the South African Buddhist Religion; a representative of the Rastafarian Religion and a representative of the Baha'i religion.

The groups consulted (which eventually extended considerably beyond the above list) continued to express support and interest in the Charter. Many substantive comments were received, some of these from individuals and others from academics in many countries internationally. These consultations continued and at the time of the public signing of the Draft in October 2010, (see attached Appendix) represented the insights and contributions of hundreds of interventions.

The Charter was eventually signed at a public meeting (at which members of the Press attended) on October 21, 2010 at the main Board Room of the University of Johannesburg. This was followed by a meeting of the signatories that established a *Council for Religious Rights and Freedoms* pursuant to Section 185 (1) (c) of the Constitution and other relevant provisions of the *Promotion and Protection of Cultural, Religious and Linguistic Communities Act* 19 of 2002. At the time of this writing a Steering Committee has been established of Members and experts that will continue to raise support for the Charter and to move ahead in discussions with the government.

What has occurred has been deep, meaningful and, might well be, in the long run of great importance not only within South Africa but in other countries as well.⁵⁰ The process, document and meetings have shown both

⁵⁰ In countries that do not have the equivalent of a Section 234 in their Constitutions it might be possible to consider whether other enactments could be developed that might serve in a manner akin to 'Interpretation Acts' in such a way that civil society initiatives could be both encouraged and effective in crafting greater delineation of the meaning of the general rights in national constitutional enactments.

that religions can cooperate at a high level of sophisticated and mature discussion and that principles important to each religion can be shared and recognized as important to all religions. These principles are a substantive contribution to the principles of *modus vivendi* as they include not only the right to join a religion but also to leave one.⁵¹ The process has showed that there are alternatives to political and legal avoidance of key aspects when the civil society organizations themselves show leadership in important areas in the context of a constitutional document set up so as to encourage the involvement of civil society in its ongoing development. The process also provides the prospect of more holistic principled development than the *ad hoc* nature of litigation on a case by case basis (the concern expressed in the quotation from Charles Taylor at the head of this section of the paper).

In this respect, use of Section 234 of the *Constitution of the Republic of South Africa* provides an important landmark for those who are concerned that constitutional development has become the property of a small number of judges and activist litigation strategists.

It remains to be seen how the political process will respect the hard work that has been done by civil society. A sign of respect would be to recognize that the Charter represents an extraordinary cooperation between as wide a set of interest groups as could likely be assembled. It did not include every possible group – that goal would be impossible of realization. It is for the government, in conversation with the Council for Religious Rights and Freedoms that is being established to determine whether Section 234 of the Constitution will prove to be as useful a guide as many hope it can be for South Africa.

Conclusion: understanding religion and law and politics according to their natures – Religions as propositional, politics and law as impositional

We will hear elsewhere at this plenary session about the meaning of religious freedom in relation to government developed up to and including *Dignitatis Humanae*. The rejection of religion in the form of theocracy is a signal development in the history of human communities and one which needs a richer theological ground within all world religious traditions.

The *Catechism of the Catholic Church* locates our conception of anthropology, the questions ‘who are we?’ and ‘what are we?’ close to the centre of the legitimacy of institutions and their ability to maintain a place for freedoms:

⁵¹ This principle was endorsed by all signatories including representatives of the Muslim Judicial Council of South Africa.

Every institution is inspired, at least implicitly, by a vision of man and his destiny, from which it derives the point of reference for its judgment, its hierarchy of values [principles a better word here], its line of conduct. Most societies have formed their institutions in the recognition of a certain pre-eminence of man over things. Only the divinely revealed religion has clearly recognized man's origin and destiny in God, the Creator and Redeemer. The Church invites political authorities to measure their judgments and decisions against this inspired truth about God and man:

Societies not recognizing this vision or rejecting it in the name of their independence from God are brought to seek their criteria and goal in themselves or to borrow them from some ideology. Since they do not admit that one can defend an objective criterion of good and evil, they arrogate to themselves an explicit or implicit totalitarian power over man and his destiny, as history shows.⁵²

Against this warning the Church witnesses to and insists upon principles that maintain a place for persons in relation and communities of difference – a place for diversity. And yet it is not aimlessness; there is a vision at work here – a vision of unity but not a convergence forced by law and politics but chosen by the free will of men and women. Law and politics can achieve forced convergences only by committing violence against freedom.

The Catholic vision of civic ordering limits civil authority and law. Subsidiarity erects places of difference and diversity (through mediating institutions and the instantiation of the principles of accommodation) against a uniformity that, if imposed from above, rather than proposed from below, will destroy it.

Law as *imposition* and religions as *proposition* need to be in relation to each other. This relation, however, demands a recognition of the key differences not only to the jurisdictions but the kinds of force (persuasion versus coercion) that are essential to each.

The long history of human communities shows us that theocracy corrupts religions. Within the Catholic tradition in the Second Vatican Council's key document *Dignitatis Humanae* (1965) the limits on religion in relation to the State were finally brought fully into Catholic doctrine within the understanding of the development of doctrine. This concept of development and the jurisdiction and limits of religion in relation to the state (law and politics) needs

⁵² *Catechism of the Catholic Church*, para. 2244 footnotes omitted [final quotation from *Centesimus Annus* 45, 46].

to be learned within other religions as well. Government has a role to ‘...safeguard the religious freedom of all its citizens’ and part of this freedom is that it ‘...must not hinder men from joining *or leaving* a religious body’.⁵³

I would like to suggest that a helpful line of inquiry in terms of understanding the appropriate jurisdictions of law and religions would be to examine the internal nature of each as a means of better describing the relationship between them. This could build upon the insights from Canada and South Africa to the effect that what constitutional development entails is a form of ‘dialogue’ between courts and legislatures. What is needed is to add to this sort of conversation by making it more open – to include civil society. Part of that involvement requires a greater recognition of the role that mediating institutions (and associations generally) can play in this more open conversation. In particular it is important to recognize the role that religions play in relation to the moral direction of government and law.

Is it possible, for example, to understand the nature of religions as *propositional* and law and politics as *impositional*.⁵⁴ That is to say that the essence of religion pertains to human being understood as freedom in relation to an ordered cosmos. Thus, though religions may in their internal matters (employment rules, hiring, discipline, etc.) have necessarily impositional *internal* rules (and these always informed by the religious ethos), their *external* action in relation to politics and the state must be *propositional*.

When religions become impositional, it may be argued that they betray the essence of their articulations of freedom as that is understood in essentially non-legal understandings within the contemporary state. Thus notions such as compassion, mercy, dignity and a theologically informed justice which are the centre of religious articulations⁵⁵ are not generally understood

⁵³ *Dignitatis Humanae*, Walter Abbott, S.J. ed., *The Documents of Vatican II*, p. 687 para. 6 (emphasis added).

⁵⁴ The line between transcendent and immanent law is ancient and universal. If one thinks of Sophocles’ *Antigone*, written over 2500 years ago, it is clear that the central tension in that play is the fact that King Creon, in his edict against sacred burial, failed to respect the transcendence which Antigone claimed requisite and the King’s decree, as the characters and chorus make clear, was an excess of his jurisdiction. In contemporary parlance, Creon’s claim to be the law (foreshadowing Louis XIV’s *l’état c’est moi*) is everywhere the unjust and disastrous claim of immanent kings against transcendent principles and the organizations which further them (principally religions) in societies.

⁵⁵ The Recitals of the Proposed *South African Charter of Religious Rights and Freedoms*, particularly no. 7, discuss concepts such as ‘compassion’ and ‘love’ which are not usually mentioned in legal enactments but few would deny they are important to society (see ‘Appendix’ to this paper).

by contemporary law and politics in those terms. Contemporary law and politics develop their rules and then impose those on all citizens irrespective of their associational commitments. Associations, however, including religions, propose their beliefs to the world around and when they seek to impose these generally undercut the richness of their spiritual/theological understandings. Perhaps this is why so many reform movements originate within religions and are driven by religious believers?

On the other hand, when law and politics over-extend their appropriate jurisdictions, this is to the detriment of associational life and religious practice. We are at a stage of development in the jurisprudence of both Canada and South Africa (and the same holds true for other countries) where, as we have seen in the decisions referred to above, from time to time, the courts under either the South African or Canadian constitutions have had to wrestle with the appropriate line between judicial interpretation and the lives of those persons living under a religious order.

In a relatively recent decision of the Canadian Supreme Court, the Chief Justice noted that both the state and the law should be reticent to delve into personal matters that are related to the nature of religious belief, because:

The state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, ‘precept’, ‘commandment’, custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*⁵⁶

This is exactly correct.

The frame, therefore, is established between religion as having a necessarily but limited ‘outside’ public dimension (the *Big M Drug Mart* decision of the Supreme Court of Canada, above) and the same court’s reticence to get ‘inside’ religions and their dogmatic ‘private’ determinations (*Amselem*). A similar insight has emerged from the Constitutional Court of South Africa. This court has also recognized different spheres but, in common with general usage and the all too common judicial dicta, place ‘sacred’ and ‘secular’ in unhelpful opposition. Despite this, the *Fourie* decision, in understanding the public realm as a sphere of ‘co-existence’ between different spheres moves towards a richer and more nuanced understanding in line with the comments set out above. In the words of Justice Sachs:

⁵⁶ *Syndicat Northcrest v. Amselem* [2004] 2 SCR 551 at para. 50 (emphasis added).

In the open and democratic society contemplated by the [South African] constitution there must be a mutually respectful co-existence between the secular and the sacred. The function of the court is to recognize the sphere which inhabits, not to force the one into the sphere of the other... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held worldviews and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm*, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all... It is clear from the above that acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage accords to heterosexual couples is in no way inconsistent with the rights of religious organizations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.⁵⁷

This paper has examined the framework language used to discuss religion and law and suggested that many of the key terms are deeply confused and misleading. Thus, a re-thinking which recognizes that all persons are believers (it is not whether they believe but what they believe in that is the proper description of things) and that all are in some kinds of communities of faith and belief goes some way to identifying the all too common (and implicit) dominance of atheism and agnosticism in the current age.

The re-configuration of the meaning of the 'secular' begun in the Canadian Supreme Court decision in *Chamberlain*, needs to be more widely understood and applied against a clearer language to describe the public sphere. This paper has also suggested that social initiatives exist in the practice of both South Africa and Canada which offer suggestions for advancement of a richer approach to respect for pluralism than simply *ad hoc* judicial developments through litigation.

⁵⁷ *Fourie* above, note #7, at para. s.94-98 (emphasis added). Justice Sachs' conception of differing beliefs co-existing within the public realm is of single importance and sets the stage, along with the approach of Justice Gonthier in the Supreme Court of Canada Decision in *Chamberlain*, for a redefinition or better yet a 're-understanding' of what might be termed central public terminology.

Law has its public role but so does religion – yet they are different. Speaking truth to power is influenced by the means chosen to do the speaking. Theocracy seems to corrupt religious proposition by using the instruments of coercion that are essential to law in service of religions which should be about witness not coercion. On the other hand, when law extends beyond its proper boundaries into the areas that should be reserved for families and associations in relation to religious liberty, it too is corrupted.

The current phase in constitutional democracies is one of a kind of tug-of-war between convergence and accommodation of difference, between subsidiarity and statism. For this reason there is a co-operation that is both practical and principled. Practical because the concerns of any threatened *subsidium* is a concern of all, and principled because the affirmation of freedom and conscience demands respect for others.

Just as Encyclicals in the Roman Catholic tradition are also directed to all ‘men and women of good will’ so the co-operative decisions in defence and support of others are necessary steps on the road to living together *with* disagreement and respect. History shows the difficulties of this vision but perhaps wisdom and hope – the union of natural and supernatural insight, are the only road to a more harmonious co-existence in which proposition will stand up against the omnipresent temptations of imposition.

APPENDIX

Brief Index to the *South African Charter of Religious Rights and Freedoms*

[Particularly notable amongst the provisions are the following]:

Preamble, particularly #7;

Right to change religion 2.1;

Principle of religious accommodation 2.2;

Medical services or procedure protections 2.3;

Non-establishment provision 3.1;

Free-exercise provision 4.0 (including access to sacred places 4.2);

Freedom of *expression* (including public debate 6.1);

Right to *share religious faith* (6.1) including to attempt to convert others (6.2);

Access to public *media* (6.3) [a recent addition after representations from

African customary religions about difficulty getting access to public media];

Advocacy of *hatred* ‘that constitutes incitement to immediate violence or physical harm’ (6.4) [narrowing from ‘hate speech’ which should be abolished from human rights according to Moon Report recently released in Canada];⁵⁸

Education, primary parental, right of information etc. (7.0);

Conditions of *employment* (9.1);

Relationship between *Church and State* recognizing autonomy (9.3) and confessional protection (9.4);

Religion not defined by ‘service to adherents’ so includes ‘whether they serve persons with different convictions’ (12).

South African Charter of Religious Rights and Freedoms

(Signed in Johannesburg, South Africa, October 21, 2010) Version 6.0 (as amended 6 August 2009)

Preamble

1. WHEREAS human beings have inherent dignity, and a capacity and need to believe and organize their beliefs in accordance with their foundational documents, tenets of faith or traditions; and

WHEREAS this capacity and need determine their lives and are worthy of protection; and

WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions; and

WHEREAS religious institutions are entitled to enjoy recognition, protec-

⁵⁸ This Report of Professor Richard Moon (dealing with hate speech laws and recommending their abolition in a Human Rights context) may be found at: www.chrc-ccdp.ca/publications/report_moon_rapport/toc_tdm-eng.aspx (accessed 11 November 2010).

tion and co-operation in a constitutional state as institutions that function with jurisdictional independence; and

WHEREAS it is recognized that rights impose the corresponding duty on everybody in society to respect the rights of others; and

WHEREAS the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society; and

WHEREAS religious belief may deepen our understanding of justice, love, compassion, culture, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationship in our lives and in society, and may therefore be beneficial for the common good; and

WHEREAS the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa; and

Therefore the Following

Charter of Religious Rights and Freedoms is hereby adopted:

1. Every person (where applicable in this Charter 'person' includes a religious institution or association) has the right to believe according to their own religious or philosophical convictions, and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.
2. No person may be forced to believe, what to believe or not to believe, or to act against their convictions.
 - 2.1. Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.
 - 2.2. Every person has the right to have their religious beliefs reasonably accommodated.
 - 2.3. Every person may on the ground of their religious or other convictions refuse to (a) participate or indirectly assist in or refer for certain activities, such as of a military or educational nature, or (b) perform certain duties or deliver certain services, including medical or related (including pharmaceutical) services or procedures.
 - 2.4. Every person has the right to have their religious or other convictions taken into account in receiving or withholding of medical treatment.

- 2.5 Every person has the right not to be subjected to any form of force or indoctrination that may cause the destruction of their religion, beliefs or worldview.
3. Every person has the right to the impartiality and protection of the state in respect of religion.
 - 3.1. The state must create a positive and safe environment for the exercise of religious freedom, but may not as the state promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion.
 - 3.2. No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.
4. Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their religious beliefs, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, order, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.
 - 4.1. Every person has the right to private access to sacred places and burial sites relevant to their religious or other convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.
 - 4.2. Persons of the same conviction have the right to associate with one another, form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.
 - 4.3. Every person has the right to communicate nationally and internationally with individuals and institutions on religious and other matters, and to travel, visit, meet and enter into relationships or association with them.
 - 4.4. Every person has the right to single-faith religious observances, expression and activities in state or state-aided institutions, as regulated by the relevant institution, and as long as it is conducted on an equitable and free and voluntary basis.
5. Every person, religious community or religious institution has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution and are recognised by law.
6. Every person has the right to freedom of expression in respect of religion.

- 6.1. Every person has the right to (a) make public statements and participate in public debate on religious grounds, (b) produce, publish and disseminate religious publications and other religious material, and (c) conduct scholarly research and related activities in accordance with their religious or other convictions.
- 6.2. Every person has the right to share their religious convictions with others on a voluntary basis.
- 6.3. Every religious institution has the right to have access to public media and public broadcasting in respect of religious matters and such access must be regulated fairly.
- 6.4. Every person has the right to religious dignity, which includes not to be victimised or slandered on the ground of their faith, religion, convictions or religious actions. The advocacy of hatred that is based on religion, and that constitutes incitement to imminent violence or to cause physical harm, is not allowed.
7. Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.
 - 7.1. The state, which includes any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.
 - 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 preference for a particular religious ethos does not constitute discrimination in breach of the constitution with respect to religious education.
 - 7.3. Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children (or their parents) who do not subscribe to the religious or other convictions practised in that institution waive their right to insist not to participate in the religious activities of the institution.
8. Every person has the right on a voluntary basis to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction.
9. Every religious institution has the right to institutional freedom of religion.

- 9.1. Every religious institution has the jurisdictional independence to (a) determine its own confessions, doctrines and ordinances, (b) decide for itself in all matters regarding its doctrines and ordinances, and (c) in compliance with the principles of tolerance, fairness and accountability regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.
- 9.2. Every religious institution is recognised and protected as an institution that functions with jurisdictional independence, and towards which the state, through its governing institutions, has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.
- 9.3. The state, including the judiciary, must respect the jurisdictional independence of every religious institution, and may not regulate or prescribe matters of doctrine and ordinances.
- 9.4. The confidentiality of the internal affairs and communications of a religious institution must be respected. Specifically, the privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected in legal proceedings.
- 9.5. Every religious institution is subject to the law of the land, and must justify any disagreement, or civil dissent, on the basis of its religious convictions or doctrines.
10. Every religious institution that qualifies as a juristic person has the right to participate in legal matters, for example by concluding contracts, acquiring, maintaining and disposal of property, and access to the courts. The state may allow religious institutions tax, charitable and other benefits.
11. Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.
12. Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.