MEMO

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF CONSTITUTIONAL ASSEMBLY

FROM: PANEL OF CONSTITUTIONAL EXPERTS

DATE: 02 JUNE 1995 (CP002065.MEM)

RE: FREEDOM OF RELIGION AND THE SECULAR STATE

1. INTRODUCTION

The purpose of this memo, requested by the Chairperson of the CA on 1 June 1995, is to provide some clarity and a few basic guidelines regarding freedom of religion and the concept of the "secular state", for the information of the Chairpersons of the CA. An attempt is not made to put forward detailed solutions for specific controversial and complex areas, such as education policies, abortion, capital punishment, the recognition of marriages and the legislation of morality (e.g. gambling, censorship, prostitution). On some of these issues differences also occur within religious circles. More detailed information could be provided on any of the aspects mentioned below, if and when the Panel is requested to do so.

2. FREEDOM OF RELIGION

Religious freedom is a value of extreme importance. History has proved that people are in fact prepared to kill and to die for it. People’s genuine religious convictions and concerns could also be mischievously manipulated, for political and other purposes, which could have serious negative effects on the tolerance level, peace and stability in a society.

Freedom of religion is universally recognised as a fundamental human right in international and comparative human rights thinking.¹

In the South African interim Constitution of 1993, freedom of religion is recognized as a fundamental right in section 14. It is bound to be included in the final Constitution, in terms of Constitutional Principle (CP) II, stating that everyone shall enjoy all universally accepted fundamental rights, freedoms and

¹ See, e.g., Art 10 of the Universal Declaration of Human Rights of 1948, the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, Arts 2 and 8 of the African Charter of Human on People's Rights of 1981 and several clauses in the European Convention of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention of Human Rights and the state constitutions of the USA, Germany, Canada, India, Nigeria and Namibia.
Freedom of religion can operate as a "liberty right" (the freedom to believe, to actively practice one's religion, and to change it), as well as an "equality right" (because anti-discrimination clauses prohibit discrimination based on religious convictions, as does section 8 of the interim Constitution).

Obviously freedom of religion is linked to several other rights, by which it could be enhanced or amplified, and with which it can overlap, correspond and sometimes compete. These would include the rights to freedom of conscience, freedom of expression and opinion, freedom of association and assembly, as well as rights related to language, culture and education.\(^2\)

In the South African context equality and non-discrimination are of particular importance.\(^3\) Not only are religion, conscience, belief and culture prohibited grounds of discrimination, but religion could also not be used as a vehicle or proxy for race discrimination.\(^4\)

2. THE SECULAR STATE AND OTHER POSSIBILITIES FOR SOUTH AFRICA

2.1 Regarding the choices to be made by drafters of the Constitution, some theoretical possibilities are discussed very briefly:

(a) an\(\) atheist state, or a state suppressing religion;

(b) a theocracy or a state with an official state religion

(c) a secular state, which

(1) tolerates religion, with a rigid separation between "church" and state and no overlapping between them, or
(2) supports and interacts with one religion, or
(3) supports and interacts with all religions.

2.2 The choice to be made by the drafters of the final South African Constitution will be dictated by the above mentioned CPII, but also the wishes of constituents, against the background of the history and nature of South African society.

Therefore possibility (a) is not an option at all. In an atheist state, or a state...

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\(^2\) For the last mentioned, see Sections 31 and 32 of the interim Constitution.

\(^3\) Section 8

\(^4\) See, eg, Section 32(c) of the interim Constitution.
suppressing religion, people holding religious beliefs may be persecuted, or excluded from holding office. Not only would the vast majority of South Africans find this abhorrent, but CPII and internationally recognized human rights standards would be violated.

Possibility (b), on the other extreme, is also not an option, for various reasons, including the following:

* Very few modern states are theocracies, with an official state religion, or with a religious official legal system, where, e.g., conduct which is "sinful" (such as adultery or the use of alcohol) is also a criminal offense according to the laws of the land. Even states where the vast majority of the population belong to one religion and where religion plays an important role in social and political decisions, are not necessarily theocracies. (According to comparative law experts, Israel has a mixed or hybrid legal system (like South Africa) of European origin. In Morocco, the Constitution proclaims that the king shall be Muslim and in Tunisia the same applies to the President. The Constitutions of, inter alia, Egypt, Morocco, Tunisia, Iran, Afghanistan and Yemen proclaim some adherence to Islam, but not all theologians accept that these are true Islamic states. Zambian President Chiluba made remarks to the effect that his country is a Christian state, but his attitude is not reflected in the Constitution of 1991.)

* South Africa is regarded as a religious country, where the majority of people (according to statistics) are members of the Christian faith. However, at least since the inception of the Union in 1910, South Africa has not been a "Christian state", but a secular one. Nor is the South African legal system a religious system, although the common law has developed within the philosophical sphere of the Judeo-Christian tradition and African customary law has been influenced by religious and spiritual notions. South Africans would not like to see members of one or more faiths being persecuted or discriminated against, because of state adherence to another faith.

* The South African legal system has in the past shown a preference for Christianity⁵. In view of the fact that all the major religions of the world, as well as traditional African nations and customs, are strongly represented in the country, this situation is probably untenable, if measured against the right to equality.

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⁵ See, e.g., the Preamble of the 1983 Constitution, the "Christian national" and "Christian" education policies for white and black children (Sections 2(1)(a) of the National Education Policy Act of 1967 and 3(3) of the Education and Training Act of 1979), Section 1 of the Publications Act of 1974 and a series of laws covering Sundays and public holidays.
Possibility (c), above, seems to be the only option open to South Africa. A "secular state" is not an "atheist" or a "godless" state. It not only allows for the tolerance of religion, but also for positive support and interaction with religious groups. In fact, historically the secular state has emerged as a reaction to the tragic and untenable persecution of members of certain faiths, because of the intolerance of others.\(^6\)

In view of the history and nature of South African society, a very rigid separation between "church" and state ((c)(1)) (see below where the USA is discussed) is unlikely to be popular. Apart from the fact that some churches have supported apartheid, religion is probably generally regarded as having played a positive role in the process of reconciliation. Representatives of different denominations have featured prominently at state functions, funerals and social occasions. South Africa has not been plagued by serious religious strife and policies which could cause such strife should be avoided.

Possibility (c)(2), where the state supports and interacts with only one religion, is bound to be problematic, in view of equality considerations.

Therefore possibility (c)(3), where the state is secular and thus separated from organised religion, but supports and interacts with all religions enjoying substantial support, seems to be the only option reconcilable with the religious and cultural diversity of South Africa, as well as South Africa's commitment to fundamental human rights. Obviously the details of such an approach have to be worked out by legislators, policy makers and civil society in a variety of specific spheres.

3. THE USA AND OTHER EXAMPLES

The US experience is often (perhaps somewhat unfortunately) held up as an example of what could happen in a society with a bill of rights guaranteeing freedom of religion.

The accepted "doctrine" in the US is that of a rigid separation between state and organised religion, or "a wall of separation between church and state", in the words of Thomas Jefferson.

In the First Amendment of the Bill of Rights of the US Constitution, it is stated that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ..."

In the US a distinction is drawn between the establishment clause (the state may not directly or indirectly be involved in the establishment or the support of religious activities), and the free exercise or non-prohibition clause (the state may not hinder the free exercise of religion).

\(^6\) Corder "A Secular State in Context" Opinion to CA.
Numerous controversial issues dealing with religion have been argued before the Supreme Court and a large jurisprudence has been built. For example, it has been ruled that the state may not set up an official church, that individuals may not be forced to go to or stay away from church, that no one may be punished for entertaining or professing religious beliefs or disbeliefs, that the government may not prefer one religion over another or even religion to non-religion, that the government may not participate in the affairs of religious organisations, and that such organisations may not participate in the affairs of government. In order to determine whether governmental action violates the establishment clause, it has been ruled that valid action must have a secular legislative purpose. Its principal or primary effect must be neither to advance nor to inhibit religion; it must not foster excessive government entanglement with religion; and it must not create an excessive degree of political division along religious lines. The question of whether the state’s conduct amounts to an "endorsement of religion" has recently emerged as a possible single standard.\(^7\)

Particularly controversial was the decision of the US Supreme Court in *Engel v Vitale* 370 US 421 that the official reading of prayers or from the Bible in public schools contravened the First Amendment.

The American approach has to be evaluated in view of the history of the US. The US Constitution emerged from a period of struggle, *inter alia* against the oppression of a state-imposed religion. Furthermore, it has been argued (eg by Christians) that the establishment clause was never intended to be invoked against states, but only the Federal Government ("Congress"). On the other hand atheists contend that they are still being discriminated against, because members of the Christian faith still in many ways benefit directly or indirectly from state policies. The rigid separation has in practice also been softened.\(^8\)

However, South Africa does not have to follow the US example. In view of the above mentioned factors regarding religion in this country, a "wall of separation between church and state" in unlikely to be a popular option.

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\(^8\) The state may not design or modify the curriculum of schools in order to further religion at the expense of non-religion, or to promote one set of religious beliefs over others (e.g. *Epperson v Arkansas* 383 US 97 (1968)). Religious instruction on public-school premises has been disallowed, but public high schools are required to allow voluntary, student-initiated religious groups to use school facilities before and after school hours, provided that other extra-curricular groups are given similar rights. (See the Equal Access Act 20 USC 1984, *Board of Education v Mergens* 110 S Ct 2356 (1990).)
In Germany, for example, the non-establishment clause differs significantly from the US. While the principle of state neutrality toward religion is recognised, churches are accorded an important role in public life, and are regarded as ‘religious bodies under public law’ and even have the power to levy taxes for the support of religious activities. Religious instruction in public schools is provided for. On the other hand, any compulsory disclosure of one’s religious conviction or participation in a religious exercise, including the mandatory taking of a religious oath, is banned. In several opinions of the Federal Republic’s Constitutional Court, various ‘models’ of neutrality have been developed.

Also in Canada the Supreme Court deliberately tried to avoid the non-establishment jurisprudence of the US.

4. THE INTERIM AND FINAL SA CONSTITUTION

Section 14 of the interim Constitution states:

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for the purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

(3) Nothing in this Chapter shall preclude legislation recognising -

(a) a system of personal and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures.

Some words and phrases in this clause (and in Section 32) have (in current litigation) proved to be problematic (eg. "observances" and "equitable basis") and the drafters of the final Constitution could come up with a new formulation. However, if South Africa wishes to avoid the American direction of a rigid separation between state and organised religion, emanating from their non-establishment clause, caution may be called for. Section 14(2) clearly states that religious observances may be conducted, eg. at public schools (subject to the "equitable basis" and "free and voluntary" provisions) and thus avoids a non-establishment approach. However, should sub-section (2) not have been there, it is not impossible that courts may be tempted to develop an American-oriented non-establishment approach in their interpretation of the "freedom" provision in
5. SOME SPECIAL AREAS

5.1 Preamble

A reference to a Supreme Being in the Preamble or elsewhere in the Constitution is not a constitutional imperative and depends on the will of the drafters of the Constitution as representatives of the people of South Africa. Such a reference does not detract from the basic separation of state and organised religion. Equality as to different religions has to be kept in mind, however.

5.2 National symbols, air time, etc

On the basis of the choice exercised in 3 above, fair solutions have to be found. As far as public broadcasting, e.g., is concerned, air time is indeed divisible and the proportional support of different denominations could be used as a basis. Some symbols, such as a flag or anthem, may not be "divisible" and 5.1 above may apply.

5.3 Public holidays

In view of the above mentioned factors, a fair policy is called for. It is suggested that it would not be economically viable to declare all religious days official public holidays. However, individuals should be allowed by employers to observe such days and times, in so far as this is reasonably possible. This could be achieved without giving an absolute preference to any particular religion. Religious days which have a secular public purpose and effect could be legally proclaimed as holidays. Christmas, e.g., seems to be generally recognised as a day of goodwill and celebration, while those who wish to observe it as a religious day are free to do so.

5.4 Religious instruction in schools; recognition of marriages; military service etc

These areas are specialized and complex. The Constitution should provide the foundation for the recognition of freedom of religion as well as other relevant fundamental rights, on which more detailed legislation and policies could be based. The same applies to the general development and application of the criminal law.

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9 This trend emerged e.g. in Canada, where the Supreme Court tried to avoid the US approach, but used non-establishment jargon, based on the argument that freedom and equality may sometimes only be possible if e.g., all religious activities in the public domain are avoided. See Rv Big M Drug Mart (1985) and Hogg Constitutional Law of Canada (1992) 944 ff.
5.5 Morality, pornography, etc

The Constitutional recognition of freedom of expression and conscience as fundamental rights could obviously result in practices such as the increased publication of pornographic material, which may be perceived by some to be symptomatic of the collapse of religious values. This does not have to be the case. These freedoms are not absolute and could be limited in accordance with the moral and other standards which prevail in our society and which are justifiable in open democracies.

6. CONCLUDING REMARK

It is extremely unlikely that any religion (excluding generally recognized criminal activities) will be persecuted or otherwise suppressed in South Africa. However, no single denomination or religion will be able to rely on exclusive support and protection by the state. The state - and the government in particular - can only play a limited role in the religious sphere. It must, however, create space for e.g. religious organisations to be active in accordance where their aims and aspirations. People who feel strongly about their religion and other values and beliefs should use their fundamental rights (such as their freedom of assembly, expression and association) to advance and promote their cause in a spirit of respect for the rights of others.

General references

* Sachs "To Believe or Not to Believe" in Sachs Protecting Human Rights in a New SA (1993) 43
* Du Plessis "The Protection of Religious Rights in SA's Transitional Constitution" Koers 1994 50(2) 151
* Pfeffer Religious Freedom (1979)
* Sadurski Law and Religion (1992)
* David & Brierley Mayor Legal Systems in the World Today (3rd ed 1985)
* Zweigert & Kötz Introduction to Comparative Law (vd1) (2nd ed 1987)