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# Freedom of religion of children in private schools

## Abstract

This article argues against the interpretation that the right to establish private schools includes the right to require religious conformity from non-adherent learners by way of a waiver of their religious freedom. Despite the importance of respecting the rights of religious communities to protect and preserve their faith in private schools, it is submitted that this right cannot be exercised without regard for the religious freedom, dignity and best interests of non-adherent children. As a result, it is submitted that the waiver of the freedom of religion of non-adherent children is not consistent with the values which South African society reveres and, therefore, cannot be enforced. This article suggests that there is a way for the rights of private schools and the rights of the non-adherent child to co-exist in harmony through the application of the reasonable accommodation principle in private schools.

## Kinders se vryheid van godsdien in private skole

Hierdie artikel voer aan dat die reg om privaatskole te stig, nie die reg insluit om by wyse van afstanddoening van hul godsdiensvryheid, godsdienstige nakoming te vereis van leerlinge wat nie navolgers is nie. Ten spyte van die belangrikheid daarvan om die regte van godsdienstige gemeenskappe te respekteer om hul geloof in privaatskole te beskerm en te behou, word dit aan die hand gedoen dat hierdie reg nie uitgeoefen kan word sonder om ag te slaan op die godsdiensvryheid, waardigheid en beste belang van kinders wat nie navolgers is nie. Gevolglik word dit aan die hand gedoen dat afstanddoening van godsdiensvryheid deur kinders wat nie navolgers is nie, nie ooreenstem met die waardes wat deur die Suid-Afrikaanse gemeenskap eerbiedig word nie, en nie afgedwing kan word nie. Hierdie artikel betoog dat daar ruimte is vir die regte van privaatskole en die regte van kinders wat nie navolgers is nie, om in harmonie naas mekaar te bestaan deur die toepassing van die beginsel van redelike tegemoetkoming in privaatskole.

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## 1. Introduction

As will be illustrated below, the issue of freedom of religion of children in private schools<sup>1</sup> is complex, since it involves a tussle between the various interrelated rights of private schools (educational, associational, cultural rights and freedom of religion) and the interrelated rights of non-adherent learner children (dignity, equality, children's rights, educational and freedom of religion). This article examines the current legal approach dealing with the issue of freedom of religion in private schools; highlights the problem areas with the current approach, and makes recommendations for improvement.

The discussion is divided into four sections: the current law pertaining to private schools; the current law protecting the freedom of religion and other relevant rights of children in private schools; problems with the current position, and recommendations.

## 2. Private schools in South Africa

Section 29(3) of the *Constitution* allows for the establishment of private schools that cater for the particular needs of cultural, linguistic or religious groups.<sup>2</sup> Practically speaking, private schools are necessary, given that the state cannot bear the responsibility for the education of all children in the country.<sup>3</sup> Therefore, it must be emphasised that the existence of private schools contributes to the realisation of the right to education.<sup>4</sup> Furthermore, the establishment of religion-based private schools allows religious communities to preserve their religion and culture<sup>5</sup> through education. It is important to point out that, although these religion-based schools are private, they are bound to the Bill of Rights in terms of

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1 The term "private school" refers to "independent school" registered or deemed to be registered in terms of the *South African Schools Act 84/1996*:section 46: "Subject to this Act and any applicable provincial law, any person may, at his or her own cost, establish and maintain an independent school." Private schools must be distinguished from public schools. In terms of the *Schools Act 84/1996*:section 12(1), "[t]he Member of the Executive Council must provide public school for the education of learners out of funds appropriated for this purpose by the provincial legislature." In terms of the *Schools Act 84/1996*:section 12(3), "[a] public school may be an ordinary public school or a public school for learners with special education needs."

2 De Waal *et al.* 2001:484-485.

3 Adhar & Leigh 2005:258.

4 Taiwo 2011:299. See also Henning 1993:12-13.

5 Although religion is different from culture, the two are so closely connected that they often overlap. It is, therefore, possible for a practice to be entirely religious or cultural or a mixture of the two. As a result, many issues pertaining to religion in schools inevitably involve cultural rights. "[T]he term "culture" is used as a modality that identifies and binds a specific group of people. Culture is then understood as a determining source of identity – it draws distinctions between people on grounds of a number of characteristics such as language, religion, beliefs and traditions." See Rautenbach 2002:6.

section 8(2)<sup>6</sup> of the *Constitution* and must act within its parameters, where applicable. Section 29(3) provides that:

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

Importantly, section 29(3) requires that certain minimum standards be upheld by private schools.<sup>7</sup> Correspondingly, the South African *Schools Act* 84 of 1996 (hereafter, *Schools Act*) provides for the establishment of private schools provided that these schools maintain a standard that is not inferior to public schools. Although private schools are generally independently funded, the state is not precluded from subsidising them.<sup>8</sup>

The inclusion of the right to establish private schools in section 29(3) of the *Constitution* is in accordance with the various international human rights instruments to which South Africa is party.<sup>9</sup> Importantly, Article 26(3) of the Universal Declaration of Human Rights (UDHR) confers on parents the “right to choose the kind of education” their children should receive. This provision recognises that parents have the right to choose between public and private education.<sup>10</sup> The International Covenant on Economic,

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6 Section 8(2) of the *Constitution of the Republic of South Africa*, 1996 states: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” This means that the *Constitution* applies not only to legislation, but also to rules and conduct carried out by the state or private institutions.

7 Section 29(3)(c) of the *Constitution*.

8 GN 2362, *Government Gazette* 1998:(19347), provides uniform national norms on private schools subsidies; the *Schools Act* 84/1996:section 48(2).

9 Article 26(3) of the Universal Declaration of Human Rights of 1948; Article 18(4) of the International Covenant on Civil and Political Rights of 1996; Article 11(4) of the African Charter on the Rights and Welfare of the Child of 1990; Article 13 of the International Covenant of Economic Social and Cultural Rights of 1996. South Africa signed the ICESCR on 3 October 1994, but has not ratified it. However, in October 2012, Cabinet announced that the recommendation to ratify the ICESCR will be tabled before Parliament in line with section 231(2) of the *Constitution*. This means that the ICESCR will be legally binding on South Africa. See Community Law Centre “South Africa to Ratify International Socio-Economic Rights Covenant”, <http://www.communitylawcentre.org.za/news/south-africa-to-ratify-international-socio-economic-rights-covenant> (accessed on 12 December 2012). See also Pan: Children “South Africa to ratify International Socio-Economic Rights Covenant”, <http://children.pan.org.za/node/9109> (accessed on 12 December 2012). See People’s Health Movement – South Africa “ICESCR Ratification campaign”, <http://phm-sa.org/icescr-ratification-campaign/> (accessed on 29 October 2013).

10 Ssenyonjo 2009:360.

Social and Cultural Rights (ICESCR) obliges States Parties to respect the educational freedom of parents by allowing them to choose and establish private educational institutions.<sup>11</sup> Similarly, Article 11(4) of the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>12</sup> allows parents to choose schools for their children “other than those established by public authorities”, provided that these schools conform to the minimum standards approved by the state. Furthermore, Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR)<sup>13</sup> states that parents have the right to ensure the religious and moral education of their children in accordance with their religion or other beliefs.

Importantly, it is submitted that section 29(3) of the *Constitution* enhances the rights of cultural and linguistic communities envisaged in sections 30<sup>14</sup> and 31 of the *Constitution*, especially when considering the accepted principle that the rights in the Bill of Rights are inter-related and mutually supporting.<sup>15</sup> Section 31 guarantees persons belonging to a cultural, religious or linguistic community the right “to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”<sup>16</sup> Although culture and language are not expressly mentioned in section 29(3), De Waal and Currie assert that the cultural rights envisaged in sections 30 and 31 of the *Constitution* would not be possible without the right to learn and teach about those cultures.<sup>17</sup> All in all, section 29(3)

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11 Article 13(3) ICESCR.

12 It was ratified by South Africa on 7 January 2000.

13 South Africa ratified the instrument on 10 December 1998.

14 Section 30 of the *Constitution* states: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

15 Furthermore, the rights in sections 29(3) and 31 of the *Constitution* are supplemented by the *Constitution*’s protection of freedom of association in section 18, which includes the right to establish, join, dissolve, leave or participate in the activities of an association, as well as the right not to join.

16 Sections 30 and 31 of the *Constitution* are in accordance with Article 30 of the United Nations Convention on the Rights of the Child of 1989 and Article 12 of the ACRWC, which grant children of religious minorities the right to enjoy their own culture and to profess and practise their own religion in community with other members of their group. In addition, the UDHR (article 27) and the CRC (article 31) afford children the right to participate freely in cultural life. A United Nations Development Report stated: “Cultural liberty is a vital part of human development because being able to choose one’s identity – who one is – without losing the respect of others or being excluded from other choices is important in leading a full life. People want freedom to practice their religion openly, to speak their language, to celebrate their ethnicity or religious heritage without fear or ridicule or punishment or diminished opportunity. People want the freedom to participate in society without having to slip off their chosen cultural moorings.” See Human Development Report 2004, “Cultural liberty in today’s diverse world”, published for the United Nations Development Programme.

17 De Waal *et al.* 2001:484-485. In *Minority Schools in Albania, Advisory Opinion* 1935 PCIJ (Ser A/B) No 64:20, the court found that minorities wish to preserve

allows religious/cultural/linguistic groups to transmit their religion/culture/ language from generation to generation,<sup>18</sup> through the school system.<sup>19</sup> In this regard, Henning expresses that private schools:

often reflect the desire of individuals or groups to express freedom and are the intangible expression in bricks and mortar of intangible values, beliefs and attitudes that groups hold in common.<sup>20</sup>

These are, in sum, powerful reasons in favour of independent schools enjoying constitutional protection.

It is important to note that section 31(2) contains an express qualification, stating that cultural and linguistic rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights. In this regard, De Waal and Currie note that the *Constitution* must be interpreted as respecting cultural associations and practices for as long as they are in accordance with the *Constitution's* individual fundamental rights. In *Christian Education South Africa v Minister of Education* (hereafter, *Christian Education*),<sup>21</sup> the Constitutional Court commented on this qualification as follows:

Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion, cannot be used to shield practices which offend the Bill of Rights. These explicit qualifications may be seen as serving a double purpose. The first is to prevent protected associational rights of members of communities from being used to 'privatise' constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned, where section 8, which regulates the horizontal application of the Bill of Rights, might be specially relevant.<sup>22</sup>

This emphasises that, while the *Constitution* supports group rights, it places them in the context of other rights that guarantee individual rights and freedoms.<sup>23</sup>

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their "racial peculiarities, their traditions and their national characteristics" and they are entitled to establish their own schools to be able to do so.

18 See positive aspects of private schools in *Minority Schools in Albania:20*.

19 Van Wyk *et al.* 1994:581.

20 Henning 1993:21. Despite this, private schools are often criticised for being elitist and privileged schools that perpetuate discrimination. Zungu, for example, refers to private schools as "elite-producing factories". Ashley (1989:54) observes further that: "[p]rivate schools still have a white ethos, and our children, if unguided, are sure to adopt the dominant culture – western capitalistic, white, elitist."

21 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

22 *Christian Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC);par. 26.

23 De Waal *et al.* 2001:481-483. The relevance of this point is illustrated below.

Significantly, section 29(3)(a) is very careful to prohibit admission criteria for schools that are based solely on race.<sup>24</sup> This provision ensures that private schools are not utilised to continue racial segregation – which is particularly important in light of South Africa’s once racially divided education system.<sup>25</sup> Practically speaking, this means that an African learner wishing to attend a school teaching in German cannot be denied access to the school on the basis that s/he is an African. However, s/he must be willing to be instructed in the school’s medium of instruction (German). However, this specific exclusion of discrimination on the basis of race<sup>26</sup> envisages that private schools may discriminate, among others, on the basis of language, religion and culture.<sup>27</sup> In this regard, De Waal and Currie note that the specific prohibition against racial discrimination in section 29(3)(a) rests on the assumption that a *degree* of discrimination on other grounds may be necessary in order to exercise the right to establish private schools. For example, a school may wish to admit only members of a particular

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24 The rationale behind this is that apartheid resulted in the denial of equal treatment to Black people on the basis of race. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC):paras. 5, 7, the Constitutional Court stated that: [f]rom the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced.” The Court stated that: “[r]ace was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.”

25 When HF Verwoerd (quoted in Kallaway 1984:92-93) spoke on the new education system in 1954, he stated: “There is no space for him [the “Native”] in the European Community above certain forms of labour. For this reason it is of no avail for him to receive training which has its aim in the absorption of the European Community, where he cannot be absorbed. Until now he has been subjected to a school system which drew him away from his community and misled him by showing him the greener pastures of European Society where he is not allowed to graze.” Davenport and Saunders (2000:674) comment that the education policy for Blacks was “based on the assumption of an inferior potential in African minds” and as “explicitly designed to prepare blacks for an inferior place in society”. Nevertheless, as a secondary issue, Witbooi asserts that the existence of private schools indirectly contributes to class and racial inequality, despite the prohibition on discrimination against racial discrimination in section 29(3)(a). He comments as follows: “[O]nly a few blacks can afford to send their children to private schools. Private schools in South Africa are a symbol of elitism, supported by the rich parents and those companies who benefit from the skills of those who have received the education which may benefit them”. See Ashley 1989:54. Akoojee (2005:4) notes that, although class differentiation has, in many respects, replaced racial discrimination, it is still racially defined.

26 “That race and religion must be examined together, in relation to law is the central insight of Eve Darian-Smith’s recently published *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*” (Stolzenberg 2011:583-587). See discussion on the link between religion and race in Darian-Smith 2010.

27 Devenish (2005:92) states that independent schools are not obliged to treat religions equally.

gender or only pupils of a certain religious group and the discrimination may, in these circumstances, not be deemed unfair or unreasonable.<sup>28</sup>

Significantly, the right to establish private schools and the religious freedom of non-adherent learners was weighed up in the case of *Wittmann v Deutscher Schulverein, Pretoria and Others* (hereafter, *Wittmann*).<sup>29</sup> In this case, the court held that the right to establish private schools<sup>30</sup> recognised the freedom to establish “parochial educational institutions with confessional religious observances and instruction, the attendance at which may be made obligatory.”<sup>31</sup> The reasoning of the court was that “the outsider”, having being made fully aware of the religious ethos of the school, had the option not to join. In other words, associational rights entail that “the outsider” cannot be allowed to join on their own terms.<sup>32</sup> The court held that:

The right to exclusivity on the ground of culture, language or religion includes the right to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity.<sup>33</sup>

In arriving at his judgement, Van Dijkhorst J employed such a narrow definition of the term “state-aided institution”<sup>34</sup> that it meant that a private school, which was subsidised by the state to the extent of R1.5 million per

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28 De Waal *et al.* 2001:486; Devenish 2005:154.

29 *Christian Education* 1999 (1) BCLR 92 (T); 1998 SACLR LEXIS 43; 1998 (4) SA 423 (T). In this case, the applicant, a parent of a minor child who had been admitted as a pupil in a German-medium private school, sought an order declaring the compulsory attendance of religious instruction classes and school assembly/prayers to be unconstitutional, on the basis that it infringed upon freedom of religion. In addition, the applicant sought an order granting her the right to have the minor child excused from attendance of the religious instruction classes and the school assembly/prayers.

30 As per section 32(c) of the interim *Constitution* (equivalent of section 29(3) of the *Constitution*).

31 In *Wittmann v Deutscher Schulverein*:par. 90, the court stated: “Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative.”

32 In *Wittmann*:paras. 90-91, the court held that: “In respect of these educational institutions the fundamental freedom of religion of “outsiders” is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.”

33 *Wittmann*:par. 90.

34 In *Wittmann*:paras. 78-79, the court held that, in section 14(2) of the interim *Constitution*, state-aided institutions must in the context of education be read as referring to a state-aided school, a phrase which has a special meaning, namely, what was colloquially known as the model C school. The German school certainly was not such, as it was a private school. The court, therefore, held that the conditions in section 14(2) of the transitional *Constitution*, the similarly worded precursor to section 15(2), do not apply to a private school subsidised by the state to the extent of R1.5 million per year, since such a school is not a state-aided institution.

year, did not fall under the definition of a state-aided institution.<sup>35</sup> This meant that, even if the interim *Constitution* was applicable, the private school was not bound by section 14(2) of the interim *Constitution* (the equivalent of section 15(2) of the *Constitution*) and could, therefore, compel its pupils to attend religious observances.<sup>36</sup>

In this case, the court held that, when a parent agrees to submit to a private school's constitution and rules, s/he in effect waives his/her child's freedom of religion.<sup>37</sup> This decision indicated that the waiver of the freedom of religion of the child in the case of private schools is not unconstitutional in the case of private schools.<sup>38</sup> This interpretation of the right to establish private schools has implications for children's rights, education rights and freedom of religion of learners attending private schools that need to be addressed.

### 3. Protecting children's rights and freedom of religion of children in private schools

The Bill of Rights affords special protection to children in the form of children's rights in section 28 of the *Constitution*. The reference to "care" in section 28(1)(b)<sup>39</sup> acknowledges the particularly vulnerable position of children due to their lack of maturity and experience. Parental, family or alternative care assists the child to overcome this vulnerability.<sup>40</sup> In this regard, Smith notes that schools and educators have a duty of care towards all learners since they act *in loco parentis*, that is, they assume the position of a responsible parent over their learners.<sup>41</sup> In addition, section 28(1)(d) of the *Constitution* protects all children from maltreatment and degradation, including all forms of psychological harm such as intimidation, ridicule and harassment and other forms of degrading treatment.<sup>42</sup> This provision further

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35 *Wittmann*:par. 85.

36 De Waal *et al.* 2001:303.

37 In *Wittmann*:paras. 90-91, the court held that: "I hold therefore that even if the German school is a State-aided institution and organ of state the right of non-attendance in section 14(2) of the interim *Constitution* can validly be waived and that the plaintiff did just that by subjecting herself to the association's constitution and the school's regulations."

38 *Wittmann*:paras. 91-92.

39 Section 28(1)(b) of the *Constitution* states that: "Every child has the rights to family care or parental care, or to appropriate alternative care when removed from the family environment".

40 *Children's Act* 38/2005:section 18 states that: "The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right – (a) to care for the child; (b) to maintain contact with the child."

41 Smith (n601) 34; Govender 2011:16; Law and Parents "What in loco parentis means: The duty to care", <http://www.lawandparents.co.uk/what-in-loco-parentis-means-you.html> (accessed on 18 November 2010).

42 Article 27(1) of the CRC states that: "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."



supplements the child's rights to bodily and psychological integrity,<sup>43</sup> dignity,<sup>44</sup> equality<sup>45</sup> and freedom and security of the person,<sup>46</sup> enshrined in the Bill of Rights. Accordingly, there is a duty on schools (including private schools)<sup>47</sup> to protect a learner's safety,<sup>48</sup> well-being and development<sup>49</sup> so that the educational obligations of the institution can be fulfilled.

Particularly relevant is section 28(2) of the *Constitution*, which states that in *all matters* concerning the child, the best interests of the child are of paramount importance. Notably, the case of *McCall v McCall* recognised the "child's preference" as a factor in determining the best interests of the child.<sup>50</sup> Section 10 of the *Children's Act* 38 of 2005 encompasses this principle by providing for the right of participation by the child (of sufficient maturity) in any matter concerning that child. It requires further that the views expressed by the child must be given due weight.<sup>51</sup>

Significantly, section 15 of the *Constitution* guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion. The content of the right includes:

- (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice...<sup>52</sup>

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43 Section 12(2) of the *Constitution*.

44 Section 10 of the *Constitution*.

45 Section 9 of the *Constitution*.

46 Section 12 of the Bill of Rights states that:

"(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right –

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent."

47 Section 8(2) of the *Constitution*.

48 In addition, section 24 of the *Constitution* provides that everyone has the right to an environment that is not detrimental to their health or well-being.

49 *Children's Act* 38/2005:section 32 states that: "(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that person's care – (a) safeguard the child's health, well-being and development."

50 *McCall v McCall* 1994 3 SA 201 (C):paras. 204 1/J-205G.

51 *Children's Act* 38/2005:section 10.

52 *Prince v President of the Law Society of the Cape* 2002 (3) BCLR 231 (CC):par. 38.

Furthermore, the Constitutional Court in *Christian Education* held that freedom of religion includes the right of people to be “different”.<sup>53</sup> This entails being who they are without being compelled to adopt the religious and cultural norms of others.<sup>54</sup> Importantly, the application of section 15 of the *Constitution* means that an adherent to a religion has the right to express him-/herself regarding that religion and to practise that religion.<sup>55</sup> This is supplemented by section 16 of the *Constitution*, which protects the right to freedom of expression, including religious and cultural expressions in the form of dress, adornments and hairstyles.<sup>56</sup>

In addition, section 15(2) of the *Constitution* allows for religious observances to be conducted at “state or state-aided institutions”, provided that they are conducted on an equitable basis and attendance is voluntary. Importantly, however, the *Constitution* recognises that freedom of religion is not absolute. The right to manifest religious beliefs may be limited if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>57</sup> This means that a child’s right to manifest religious beliefs in schools may be limited in order to protect the legitimate goals of the school or the rights of other learners within the school, if such limitation complies with the requirements of section 36 of the *Constitution*. This is in accordance with the CRC which recognises that manifestations of religion may be limited in order to “protect public safety, order, health or morals, or the fundamental rights” of others.<sup>58</sup>

In terms of international law, children also acquire religious freedom in terms of Article 14(1) of the United Nations Convention on the Rights of the Child (CRC)<sup>59</sup> and Article 9 of the ACRWC.<sup>60</sup> In these children’s rights

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53 *Christian Education*:par. 24; Kroeze “God’s Kingdom in Law’s Republic: Religious Freedom in South African Constitutional Jurisprudence” 2003 19(3) *SAJHR* 469 478; In *Prince*, the minority came to the conclusion that there was a duty on the courts to guarantee the Rastafari a reasonable means within which to exercise their religious rights. The minority made the decision to safeguard the “right to be different”. See *Prince*:paras. 163, 170.

54 *Christian Education*:par. 24.

55 Burns 2009:103-104.

56 See GN 776 *Government Gazette* 1998.

57 Section 36(1) of the *Constitution* states that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”. These factors include – “(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”. Section 36(2) states that: “Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

58 Article 14(3) CRC.

59 Article 14(1) of the CRC states: “States Parties shall respect the right of the child to freedom of thought, conscience and religion.”

60 Article 9(1) of the ACRWC states: “Every child shall have the right to freedom of thought, conscience and religion.”

instruments, children are expressly mentioned as the holders of rights. Although Article 14(2) of the CRC protects the right of parents to direct their child in the exercise of his/her rights (by virtue of the child's age and immaturity), it is recognised that this must be done "in a manner consistent with the evolving capacities of the child". This implies that, as the child evolves and matures, the direction given by parents may need to diminish.

In addition, the UDHR,<sup>61</sup> the ICERD<sup>62</sup>, the ICCPR<sup>63</sup> and the Declaration<sup>64</sup> guarantee everyone the right to freedom of thought, conscience and religion, which includes the rights to manifest such beliefs whether in public or in private. Importantly, Article 18(2) of the ICCPR recognises that freedom of religion entails the absence of any coercion, which would impair a person's freedom to have or to adopt a religion or belief of his/her choice. This provision coincides with the Constitutional Court's definition of freedom of religion, which entails the absence of coercion or constraint; meaning that freedom of religion may be impaired when people are forced to act or refrain from acting in a manner contrary to their religious beliefs.<sup>65</sup> The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration) also protects the right of the child to be brought up in the "spirit of understanding, tolerance, friendship among peoples", and "respect for freedom of religion or belief of others."<sup>66</sup>

Significantly, the Constitutional Court recognised the integral link between freedom of religion and human dignity in the case of *Prince v President of the Law Society of the Cape* (hereafter, *Prince*)<sup>67</sup> and *MEC for Education: KwaZulu-Natal, Thulani Cele: School Liason Officer v Navaneethum Pillay* (hereafter, *Pillay*).<sup>68</sup> This link is also emphasised in Article 3 of the Declaration, which recognises that discrimination on the basis of religion as an offence against human dignity.

Importantly, human dignity (along with equality and freedom) is included as a founding value upon which the *Constitution* is based.<sup>69</sup> Constitutional values serve as guiding principles for the legislature, executive and judiciary,

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61 Article 18 UDHR.

62 Article 5(d)(vii) ICERD.

63 Article 18(1) ICCPR.

64 Article 1(1) of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981.

65 See *S v Lawrence* 1997 4 SA 1176 (CC); *Prince* and *Christian Education*.

66 Article 5(3) Declaration.

67 In *Prince*:par. 51, Ngcobo J stated: "There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity. It strikes at the very core of their human dignity. It says that their religion is not worthy of protection. The impact of the limitation is profound indeed."

68 In *MEC for Education v Pillay*:par. 62, Langa CJ stated: "[R]eligious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality."

69 Section 1 of the *Constitution*.

and inform the understanding of all the rights in the Bill of Rights. Aside from being reflected as a value in the *Constitution*, section 10 of the *Constitution* provides that everyone has the right to have his/her dignity respected and protected. The extent of the state's concern for the protection of a child's right to dignity was emphasised in the case of *Christian Education*. As part of the proportionality analysis conducted in this case, the court found that the purpose of the blanket ban on corporal punishment was to protect learners from physical and emotional abuse. In turn, its symbolic effect would be to promote respect for the dignity and physical and emotional integrity of all children. This case emphasised that the constitutional duty of the state to protect the dignity and well-being of all children outweighed the freedom of religion of (Christian private) schools.

In addition, inevitably intertwined with freedom of religion is the right not to be unfairly discriminated against on the basis of religion. In this regard, section 9 prohibits unfair discrimination by the state<sup>70</sup> and any person<sup>71</sup> (including a private school), whether directly or indirectly, on numerous grounds, including religion.<sup>72</sup> This means that schools must ensure that learners are not disadvantaged due to certain characteristics that make them different from other learners. The reference to *unfair* discrimination signifies that, in certain circumstances, discrimination may be fair. This would be the case where the discrimination serves a legitimate societal goal.

As alluded to earlier, the specific exclusion of discrimination on the basis of race in section 29(3) implies that a measure of discrimination on the basis of religion and culture may not be unfair.<sup>73</sup> The discussion below questions whether a waiver<sup>74</sup> of the freedom of religion of a non-adherent child is an appropriate measure. Furthermore, the right of non-discrimination is reiterated in section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter, *Equality Act*).<sup>75</sup> Significantly, the *Equality Act*, which applies to both the state and private persons,<sup>76</sup> requires that the existence and extent of reasonable accommodation of diversity be considered as a factor in the determination of unfair discrimination.<sup>77</sup>

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70 Section 9(3) of the *Constitution*.

71 Section 9(4) of the *Constitution*.

72 Article 7 of the UDHR and Article 26 of the ICCPR recognise the right of all people to equal protection of the law, which requires a prohibition of discrimination on the basis of religion. In addition, Article 4 of the Declaration aims to prevent and eliminate discrimination on the basis of religion.

73 De Waal *et al.* 2001:486; Devenish 2005:154.

74 This entails an agreement not to exercise a right in future.

75 Religion is mentioned as a prohibited ground in *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000*:section 1(xxii)(a).

76 *Equality Act 4/2000*:section 5.

77 *Equality Act 4/2000*:section 14(3)(j)(ii); Article 4 of the South African Charter of Religious Rights and Freedoms of 2009 (as amended) states: "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

The most prominent case on reasonable accommodation of religious practices within schools is the case of *Pillay*. The court in *Pillay* held that a society, which values dignity, equality, and freedom, must require people to take positive action to accommodate diversity.<sup>78</sup> What this means in relation to the topic at hand is that schools<sup>79</sup> are required to take positive measures and perhaps even incur added hardship or expense in order to allow all learners within its sphere to participate and enjoy all their rights equally. This ensures that learners are not marginalised for not conforming to the norm/majoritarian belief or practice.<sup>80</sup> Essentially, the principle of reasonable accommodation is appropriate in cases that involve a rule that is neutral on the face of it and is intended to serve a legitimate purpose, but still has a marginalising effect on certain people.

Lastly, children are conferred educational rights. Section 29 of the *Constitution* guarantees the right to “basic education” and “further education”.<sup>81</sup> The right to education is acknowledged in the UDHR,<sup>82</sup> the CRC<sup>83</sup> and the ICESCR<sup>84</sup>. In addition, Article 28(1) of the CRC recognises the right of the child to education, “with a view to achieving this right progressively and on the basis of equal opportunity.” Importantly, the Declaration,<sup>85</sup> the CRC<sup>86</sup> and the ACRWC<sup>87</sup> highlight the need for education to promote understanding, tolerance and friendship among all religious groups. This is purported to be necessary in order to prepare children for a “responsible life in a free society.”<sup>88</sup>

#### 4. Problems with the current position

The *Wittmann* interpretation denotes that the right to maintain private institutions based on religion, culture or language includes the right to require conformity or to exclude non-adherents from those institutions. The freedom of religion of the “outsider” is limited to his/her right not to join. In other words, “outsiders” cannot join on their own terms and once they have joined cannot impose their own terms.<sup>89</sup> In effect, this means

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of religious and other sacred days of rest, festivals and ceremonies. This is subject to the duty of reasonable accommodation.”

78 *Pillay*:par. 75.

79 This article argues that this includes private schools.

80 *Pillay*:par. 72.

81 Section 29(1) of the *Constitution* states: “Everyone has the right- (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

82 Article 26(1) UDHR.

83 Article 28(1) CRC.

84 Article 13(1) ICESCR.

85 Article 5(3) Declaration.

86 Article 29(1) CRC.

87 Article 11(2)(d) ACRWC.

88 *Du Plessis and Another v De Klerk* 1996 (3) SA 850 (CC).

89 *Wittmann*:par. 91.

that private schools may legitimately exclude non-adherents who refuse to conform to the religious character of the school and need not treat all religions equitably.<sup>90</sup> The conflict lies in the fact that permitting the establishment of a private school with a particular religious ethos defends the right of that community (or religious group) to continue to perpetuate its way of life (which is a positive for that community); however, it does not provide for equal opportunity for those who are not part of that community (or religious persuasion).<sup>91</sup>

In practice, the problem with the current position is that non-adherent children can be compelled to attend religious instruction and religious observances contrary to their faith and can be restricted from all forms of manifesting their own faith, with no possibility of accommodation by the school. This situation arguably impacts upon not only the freedom of religion of the children concerned, but also their equality rights, children's rights, dignity and best interests. In addition, it must be questioned whether this interpretation is in accordance with the constitutional values. As a result, the core issue to be determined is the constitutionality of the deemed waiver of the freedom of religion of a child in order for that child to attend a private school.

As mentioned earlier, the *Wittmann* decision was made in respect of the interim *Constitution*,<sup>92</sup> which was held to have vertical effect only. This means that the interim *Constitution* (particularly section 14(2)) was not applicable to the relationship between the plaintiff and the private school. The situation under the interim *Constitution* was as follows: since private schools were not bound by section 14 of the *Constitution*, gaining admission into private school entailed an automatic waiver of the freedom of religion of the child (that is, where the private school was not religion-neutral). There was no constitutional duty on the private school to recognise the freedom of religion of a non-adherent learner, with the result that the child could be compelled to attend religious instruction and religious observances.

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90 De Waal *et al.* 2001:308. In this regard, Devenish (2005:95) comments that, although provision is made for the horizontal application of the Bill of Rights, it is uncertain to which extent certain rights apply between private persons *inter se* and legal entities. He raises the question of whether it should be permissible for a completely private religious school to refuse admission to persons of other faiths or atheists or agnostics. He concludes that, ultimately, this is a question for the Constitutional Court to decide. On 30 July 2012, the Alberton Magistrates' Court, sitting as an Equality Court, upheld the rights of a lesbian couple who had lodged a complaint that they were not allowed to publicly celebrate their civil union at Sha-Mani, a privately owned functions venue and conference centre in Alberton. The outcome of this case emphasised that the *Constitution* prohibits unfair discrimination not only by the state, but also by private organisations, such as Sha-Mani. See University of Pretoria, Faculty of law "Equality Court affirms lesbian couple's rights" (Press Release) 31 July 2012.

91 Adhar & Leigh 2005:257.

92 Since there has not been a Constitutional Court decision on this issue, the *Wittmann* interpretation stands as the highest authority on the issue of the waiver of freedom of religion in private schools; as a result, it is relevant to the discussion of the current legal problem.

By contrast, section 8(2) of the *Constitution* provides for the horizontal effect of the Bill of Rights, meaning that the provisions of the Bill of Rights apply to the conduct of private persons (to the extent that they are applicable). Private schools, therefore, cannot act outside the bounds of the Bill of Rights. Under the *Constitution*, the wording of section 15(2)<sup>93</sup> indicates that it is applicable only to the “state or state-aided institutions”;<sup>94</sup> however, section 15(1)<sup>95</sup> applies to both state and private institutions. This means that private schools that do not fall under the definition of “state-aided institutions” are not bound by the limitations placed on the conducting of religious observances by section 15(2), but are bound by section 15(1); private schools that are defined as “state-aided institutions” are bound by both sections 15(1) and 15(2). Section 15(1) impliedly protects the right of the child to non-attendance of religious instruction.

Nevertheless, since there has not been a Constitutional Court decision on this issue, the *Wittmann* interpretation stands as the highest authority on the issue of the waiver of freedom of religion in private schools.

Practically speaking, private schools can circumvent their obligations in terms of freedom of religion by setting up school rules, which require a waiver<sup>96</sup> of the religious freedom of the non-adherent child upon admission

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93 Section 15(2) of the *Constitution* states: “Religious observances may be conducted at state or state-aided institutions, provided that – (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.”

94 According to De Waal and Currie (2001:303), a state-aided institution is neither public (as in state-controlled) nor private; rather, it lies somewhere in between. They define state-aided institution as “not public, but funded by the state to an appreciable extent and subject to extensive state regulation.” In terms of the *Schools Act 84/1996*:section 48(2), “The Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school.” The term “state-aided institution” includes more than schools; it includes, for example, other educational institutions; state hospitals and state prisons. Van der Schyff (2001:66) observes that the institution’s connection to the state is more relevant than the function of the institution itself. As discussed earlier, in *Wittmann*:paras. 78-79, the court held that a private school, subsidised by the state to the extent of R1.5 million per year, is not a state-aided institution. Van der Schyff (2001:66) argues that any amount of state-aid should suffice for the state to have a right to intrude upon the associational or religious rights of the institution, to a certain extent. According to Du Plessis (2001:439-459), the narrow definition of “state-aided institution” utilised in *Wittmann* overlooks the danger of this amount of financial aid provided by the state being used to enforce religious beliefs and practices upon people against their will.

95 Section 15(1) of the *Constitution* states: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

96 In this regard, Woolman (2008:10-11) argues that not all parties to a contract are in a position to bargain or exercise fully autonomous choices: “the traditional conception of the common law relies upon the *fiction* that our private law provides a neutral backdrop for agreements, contractual and otherwise, between ‘fully autonomous individuals’. This traditional view of the common law is, in turn, wedded to the idea of the sanctity of contract.” “We also share

into the school. The problem with this approach is not that private schools expressly exclude children of other faiths, but rather that they may require conformity with the religious ethos of the school by all learners who attend the school. From the private school's perspective, the waiver of the religious freedom of the non-adherent children assures them that the chosen religious ethos of the school will not be jeopardised or compromised by the presence of individuals adhering to other religions or no religion at all.<sup>97</sup> This is an important consideration for the school. However, it has severe implications for the child, because it means that the school can compel the child to attend religious observances and religious instruction and restrict the child from manifesting his/her own religious beliefs or non-belief within the school environment.

Unlike the situation under the interim *Constitution*, the waiver of freedom of religion is not automatic upon admission. Since private schools are bound to the *Constitution*, the waiver must be express. The word "require" is used, because the private school is in the powerful position to set the rules of admission (namely, that the child who attends the school, must attend religious observance and religious instruction of the chosen faith of the school). The parent is given the "choice" to submit to these rules – which would entail waiving their child's religious freedom. The parent makes the "choice" to waive, knowing that if they do not, the possibility exists that the private school will refuse admission of their child into the school. The school rules determine that a waiver would be necessary. Despite the requirement that a waiver should be exercised freely and with intention to waive, one can argue that, when two contracting parties have unequal bargaining power, the aspect of voluntariness must be questioned. Ultimately, the private school holds the child's educational fate in its hands as the more powerful party to the contract.

If a waiver of freedom of religion is in place, the situation for non-adherent children under the *Constitution* is, in effect, the same as it was under the interim *Constitution* – they may have severely diminished religious freedom within the private school.<sup>98</sup> The major concern is that private schools can operate with complete disregard for the freedom of religion of non-adherent children. It must be pointed out, however, that some

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the belief that the Supreme Court of Appeal's classically liberal approach to the law of contract reinforces 'the poverty and powerlessness' of many South Africans ... through the structured silence of [contractual] disputes that never make it to court." See also *S v Pienaar* 2000 (7) BCLR 800 (NC); par. 6; *Ex parte Sussens* 1941 TPD 15:20. *Schools Act* 84/1996:section 5(3) states: "No learner may be refused admission to a *public* school on the grounds that his or her parent – (b) does not subscribe to the mission statement of the school." The same protection is not afforded to children in private schools.

97 The existence of other methods to preserve the religious ethos of private schools is discussed below.

98 As explained earlier, the interim *Constitution* had vertical effect only. This means that the interim *Constitution* (particularly section 14(2)) was not applicable to the relationship between the plaintiff and the private school.



private schools choose to admit and reasonably accommodate non-adherent children without requiring conformity from them.<sup>99</sup> This is addressed below.

As mentioned earlier, there has not been a Constitutional Court decision on the constitutionality of the waiver of the religious freedom of a child in order to attend a private school; nor is there a constitutional provision dealing with the waiver of rights. Therefore, there is no definitive answer on whether it is constitutionally permissible for a person to waive a fundamental human right and, if so, under which circumstances it would be permitted.<sup>100</sup> What is more, the waiver in this case is more complicated, because the non-adherent child is the holder of the right to freedom of religion;<sup>101</sup> yet the parent waives the right on behalf of the child.

This means that the waiver of a child's freedom of religion may result in a clash between the child's individual right to freedom of religion and the parent's authority over the child's educational and religious upbringing.<sup>102</sup>

Importantly, international human rights instruments and the *Constitution* recognise children as the holders of their own specific children's rights and religious rights – aside from the rights afforded to everyone.<sup>103</sup> Both international law and domestic law emphasise the importance of the child's voice and child participation in matters that affect the child's rights<sup>104</sup> – with the best interests of the child being the guiding principle.<sup>105</sup> The case of *Pillay* emphasised the importance of hearing from the person whose religious/cultural rights are at issue – that being the child concerned.<sup>106</sup> It can, therefore, be argued that, although children cannot be completely autonomous by virtue of their inexperience and vulnerability, once they are sufficiently mature, they have the right to express themselves in accordance with their own religion or beliefs.<sup>107</sup> A child (of sufficient maturity) may wish to assert his/her freedom of religion or be exempt from religious observances/religious instruction and may find the waiver to be a violation of his/her freedom of religion – which s/he did not choose to waive.<sup>108</sup>

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99 This is discussed below.

100 Of course, it would be somewhat paternalistic to prevent people, including children, from consenting to treatment that would otherwise be in violation of their fundamental rights. In *Knox D'Arcy Ltd v Shaw* 1996 (2) SA 651 (W), the Court held that “the Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is violated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage...” (at 660B-F).

101 Article 14(1) CRC; Article 9 ACRWC; Section 15 of the *Constitution*. In addition, Article 28(1) of the CRC refers to the child as the holder of the right to education, without reference to the rights of parents.

102 Article 26(3) UDHR; Article 18(4) ICCPR.

103 Section 28 of the *Constitution*; *Children's Act* 38/2005, the CRC and the ACRWC.

104 Article 12 CRC; Article 4 ACRWC; *Children's Act* 38/2005:section 10.

105 Article 5(4) Declaration; section 28(2) of the *Constitution*.

106 *Pillay*:par. 56.

107 See *Kotze v Kotze* 2003 (3) SA 628 (T).

108 One could argue that nothing prevents the learner, whose freedom of religion has been validly waived in one school, from going to another school (public or

On the other hand, although parents are not expressly given the constitutional right of parental authority over their children, the state often relies on the choices/decisions of parents in order to fulfil its constitutional obligations towards children.<sup>109</sup> The role of the parent in matters pertaining to the education of the child is emphasised in international law.<sup>110</sup> Although parents generally direct the education of their children,<sup>111</sup> it is arguable whether this would include the decision on whether or not to waive the child's freedom of religion in order to acquire access into a particular private school. It must be questioned, if waivers are constitutionally permissible, whether one person may waive a right on behalf of another.

Importantly, although the contract law indicates that a right (as conferred by a contract) may be waived by an agent on behalf of a principal, waiver by an agent on behalf of a principal is only possible if the principal has contractually capacity (which a child does not).<sup>112</sup> One could otherwise have argued that the parent is the agent of the child for purposes of educational decisions relating to the child.<sup>113</sup> After all, the parent is allowed to choose

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private) – one which permits his/her religious expression. This argument was raised in *Pillay*, but rejected by the Constitutional Court. The court found that requiring the learner to change schools would be inconsistent with the values of the *Constitution* in that particular case. Langa CJ stated: “The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation.” The court made it clear that the availability of another school may be a relevant consideration in searching for a reasonable accommodation in certain cases, but not in all cases. *Pillay*:par. 107.

109 De Waal *et al.* 2001:457.

110 Article 18(4) ICCPR; Article 5(2) Declaration; Articles 14(2), 3(2) and 5 CRC.

111 *Christian Education*:par. 15.

112 In *Pretorius v Greyling* 1947 1 SA 171 (W): “if in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as the principal's legal rights and intended to waive those rights, and it must also be proved that he was authorised to waive his principal's rights.” See Christie 2001:514.

113 Parents have the responsibility of making decisions on behalf of children until such time as the child is of a certain age or is sufficiently mature to do so themselves. For example, parents (or guardians) are given the authority to conclude juristic acts on behalf of minor children, such as contracting on their behalf or assisting them with contracts. In terms of the common law, minors under the age of seven have no capacity to conclude contracts. The law confers upon their parent or guardian the right to conclude contracts on their behalf. Whereas minors between the ages of seven and eighteen have limited capacity, they must be assisted by or obtain consent from their parent or guardian. See Nagel 2006:66-67. Some authors refer to this authority as an implied “agency” between the parent and the child. See Havenga *et al.* 2010:301. Furthermore, *Children's Act* 38/2005:section 18(3)(b) states that: “a parent or other person who acts as guardian of a child must assist or represent the child in administrative, contractual and other legal matters.”

the type of education the child should receive (public or private);<sup>114</sup> the parent selects a school based on various factors; the parent agrees to submit to the school's rules and regulations on behalf of the child, and the parent is entitled to make decisions about the religious or moral education of the child in accordance with his/her wishes and beliefs.<sup>115</sup> However, what the contract law makes clear is that the services of an agent must be carried out in accordance with the law, morality and public policy;<sup>116</sup> if not, no action arises out of it.<sup>117</sup> In any event, contract law indicates that the courts will not enforce any arrangement (including a waiver) by a parent that is detrimental to the interests of the child<sup>118</sup> – on the basis that it is contrary to public policy.<sup>119</sup>

This raises the important point that, even in cases where waivers are legally permissible (as with contractual rights), they may be unenforceable for being contrary to public policy.<sup>120</sup> In this regard, public policy amounts to the values that South African society holds “most dear”.<sup>121</sup> What is contrary to public policy is reflected in the values and provisions of the *Constitution*. It stands to reason that any arrangement that is contrary to the values and provisions of the *Constitution* is contrary to public policy and, therefore, unenforceable.<sup>122</sup> The case law indicates, however, that this principle must be exercised cautiously, only in clear cases where the harm

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114 Article 26(3) UDHR; Article 13(3) ICECSR; Article 5(2) Declaration.

115 Article 18(4) ICCPR.

116 Grotius:3.1.12.3; Grotius:3 1 42; Voet:2 14 16.

117 Kerr 2006:54-55.

118 With regards to the agency of a parent in respect of a child, the contract law emphasises that a parent must “proceed in this matter with particular caution” in order to ensure that the minor is not prejudiced by actions taken on his/her behalf. See Grotius (translated), quoted in Visser *et al.* 1997:23. Ultimately, the High Court, as upper guardian of all minors, has the power to protect the interests of the minor child, by replacing any consent given by a parent with its own. See Christie 2001:267. It is for this reason, for example, that the contract law would render unenforceable a contract in terms of which the vital interests of a minor are traded for money by a parent and that a guardian is forbidden in law to purchase a ward's property. See example in Pothier 1907:par. 43, quoted in Kerr 2006:54-55. The relationship a child has with his/her parents is a relationship of responsibility, where the parental rights and duties exist to the *benefit* of the child. See Bekink 2002:10.

119 Van der Merwe *et al.* (2003:177) observe that public policy relates to the goals of society on an abstract level. The learned scholar Aquilius (1941:337-346) defines a contract against public policy as “one stipulating performance which is not *per se* illegal or immoral but which the courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community.” It is submitted that since public policy is reflected in the values and provisions of the *Constitution* (see note 132 below), it would include protecting the best interests of children as per section 28(2) of the *Constitution*.

120 Christie 2001:210, 398-399.

121 *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC):par. 28.

122 *Barkhuizen v Napier*:par. 29.

to the public is “substantial and incontestable”.<sup>123</sup> The question is: if one were to extract this principle and apply it to the issue of the waiver of freedom of religion in private schools, would the enforcement of a waiver be in accordance with the values that South African society reveres? In order to establish that, one must first examine the dangers that the enforcement of such a waiver presents to society.

The societal harm of sectarian private schools that do not accommodate diversity is that they prevent children from different religious backgrounds from sharing their common experiences, which only increases divisiveness within society.<sup>124</sup> It results in the creation of exclusive groups of young children who might only engage with children who are “different” to them on a very limited basis. Levinson points out that, in order to tolerate or respect others, one needs to interact with them (in the sense of observing behaviour and engaging with persons from other backgrounds) in meaningful ways, particularly at a young age before prejudices become hardened.<sup>125</sup> This religious divisiveness is contrary to the objectives of education in terms of Article 29(1) of the CRC, Article 11(2)(d) of the ACRWC, and Article 5(3) of the Declaration, which emphasise the need for education to promote “understanding, tolerance and friendship” among all religious groups. It also runs contrary to the state’s goals of nation-building and celebrating diversity through education.<sup>126</sup> After all, the Preamble of the *Constitution* states that “South Africa belongs to all who live in it, united in our diversity”. Correspondingly, the court in *Pillay* observed that there is a “need for solidarity between different communities in our society” and the *Constitution* “does not envisage a society of atomised communities circling in the shared space that is our country, but a society that is unified in its diversity.”<sup>127</sup>

Furthermore, due regard must be had for the impact of waivers of this nature on the children concerned. Freedom of religion is a freedom that is inherently intertwined with each person’s identity and dignity.<sup>128</sup> It can be argued that the waiver of the freedom of religion of a child has the potential to impair the fundamental human dignity of non-adherent learners. Ultimately, the child whose freedom of religion has been waived

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123 *Sasfin (Pty) Ltd v Beukes* (149/87) [1988] ZASCA 94; [1989] 1 All SA 347 (A) (19 September 1988); par. 12; *Fender v St John-Mildmay* (1938) AC 1:12.

124 SAHRC “The exclusionary policies of voluntary associations: Constitutional considerations”:10.

125 Levinson 2003:104. Bilchitz (2012:296-298) states: “Furthermore, unfair discrimination in the private sphere – particularly in a society so scarred by the effects of discrimination in the past – easily spills over into the public realm.”

126 *Pillay*: par. 107; *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC): par. 60. The goal of nation-building and celebrating diversity is mentioned in the *National Policy on Religion and Education* 2003: par. 10; The Preamble of the *Language in Education Policy* in terms of the *National Education Policy Act 27/1996*: section 3(4)(m), Government Notice (No. 383, Vol. 17797) on language policy in (school) education of 14 July 1997, states that cultural diversity is a national asset.

127 *Pillay*: par. 155.

128 *Christian Education*: par. 36.

finds him-/herself being compelled to attend religious instruction/religious observances contrary to his/her beliefs and restricted in terms of manifesting his/her own beliefs, in order to comply with school rules – a situation one could deem a “Hobson’s choice”.<sup>129</sup> In the case of *Christian Education*, the applicant argued that parents have a divinely imposed responsibility for the training and bringing up of their children.<sup>130</sup> However, the court held that parental consent does not override the state’s responsibility to protect the safety and inherent dignity of all children.<sup>131</sup>

Importantly, section 28(2) of the *Constitution* and numerous international human rights instruments<sup>132</sup> emphasise that, in all matters pertaining to children, the best interests of the child must be the paramount concern. This includes upholding the best interests of all children within private schools. Compelling a child to participate in religious observances and to receive sectarian religious instruction in a faith that is not his/hers cannot be in the child’s best interests. Although private schools may have religious and associational rights that need protection, this does not absolve the state from its duty to protect the best interests and well-being of the non-adherent children within these schools. Of crucial importance, the Constitutional Court in *Pillay* did not enforce the contractual undertaking (waiver) by a parent that the child would abide by school rules which required that the child would avoid certain forms of religious expression in school. The rules were found to be discriminatory towards the child on the basis of religion and culture. The court recognised that upholding such a contractual undertaking would give rise to unjust results for the child. Contrary to *Wittmann*, the court would not allow a learner child to be disadvantaged or discriminated against as a result of an agreement between the parent and the school.

Another important consideration is that parents may have legitimate, well-founded reasons for having selected a particular private school that, they believe, serves the best interests of their child. For example, there may be a limited choice of schools in small communities; the chosen school may be a historically privileged school with better facilities than other schools or the school may offer particular subjects or extramural activities that other schools do not. This means that children of certain faiths have opportunities to attend better quality schools than others – without having to forgo their religion or other beliefs. One can argue that it is in the child’s best educational interests to be allowed to benefit from a private school without the school requiring a waiver of their religious freedom. It is submitted that non-adherent children should be given the

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129 In *Pillay*:par. 62, Langa J states that: “The traditional basis for invalidating laws that prohibit the exercise of an obligatory religious practice is that it confronts the adherents with a Hobson’s choice between observance of their faith and adherence to the law.” This was also mentioned in the case of *Prince*:par. 44, wherein Ngcobo J stated: “They are forced to choose between following their religion or complying with the law.”

130 *Christian Education*:par. 5.

131 *Christian Education*:paras. 49-50.

132 See Article 3 CRC; Article 4 ACRWC; Article 5 Declaration.

equal opportunity to attend the best school that their parents can afford as adherent learners. The child may well be a suitable candidate for admission in many ways – other than the fact that they do not ascribe to the chosen religion in the school. It appears, in any event, to be clear that, in the absence of a valid waiver to the right to freedom of religion, pupils who attend private schools should be accommodated by these schools, where an exemption would not prejudice the religious ethos of the school.

Consequently, it is submitted that the current approach is contrary to public policy for not being in accordance with the dignity, equality and best interests of schoolchildren. In addition, it undermines the state's goals of nation-building and celebrating diversity and, therefore, presents a substantial and incontestable danger to the interests of society. As a result, the issue of the waivers of freedom of religion in private schools must be addressed. Even if waivers of freedom of religion are found to be constitutional in certain circumstances,<sup>133</sup> it is submitted that, in this particular context, they should not be enforceable by the law. It is submitted that a definitive answer is required from the Constitutional Court on the constitutionality of the waiver of the freedom of religion of non-adherent learners in private schools. An interpretation of this issue under the final *Constitution* may well lead to a different conclusion than in *Wittmann*.

The *Wittmann* interpretation of section 29(3) presumes that the waiver of the freedom of religion of non-adherents is essential to ensuring the practice

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133 For example, the case of *Garden Cities Inc Association v Northpine Islamic Society* 1999 (2) SA 268 (C). In this case, the respondent had bought land on which to build a mosque, but had agreed not to use sound amplification equipment for the call to prayer. It acted to the contrary and was interdicted by the High Court. The Society argued that it had never intended to abide by the clause in the contract precluding the amplification of sound, given that this was a fundamental tenet of the Islamic faith and because the *Constitution* did not permit the waiver of a fundamental aspect of one's faith. Conradie J assumed in the respondent's favour that the Constitution operated in such a way as to protect an aggrieved contracting party at the time the contract was to be enforced (since the agreement in this case was concluded long before the *Constitution* came into operation). He held that the prohibition in this case did no more than consensually regulate a particular ritual practised at a particular place in the interests of other members of the community (at 271). The Court held further that, since the amplification of the call to prayer was not a fundamental tenet of Islam, the agreement did not infringe upon the respondent's religious freedom and could therefore be upheld. Conradie J posited two reasons for deciding that the *Constitution* might permit the waiver or abandonment of a fundamental precept of one's faith: first, because the other contracting party would not necessarily know whether the right purportedly relinquished was or was not a fundamental one and, secondly, that the essence of individual freedom of religion is the right to discard established dogma and to believe in something new or different or nothing at all. De Waal and Currie (2001:44) assert that it is not for the Court to decide what constitutes a "fundamental precept" of the Islamic faith. Nevertheless, they concede that by waiving the right to practise religion in that particular way, the respondent had made the decision of his own accord. They note that this was a clear case of a constitutionally legitimate waiver.

and preservation of the religion ethos of the private school. De Waal and Currie agree with this presumption and assert that section 29(3) would mean very little if such a waiver is not recognised as constitutionally valid.<sup>134</sup> However, in a case where two fundamental rights (which are crucial to democracy) are in conflict, the courts have the task of balancing the two.<sup>135</sup> In general, when this occurs, the provisions of the *Constitution* are interpreted in a way that they do not conflict with one another.<sup>136</sup> Furthermore, when interpreting a right, courts are required to promote the values that “underlie an open and democratic society, based on human dignity, equality and freedom.”<sup>137</sup> This is analogous to ascertaining the legal convictions or *boni mores* of the community – which would require protecting the dignity and best interests of children.<sup>138</sup> Even if the majority of the community agrees with the school’s ethos, the protection of the dignity and best interests of all children should prevail.

Significantly, section 31(2) ensures that the rights of members of religious and cultural communities cannot be used to shield practices that are contrary to the Bill of Rights, more particularly the best interests of the child and the right to equality. A similar argument could be made with respect to the right contained in section 29(3). This article argues that the associational rights of religious private schools cannot be preserved without considering the impact of this right on the other fundamental rights of the children concerned.

The authors submit that it is possible for sections 29(3) and 15 of the *Constitution* to be interpreted in a manner in which the associational rights of the school and the freedom of religion of non-adherent learners can co-exist in harmony. There is proof of this in the fact that some private schools accept and reasonably accommodate non-adherent children, while simultaneously maintaining their religious ethos and continuing to conduct religious observances with the other adherent learners. In these schools, the associational rights of the school survive the presence of non-adherent children who still hold their religious freedom – subject to reasonable and justifiable limitations in terms of section 36 of the *Constitution*. This entails that freedom of religion may have to be limited in order to give effect to section 29(3), but not waived.

## 5. Recommendations and conclusion

In light of the above, it is recommended that reasonable accommodation (as per section 14(3)(l)(ii) of the *Equality Act*) in private schools be enforced in order to protect the freedom of religion of the non-adherent child, while

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134 De Waal *et al.* 2001:44.

135 Section 36(2) of the *Constitution*.

136 Rautenbach & Malherbe 2009:357; De Waal *et al.* 2001:163.

137 Section 39(1) of the *Constitution*.

138 De Waal *et al.* 2001:140.

simultaneously respecting the religious/associational rights of the school.<sup>139</sup> Reasonable accommodation offers an alternative to enforcing conformity via a waiver of the freedom of religion of the child. It is submitted that private schools should assure a minimum level of tolerance, pluralism<sup>140</sup> and non-discrimination; this can be achieved through reasonable accommodation and would be in accordance with sections 9, 15 and 29(3) of the *Constitution* and Article 29(1) of the CRC.

The reasonable accommodation principle requires that a school take positive action to accommodate diversity<sup>141</sup> where such accommodation does not impose too great a burden on the school. It requires schools to accept the diversity in children who are “different”, rather than attempting to reject it. The positive action may be as simple as granting an exemption from certain aspects of the code of conduct on the basis of religion.<sup>142</sup> It is argued that, in the absence of a valid waiver of the right to freedom of religion, learners who attend private schools should be reasonably accommodated by these schools, where an exemption would not prejudice the religious ethos of the school. This would entail that the private school does not compel the admitted learner to attend school assemblies, sing hymns, participate in a nativity play or attend religious instruction, for example, but rather allows the child to engage in constructive activities when religious observances or religious instruction is being carried out. The rights of adherent learners are not encroached upon, since they can continue to engage in the required religious activities and religious instruction of the school, despite the presence of non-adherent children.

Furthermore, if a non-adherent child were to be allowed to manifest his/her own religious beliefs in a private school, this manifestation would not be without limitation.<sup>143</sup> The child would be bound by the school’s code of conduct and religious exemption processes. If the non-adherent child wishes to manifest a religious belief, which imposes an unreasonable

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139 One could counter-argue this by stating that every religious community has an equal right to establish private schools based on their own faith and, therefore, there is no need for “outsiders” to apply for their child to be accepted into a private school which is not of their faith and no need for a private school to compromise on its associational rights. In other words, all communities can establish schools in terms of which their identities resonate best with their own religious convictions. However, an important point to the contrary is that not all communities have access to the funds of sufficient numbers to be able to establish a private school/s.

140 Beiter 2006:171. *Schools Act* 84/1996:section 46(3) states that: “the standards to be maintained by such school will not be inferior to the standards in comparable public schools.” It is submitted that certain minimum standards should pertain to reasonable accommodation of diversity as well.

141 *Pillay*:par. 75.

142 Prof. Amor (2001:par. 79) advised that: “...whenever education in the field of religion and conviction is part of the curriculum in state and/or private schools, provisions should be envisaged for it to be optional, at least in terms of allowing for a conscientious right of withdrawal to be exercised by the parents, guardians or mature pupils.”

143 Section 36 of the *Constitution*; Article 14(3) CRC.



burden on the school or threatens the academic standards, discipline or chosen religious ethos of the private school, the practice may be disallowed.<sup>144</sup> For example, a Muslim female learner, attending a Christian private school, insists on wearing a full *burka* to school, in assertion of her individual religious/cultural rights. The school prohibits the practice based on the fact that the wearing of full religious garb completely undermines the need for a school uniform; it makes pupils difficult to identify (which is a security issue) and is regarded as an act of proselytism<sup>145</sup> by the majority of the school and, therefore, “threatening” to their freedom of religion. The school would be correct in prohibiting the wearing of the *burka* as it takes reasonable accommodation too far within that particular school (with a significant Christian majority).<sup>146</sup>

However, if a religious practice does not impose a burden or is not a threat to the order or religious ethos of the school – there is no reason why the private schools cannot accommodate the practice. For example, if a Muslim child attending a Christian private school wants to conduct Islamic prayers in a private area within the school, where the Christian majority is not exposed to it and the school has an area available, there is no unreasonable burden on the school, nor any threat to its religious ethos.

It is submitted that non-waiver of freedom of religion and reasonable accommodation in private schools will ensure that children of all religions will be able to access the school of their parent’s choice (subject to affordability and places being available in the school) without having to choose between their religion and the best quality education available to them. This would be in the best interests of all learners regardless of their faith. Through reasonable accommodation, adherent learners will learn to interact with children of different faiths, as they will more than likely have to do once they leave the school environment. In other words, the practice of reasonable accommodation in private schools will prepare them for life in the religiously diverse society that exists beyond the school walls, while simultaneously maintaining and practising their own religious beliefs.

Finally, it must be made clear that this recommendation pertains to religion-based private schools and not all religious associations/institutions. Unlike other religious associations, which have primarily religious goals, private schools carry out important societal goals such as facilitating the right to education and protecting the rights and best interests of its learners in its role as responsible “parent” (*in loco parentis*). One can argue that private schools exercise a public function in educating children in terms of the state’s requirement of compulsory education<sup>147</sup> and that the state exercises some control over these schools through registration requirements and

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144 *Pillay*:par. 114.

145 Meaning an attempt “to induce someone to convert to one’s faith”. See definition – <http://www.merriam-webster.com/dictionary/proselytize> (accessed on 9 December 2012).

146 *R (on the application of Begum) v Head Teacher and Governors of Denbigh High School, House of Lords* [2006] UKHL 15, 2 All ER 487.

147 *Schools Act 84/1996*:section 3(1).

subsidies.<sup>148</sup> Therefore, it is submitted that the associational rights of private schools cannot be treated the same in the law as the associational rights of purely religious associations. The protection of children's rights in schools may require a greater degree of interference by the state.

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148 This was argued on behalf of the plaintiff in *Wittmann*:par. 88.

## Bibliography

- ADHAR R AND LEIGH I**  
2005. *Religious freedom in a religious state*. Oxford: Oxford University Press.
- AKOJEE S**  
2005. Private further education and training in South Africa: The changing landscape. Pretoria: HSRC Press.
- AMOR A**  
2001. The role of religious education in the pursuit of tolerance and non-discrimination. Study prepared under the guidance of Prof. Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on the question of religious intolerance. International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination. Madrid, 23-25 November 2001: par. 79.
- ANONYMOUS**  
(s.d.). Community Law Centre. South Africa to ratify international socio-economic rights covenant. <http://www.communitylawcentre.org.za/news/south-africa-to-ratify-international-socio-economic-rights-covenant> (accessed on 12 December 2012).
- ANONYMOUS**  
(s.d.). Merriam Webster. Definition of proselytize. <http://www.merriam-webster.com/dictionary/proselytize> (accessed on 9 December 2012).
- ANONYMOUS**  
(s.d.). Pan: Children. South Africa to ratify international socio-economic rights covenant. <http://children.pan.org.za/node/9109> (accessed on 12 December 2012).
- ANONYMOUS**  
(s.d.). SAHRC. The exclusionary policies of voluntary associations: Constitutional considerations:10.
- ANONYMOUS**  
2012. University of Pretoria, Faculty of Law. Equality Court affirms lesbian couple's rights. (Press Release).
- AQUILIUS**  
1941. Immorality and illegality in contract. *South African Law Journal* 58:337.
- ASHLEY MJ**  
1989. Ideologies and schooling in South Africa. Rondebosch: SATA.
- BEITER KD**  
2006. The protection of the right to education by international law. Leiden: Martinus Nijhoff Publishers.
- BEKINK B**  
2002. Striking a balance between parental religious freedom and the rights and best interests of children. In P Lodrup and E Modvar (eds) 2002:10.
- BILCHITZ D**  
2012. Why courts should not sanction unfair discrimination in the private sphere: A reply. *South African Journal on Human Rights* 28(2):296.
- BLAKE RC AND LITCHFIELD L**  
1998. Religious freedom in Southern Africa: The developing jurisprudence. *Brigham Young University Law Review*:515.
- BURNS Y**  
2009. *Communications law*. Durban: Butterworths.
- CHRISTIE RH**  
2001. *The law of contract*. Durban: LexisNexis.
- DARIAN-SMITH E**  
2010. *Religion, race, rights: Landmarks in the history of modern Anglo-American law*. Portland, OR: Hart Publishing.

- DAVENPORT TRH AND SAUNDERS C**  
2000. *South Africa: A modern history*. London: Macmillan.
- DEVENISH GE**  
1999. *A commentary on the South African Bill of Rights*. Durban: Butterworths.  
2005. *The South African Constitution*. Durban: LexisNexis Butterworths.
- DE WAAL J & CURRIE 1**  
2001. *The Bill of Rights handbook*. 4<sup>th</sup> ed. Cape Town: Juta.
- DU PLESSIS L**  
2001. Freedom of or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in 'the New South Africa'. *Brigham Young University Law Review*:439.
- ELLIOT L**  
2013. Law and parents. What *in loco parentis* means: The duty to care. <http://www.lawandparents.co.uk/what-in-loco-parentis-means-you.html> (accessed on 18 November 2010).
- GOVENDER M**  
2011. *Balancing the educator's rights to fair labour practices and to strike with the right to education* (Master's treatise). Faculty of Law, Nelson Mandela Metropolitan, University.
- HAVENGA P, HAVENGA M, HURTER E, KELBRICK R, MANAMELA E, MANAMELA T, SCHULZE H AND STOOP BC**  
2010. *General principles of commercial law*. 7<sup>th</sup> ed. Cape Town: Juta.
- HENNING M**  
1993. *The case for private schools*. Pretoria: Van Schaik.
- KALLAWAY P**  
1984. *Apartheid and education: The education of Black South Africans*. Johannesburg: Ravan Press.
- KERR AJ**  
2006. *The law of agency*. Durban: LexisNexis.
- KROEZE I**  
2003. God's kingdom in law's republic: Religious freedom in South African constitutional jurisprudence. *South African Journal on Human Rights* 19(3):469.
- LE ROUX J**  
2013. People's health movement – South Africa. ICESCR Ratification Campaign. <http://phm-sa.org/icescr-ratification-campaign/> (accessed on 29 October 2013).
- LEVINSON S**  
2003. *Wrestling with diversity*. Durham, NC: Duke University Press Books.
- LODRUP P AND MODVAR E (EDS)**  
2002. *Family life and human rights*. Oslo: Glydendal.
- NAGEL CJ**  
2006. *Commercial law*. 3<sup>rd</sup> ed. Durban: LexisNexis Butterworths.
- POTHIER RJ**  
1907. *Obligations: A treatise on the law of obligations, or contracts*. In AJ Kerr 2006:par. 43.
- RAUTENBACH C, JANSEN VAN RENSBURG F AND PIENAAR G**  
2002. Culture (and religion) in constitutional adjudication. Revised paper delivered at the 5<sup>th</sup> Colloquium on Constitution and Law, Johannesburg, 16 November 2002.
- RAUTENBACH IM AND MALHERBE EFJ**  
2009. *Constitutional law*. 5<sup>th</sup> ed. Durban: Butterworths.
- SSENYONJO M**  
2009. *Economic, social and cultural rights in international law*. Oxford: Oxford University Press.
- STOLZENBERG NM**  
2011. Religion, race, rights: Landmarks in the history of modern Anglo-American law. *Oxford Journal of Legal Studies* 31(3):587.

**TAIWO EA**

2011. *The implementation of the right to education in South Africa and Nigeria* (Doctoral thesis). Faculty of Law, Nelson Mandela Metropolitan University.

**VAN DER MERWE SWJ, VAN HUSSTEEN LF, REINECKE MFB, LUBBE GF AND LOTS JG**

2003. *Contractual general principles*. 2<sup>nd</sup> ed. Cape Town: Juta.

**VAN DER SCHYFF G**

2001. *The right to freedom of religion in South Africa* (Master's dissertation). Faculty of Law, Rand Afrikaans University.

**VAN DER VYVER JD**

2012. Constitutional protection of the right to education. *SAPR/PL* 27(2):326.

**VAN WYK D, DUGARD J, DE VILLIERS B AND DAVIS D (EDS)**

1994. *Rights and constitutionalism: The new South African legal order*. Cambridge: Cambridge University Press.

**VERWOERD HF**

1954. Bantu education: Policy for the immediate future. In Kallaway 1984:92.

**VISSER C, PRETORIUS JT, SHARROCK R AND VAN JAARVELD M**

1997. *Gibson: South African mercantile and company law*. Cape Town: Juta.

**WOOLMAN SSC**

2008. Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen. *South African Law Journal* 125:10.