

## SOUTH AFRICAN CHARTER OF RELIGIOUS RIGHTS AND FREEDOMS

### EXPLANATORY NOTES<sup>1</sup>

It is explained elsewhere that the South African Charter of Religious Rights and *Freedoms* is the product of a long process of research, reflection, consultation, drafting and redrafting. It is the combined outcome of the best efforts of many enthusiastic and committed participants. The Charter contains the main elements of the right to religious freedom, and related freedoms (such as the rights of equality and association) as they are accepted internationally. The Charter, therefore, relates to and relies on several other rights guaranteed in the South African *Constitution*. To a very large extent one may say that the Charter does not make new law, it rather compiles existing law in a coherent and intelligible way. In that way the Charter unlocks and explains the law in respect of the right to religious freedom and related freedoms.

The Charter is based on the recognition of two paramount principles underlying the right to religious freedom: namely the right to have religious beliefs individually and in association (or not to have religious beliefs), and the right to manifest, teach and disseminate those beliefs and convictions as they are expressed in several areas of life. Religion is also an **equality right** as it is listed within the Constitution's equality provision (Section 9 (3)). Because religion is itself an equality right, it is incorrect to view certain kinds of conflicts as "between religion and equality" (as the conflicts are often inaccurately described).

Moreover, there is no hierarchy of rights in South Africa – all rights protected by the Constitution are equal and formally no right carries more weight than another right. This means that when two rights do come into conflict, one right will not necessarily always trump the other right. When disputes arise between rights (also between equality rights, for example, the right not to be subjected to unfair discrimination on the basis of one's religious convictions and the right not to be subjected to unfair discrimination on the basis of one's sexual orientation), the proper approach to reconciliation is to take into account *the context of the conflict between these rights* and to determine the outcome on the basis of the facts and circumstances of each case.

Based on these two important aspects, the right to hold religious beliefs and the right to manifest them individually and in *association* with others, the Charter unpacks the right to freedom of religion in some detail. The Charter can be divided into several broad parts, namely –

- the introduction
- the preamble,
- the right to believe and to act upon those beliefs,
- the state's role of protection,
- the right to manifest or observe one's beliefs in different settings,
- freedom of expression in respect of religion,
- religious freedom in education, and
- the freedom of religion of institutions.

What follows are explanations of the provisions of the Charter one by one:

#### **Introduction**

In this introduction it is clearly stated that the South African Charter of Religious Rights and Freedoms is subject to the Constitution of the Republic of South Africa, 1996. The Charter builds

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<sup>1</sup> These notes are not intended to be a complete explanation of the principles set out in the Charter but to offer some assistance in understanding the principles in the context of frequently raised questions.

upon and relies on several of the provisions of the Bill of rights as entrenched in the Constitution. The Charter describes in more detail what the rights are that religious people see they can claim in the light of the Constitution.

### **Preamble: General Framework Concepts for the Charter**

By stating certain points of departure, the preamble serves as an introduction to the Charter. It recognises the importance of belief, thought, conscience and opinion in society, and the need for the legal protection of religious freedom as a basic human right. It recognises the relationship between religion and the state and the positive role the Charter can play in shaping and informing that relationship in a healthy and constructive way. It recognises the rights and responsibilities of all concerned, including religious institutions and the state. Finally, it recognises the role religion can play in deepening our understanding of and contributions to the common good, as well as that the effective protection of religious freedom can foster a spirit of mutual respect and tolerance throughout society within communities and between them. Rights in the Constitution are not rank-ordered where one is given greater priority than others. Where there are conflicts between rights, therefore, the proper approach for courts or politicians is to engage in a searching evaluation of the context of the disputes in question so as to preserve appropriate diversity. This set of explanatory notes seeks to set out some principles for better understanding the context where religious freedom is concerned.

### **Article 1: The Right to Believe**

To have religious beliefs or to choose not to have religious beliefs is an integral and intimate part of being human. By respecting this capacity of every person we respect their dignity as human beings, a principle that is highly regarded by the Constitution. Belief, conscience, convictions and opinion direct people's lives. These determine our views about life and death and right and wrong. These beliefs influence or determine our choices in relation to ethics and morality, marriage, work, children, relationships and our place in society. Denying the role of belief, conscience and opinion in people's lives has led to much persecution throughout history. Recognising and protecting the right to religious freedom is an important step we take in modern states to respect human dignity and prevent such persecution. Article 1 confirms therefore the first main pillar of religious freedom, namely the right to believe according to one's convictions and to make choices with regard to one's convictions and religious affiliation. One may, in other words, choose one's faith, worldview or religion, and may join the religion or religious institution of one's choice. In addition to the positive right, the right includes the ability not to have religious beliefs, and not to join any religion or religious institution and to be free from religious coercion. It does not include the right to be free from the incidental effects of religion when they are exercised appropriately in private or in public.

### **Article 2: No Coercion in Belief**

This Article builds logically on Article 1 and provides that no-one may be forced to believe or not to believe, or to act against their beliefs. If one is free to believe, one should also be free from being forced or coerced in any way with regard to beliefs or convictions.

#### **Article 2.1 Right to Change Faith or Institution**

This Article emphasises that everyone has the right to change their beliefs, which is again a logical consequence of one's freedom in respect of religion.

#### **Article 2.2 Right to Reasonable Accommodation**

This Article contains an important principle for living together in society – when living together we should exercise our beliefs in such a way that others or society in general are not affected negatively – in other words, we should exercise our right in a reasonable way. We do not have an absolute right to freedom of religion if that can hurt others. So, we may therefore only claim for our beliefs or

convictions to be *reasonably accommodated* in society and, the corollary of this, that religious groups owe a duty of reasonable accommodation to those who may disagree with their practices. In the *Pillay* case, the court held that it was reasonable for a learner to be allowed to wear a nose stud for religious reasons, and that the dress code of the school should be amended to accommodate that. So, the principle implies that private as well as public institutions have a duty to create the scope within which we may exercise our religious freedoms in a reasonable way. An example would be that as a factory worker I may not insist on taking such a long break for religious observances every day that it affects the business of the factory negatively, but I am entitled to a reasonable break that is not disruptive of the activities of the business. Or I should not necessarily be able to take the day off every time my religion celebrates a holy day, but I may be entitled to a reasonable break on that day. Providers of essential services (such as medical facilities, security services, and municipalities) may also not allow the exercise of the right in such a way that those services are disrupted though a reasonable duty of accommodation applies. Many more examples may be mentioned but suffice it to say that what would be a reasonable accommodation of one's right has to be determined on the particular facts and contexts of each case. (See also the discussion of **Article 4.**)

### **Article 2.3: The Right to Dissent**

The right not to be forced in any way in respect of religious matters means that a person may, on religious grounds, refuse to perform certain duties or to participate in certain activities. In the private sphere this is accepted, although even there one will not be allowed to insist on one's rights if the interests of others are endangered. In the public sphere this poses difficulties, though. A well-known example is to refuse to do military service involving combat. Usually a person is then accommodated in non-combative services. In public health services, doctors, nurses and pharmacists are obliged to perform certain duties and if they refuse, disciplinary action may be taken against them but reasonable accommodation is required in relation to them. The Charter takes the view that it is un-Constitutional to expect from anyone working in the private or public sphere to perform duties or provide services contrary to their religious and conscience convictions. If they are challenged, they may call on section 7(2) of the *Constitution* which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, including the religious rights; they may also call on section 9 (equality) and section 15 (religious freedom) of the *Constitution* as well as the Charter of Religious Rights and Freedoms. Finally, it is for the Courts to adjudicate the matter on these grounds. Religious people should claim their right to have their religious convictions acknowledged and, within reason, to be allowed to live according to them.

In general, it is our view that as is the case with all rights in the *Constitution*, no right applies absolutely and that all rights may be limited when it is reasonable and justifiable (section 36 of the *Constitution*). As explained, the Charter acknowledges this reasonable approach by stating in **Article 2.2** (see also **Article 4**) that every person has the right to have their convictions reasonably accommodated. That means that one's convictions have to be respected but that it may not necessarily prevail in all circumstances. To be practical, a doctor or nurse should on religious grounds be allowed to refuse to do abortions or refer for them (**Article 2.3** "indirectly to assist in"). On occasion the duty of accommodation may well require that health care associations (medical or pharmaceutical) bear the responsibility to provide for the protection of establishing protocols that protect conscientious objectors as well as the rights of patients by setting up, for example, access to services that do not implicate those opposed on religious or conscientious belief grounds. Provision of contact numbers of those who do not object to certain procedures, or a number any patient may call to receive such a list, may be the duty of health associations if there are concerns about access to certain controversial services. Keep in mind that two sets of rights are at issue in many contemporary ethical disputes: those who provide medical services as well as those who request them and reconciling both sets of rights as far as possible should be the goal rather than subordinating one to the other. Obviously, using an ethical dispute as a proxy to work out anti-

religious prejudices is completely unacceptable.

#### **Article 2.4: Medical Treatment and Belief**

Receiving or withholding medical treatment is a sensitive issue and is often related to people's religious convictions. The Charter confirms the legal position by stating that one's convictions should be taken into account in these matters, although it may not always determine the outcome. For example, an adult able to take such a decision may be allowed to refuse medical treatment on religious grounds, but when a child's life is threatened, parents should not be allowed such refusal purely on religious grounds. It seems the Constitutional principle that in every case "the best interest of the child" is paramount (section 28(2) of the Constitution) will prevail in such a case and will trump the views of the parents if there is no other way to protect the child's interest.

#### **Article 2.5: Freedom from Coercion**

Freedom of religion also means that one's freedom to believe and what to believe should not be undermined by indoctrination from anyone (the state or a private person or institution), if it may destroy, change or compromise one's religion or convictions. In the context used here, indoctrination means to teach someone in a systematic and coercive way to accept something uncritically. This removes the freedom of the individual to determine for themselves what to believe or not to believe, and may indeed destroy, change or compromise their beliefs or convictions.

#### **Article 3: State Protection of Religion**

This provision deals with the impartial protection the state owes those who exercise their religious freedom. Section 7(2) of the *Constitution* provides that the state must respect, protect, promote and fulfil the rights guaranteed in the *Constitution*. The state must refrain from violating the rights (unless there is good reason under section 36 to limit the rights), it must protect the rights from violation by others, it must take steps to enable people to exercise their rights effectively (for example, to put the mechanisms in place for people to be able to exercise their right to vote, or as mentioned above, exercise religious beliefs in state-run medical institutions), and it must create a positive and safe environment and atmosphere in which everyone is free to exercise their rights. This duty on the state applies to all rights, including the right to religious freedom. Article 3 gives effect to these duties on the state. It expressly provides that the state must be impartial, and may not promote, favour or prejudice a particular faith, religion or worldview, or indoctrinate anyone in respect of religion. The state may also not discriminate unfairly against anyone on the grounds of their faith, religion, religious affiliation, or convictions. (**Article 3.2**).

#### **Article 3.1: The State Should Create Positive Conditions for Religion and not Promote one Religion over Others**

Giving effect to section 7(2) of the *Constitution*, this provision states clearly that the state must create a positive and safe environment for the exercise of religious freedom. Where necessary, the state must take specific steps to ensure this. When it comes to religious freedom, this approach followed in the South African *Constitution* is something quite different from what is sometimes popularly understood to be the proper role of the state. In some countries there is, in theory, a more or less complete separation between religion and the state. The state, even if it attempts to act impartially, may not take any step assisting the effective exercise of the right to religious freedom or to promote or fulfil the right.

The state, so it is argued in such countries, must take a "neutral" stand in respect of all religion and religious matters. In practice this means the state has to maintain a "hands-off" attitude in all religious matters under the guise of any positions it takes (expressly or by default) being free of moral viewpoints. In some countries this has led to a situation where, for example, no religious observances are allowed in public institutions such as schools. In certain cases it has even led to

hostility against religion – anything offending religion is permissible in the public sphere, but religion itself is not. This is not the approach in South Africa.

In South Africa a more evolved approach is applied; one that recognizes that religious beliefs, like all beliefs, have a place in the public sphere and that the state should try and make clear its moral viewpoints. The more evolved approach, that of the “co-operation” of religion and state is the approach taken in South Africa. We do not follow a secularistic “complete separation of religion and state” nor a “view from nowhere” in relation to public moral positions (however difficult it may be to articulate these within a pluralistic society).

This South African approach recognizes a jurisdictional distinction between religion and state yet at the same time it allows for *co-operation* (and financial support in certain instances) between state and religions. The *Constitution* expects the state to take steps to protect the right to religious freedom, and it expects the state to take action to create a positive and safe environment for the exercise of religious freedom. This is the opposite of a “hands-off” attitude which leaves those exercising their religious freedom unprotected. The state has to be engaged in order to level the playing field for everybody and ensure, amongst other things, that the principles of accommodation are present and effective. The only condition is therefore that when the state does act, it must act impartially and not favour any religion or discriminate against any other. Schools and Health Care are good examples of areas in which this co-operative approach is applied practically – this is discussed below in more detail under **Article 4.4**.

#### **Article 4: Right to the Exercise of Religious Beliefs and Limits on Religious Exercise**

This provision deals with the second main pillar upon which the right to religious freedom rests. The right to believe always goes hand in hand with the right to manifest and practice those beliefs. This means that one has the right to the private or public, and the individual or joint, observance and exercise of one’s religious or other convictions. As **Article 4.4** shows, observing one’s beliefs may take many different forms. This pillar emphasises that religion, beliefs and convictions are not only a private matter, but as they go to the heart of a person’s deepest beliefs and convictions, to their very dignity as a person, they cannot but have an impact upon people’s opinions, actions and relationships to the outside. And according to the Charter this is a good thing. First, everyone should be free to carry their deepest beliefs, conscience and convictions into the public sphere as they serve to form their opinions and actions in respect of public matters. Should we ban people’s religious beliefs, consciences and convictions from the public domain, we act unfairly because in reality we will necessarily allow other beliefs to be dominant - - those, perhaps, not explicitly formed by religious convictions. This form of exclusion and preference is an unacceptable interference with the public aspects of religion and also serves to cloak, inaccurately, the “beliefs” of, say, atheists and agnostics which may then come to dominate the public sphere. The exclusion of religious but not non-religious beliefs readily becomes prescriptive and tends to deny the essence of religious freedom while it fails to identify atheism and agnosticism for what they are: belief systems.

Second, to develop understanding, respect and tolerance, we should each be able to express and observe our beliefs and convictions, even if they differ. By not sharing and not allowing the free expression and observance of our convictions, we can never reach a stage where we can tell one another we understand and therefore we tolerate even where we continue to disagree. Should we ban beliefs and convictions from the public domain, we rob ourselves of opportunities to understand one another and to develop the ability to live together peacefully with agreement or disagreement and to make our moral agreements and disagreements visible as belief differences.

So, this aspect of religious freedom as formulated in **Article 4.4** ensures that the right to religious freedom is not relegated and confined to the private sphere, as has happened to different degrees in certain countries, mainly because of a misunderstanding or a rejection or mischaracterization of the role and nature of beliefs and convictions in people’s lives and in society. In South Africa, therefore,

religious freedom does not mean freedom *from* religion, but freedom *of* religion and, as set out above, freedom from religious *coercion* and not simply from the incidental results of religious practices in the public and private spheres. Society is not shielded from religion, rather the scope and atmosphere are created for people to express and observe their religious or other convictions freely. It means we have the right to manifest our beliefs in public, and even in public institutions. Of course, the principle of reasonable accommodation applies, and even if one may not have an absolute right to observe one's religion, one does have the right to have one's beliefs reasonably accommodated in such institutions and to have one's conscience, formed by religion, respected in the private and public spheres. An example is that an employer in a public institution should be allowed to wear religious attire, unless it is incompatible with the uniform the employer is supposed to wear in an institution such as the police services or the defence force or if it hampers proper functioning on the job (such as face veils might in an educational environment or where facial recognition is deemed essential). Even here, however, as may be seen in certain other countries, uniforms may be changed to accommodate the wearing of certain kinds of religious garments (such as turbans, head scarves or yarmulkes) and the context and facts of each case are essential with maximal respect being the keynote.

The free exercise of religion, as with other rights, is not unlimited. Any manifestation of a religion is always subject to the laws of the land in general as well as constitutional limits. Religious practices that are dangerous or coercive, such as making followers eat grass, drink petrol, eat snakes or performing other acts that would be likely to constitute coercion or assaults, can be restricted by law. In addition to restrictions in laws of general application, religions are also answerable to their own governing rules and regulations and breaches of such rules may well be justiciable before the courts (subject to the concern about judicial interference with doctrines discussed below in **Article 9.1**). (See also the notes on **Article 9.5**)

#### **Article 4.1: Access to Sacred Places and Burial Sites**

This provision enables visits to sacred places and burial sites situated on private land, as long as property rights and other legal considerations are observed. This means, for example, that any visit to such sites has to be arranged with the landowner and may not put an unreasonable burden on the landowner or cause damage of any kind to the property. Mutual respect and consideration is the tone anticipated here. Regulation of access for purposes of historic site protection or peaceful and orderly access would be consistent with the recognition of access rights.

#### **Article 4.2: Freedom of Religious Association and Establishment of Places of Worship**

The right to freely associate with others is already guaranteed in the Constitution (section 18), and in this provision of the Charter this right is confirmed for religious purposes. It enables us to form associations and act jointly in pursuing common objectives. The rights of religious institutions formed in this way are discussed under **Article 9**.

#### **Article 4.3 Freedom of Religious Communication National and International**

This provision builds upon **Article 4.2** and confirms that religious freedom transcends all national boundaries. One may therefore communicate with others, nationally or internationally and may travel, visit and meet for religious purposes, and may enter into relationship or association with others irrespective of location. Restriction on movement and associations has long been a method used by closed societies to restrict the freedoms that should exist for citizens in free and open societies.

#### **Article 4.4: Right to Single Faith Practices in State-aided Institutions and the Importance and Validity of "Opt-out" Provisions**

This article is based on section 15(2) of the *Constitution* which provides that religious observances

may be conducted in state or state-aided institutions, such as hospitals, schools and prisons. This confirms what is already in section 15(1), namely that one has the right to believe and to manifest those beliefs and what is set out above about the possibility of the state having a co-operative relationship with religions and religious communities. This is also stated in Articles 1 and 4 of the Charter. What section 15(2) and Article 4.4 actually do is to emphasise in state and state-aided institutions what is already provided for. Private institutions have the right to conduct religious observances in accordance with their religious ethos. In respect of public schools, the *South African Schools Act* and Policies in relation to Religion and Schools, confirm this provision and allow a school governing body to decide on the ethos of a public school (section 7). According to the *Constitution*, certain conditions apply to religious observances in a public school. These conditions apply in order to ensure fairness. The Charter confirms this and provides, firstly, that the appropriate public authorities (according to the *Schools Act* this is the school governing body) must determine the rules for religious observances – it is not for any individual, be it a teacher or any other person, to conduct religious observances as they wish. It is the task of the school governing body to determine what religious observances may be conducted, in what way these may be conducted and who are allowed to lead them. The religious observances must also be conducted on an equitable basis which means that reasonable and equitable provision must be made for other religions in a school to conduct religious observances and for the principles of accommodation to be followed for those who do not wish to be a part of religious observances; and the attendance of any religious observances must be free and voluntary – nobody may be forced to attend specific religious observances or to believe in a certain way. The purpose of this provision is, first, to allow religious observances in public institutions, to ensure fairness in the way they are conducted, and to ensure that no-one is forced in any way to participate or not to participate. This is the way in which a spirit of respect and tolerance can be cultivated in a diverse, plural and multi-religious society. It is also clear from this provision, and as discussed above, that the *Constitution* and the Charter do not accept the approach in certain other countries where religious observances are virtually banned from public institutions; on the contrary, these are expressly allowed, as long as the conditions are fulfilled. A final point. School policy in respect of religion should neither be syncretistic nor relativistic. It should allow for religions to be taught from their own religious perspective as long it is equitable, free and voluntary and as long as it allows for the equitable use of buildings etc. by all religions and that they provide for the accommodation including “opting out” of religious exercises for those who do not wish their children to be in such exercises. As long as “opting-out” is accommodated with a spirit of respect and tolerance it should not be seen as stigmatising or unduly exclusionary - rather, it is the proper accommodational response to diversity. Rejecting, as some countries have, “opt-outs” on the grounds that they “stigmatise” those opting out, can lead to the exclusion of activities for others, a result that is unfair and can lead to a unfriendly rather than an encouraging environment for the exercise of religion.

#### **Article 5: Right to Traditions of Matrimonial and Family Law**

This article recognises the diverse nature of the South African society and repeats section 15(3) of the *Constitution*, recognising religious traditions and legal systems alongside the South African legal system. The *Constitution* is supreme, though, and where the state is concerned, religions and the exercise of religious beliefs must function alongside constitutional principles. The law, however, also has limits and it is important to recognize that part of an open society is the recognition of the role and limits of law itself.

#### **Article 6: The Right to the Freedom of Religious Expression**

This article emphasises another aspect of religious freedom, namely the right to freedom of expression. It follows more or less logically for religious freedom to include that one should be able to express one’s beliefs and convictions.

**Article 6.1: The Right to the Freedom of Religious Expression confirms this by** stating that every person (which includes an institution) may make public statements and participate in public debate on religious grounds. This is yet another manifestation of the approach in the Charter that religious beliefs and other convictions should not be confined only to the private sphere, and must be allowed to be expressed and heard in the public domain. In a diverse society this implies that one may state opinions with which others disagree, or hear opinions with which we may disagree, but that is the room we allow one another in a mature diverse society. It is actually ironic that in certain countries in which freedom of expression is held in the highest esteem, this logical consequence of freedom of expression in respect of religion is denied. In contrast, the open and accommodating approach we follow in South Africa is the proper way to cultivate the mutual respect and tolerance upon which a healthy and peaceful society is built. As in the case of the general right to freedom of expression guaranteed in section 16 of the *Constitution*, the right does not apply absolutely, though, as is explained below under **Article 6.4**. One may also conduct scholarly research in accordance with one's convictions and may publish and distribute religious publications.

#### **Article 6.2: The Right to Share Religious Convictions**

In the spirit of freedom of religion promoted by the Charter, it follows that one may freely share one's beliefs and convictions with others. Giving effect to the right not to be forced in any way to believe or what to believe (**Article 2**), the only condition is that others must consent to one's sharing one's beliefs or convictions with them and that, therefore, when a person requests that such sharing cease, this be respected.

#### **Article 6.3: Right of Religious Access to Public Media**

The duty on the state to be impartial in religious matters and to create a positive and safe environment for the exercise of religious freedom includes that religious institutions and communities should have access to the public media, such as television and radio. This access includes the establishment of radio stations and so on. Of course, it is a practical reality that access has to be regulated, and the condition is that it must be regulated on a fair basis. Fairness here would relate, in part, to the numeric representation of a religious belief in society as measured by reliable empirical data. The recognition of a role for public media in relation to religion follows from a recognition of the public dimension of the freedom of religion itself.

#### **Article 6.4: Right to Religious Dignity and Freedom from Ridicule and Hatred:**

As with all rights, the right to freedom of expression in respect of religion does not apply absolutely; there is a limit. The right to religious dignity is also part of religious freedom, and we should not victimise, ridicule or slander others on the basis of their beliefs or convictions. The provision states specifically that no person may advocate hatred that is based on religion and that constitutes incitement to violence or to cause physical harm. What does all of this mean? It simply means that freedom of expression allows us to state views on religious, moral and other public issues that may disagree with other views and may even be seen as critical of other views or conduct and that may produce strong reactions from those criticized or that may "hurt the feelings" or another. That is what freedom of expression is all about – the open and robust exchange of ideas and views. We cannot learn to understand one another and build a mature and tolerant society without such exchange of ideas. So, where is the limit? We aim to live together peacefully and to build unity among us, despite our differences. The *Constitution* echoes this by stating that we are united in our diversity, that we want to heal the divisions of the past, and that we want to build a united South Africa (Preamble). So, when someone threatens the peace by their statements which advocate incitement to violence or physical harm, the limit is reached. But hatred should not be equated with disagreement or "hurt feelings". As difficult as it may be, part of personal and social maturity is the recognition that the freedom to express opinions includes the fact that these may on occasion upset others. In some parts of the world attempts are made to stop any disagreement and criticism by



alleging that insult or “hurt feelings” amount to hatred. This is not the South African approach. An example of conduct that should not be tolerated here would be when, on religious grounds, someone condemns certain behaviour (which would be in order) but does not stop there and threatens those who behave that way with violence or physical harm or encourages others to act violently or cause physical harm to those who behave that way. Respect does not mean “agreement” and disagreement, sometimes vehement, is important in a free and open and mature society. Over-extending the concept of “hatred” and limiting dissent and disagreement, might well lead to a backlash greater than the harm such overly broad exclusions seek to avoid.

#### **Article 7: Right to Educate Children in Accord with the Religion and Philosophy of the Parents**

This article deals with education and states that every person has the right to be educated or to educate their children or have them educated in accordance with their religious or philosophical convictions. Implicitly, parents have the right to choose the form of education for their children and schools are delegated the parental authority when they take on the task of education. The state has no “prior right” to educate the young.

##### **Article 7.1 Right of Parents to be Consulted and to Withdraw Children**

The State, including any public school, must respect religious rights and freedoms and must inform and consult with parents on these matters. There is a particular duty on school governing bodies to determine and monitor religious observances and instruction taking place in school, and to liaise with parents on all matters relating to religion in school. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions. An example would be a compulsory dietary programme that is inconsistent with the religious convictions of certain parents. Although this right does not appear in these exact terms in some well-known international human rights documents, it is internationally accepted that this is one of the necessary implications that the right to freedom of religion has for education. Still, the right is indeed formulated in these explicit terms in Article 2 of Protocol 1 of the *European Convention on Human Rights and Fundamental Freedoms* (1950) as well as article 5(2) of the U.N. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981).

The right of parents to withdraw their children from programs or activities inconsistent with their beliefs or convictions regularly leads to court cases in the USA and Europe, for example in the case of sex education or, in Canada, mandatory courses on ethics and religious culture. The trend in these countries is to decide such cases on the basis of what is in the best interest of the child which, due to the fact that the courts may have a different worldview from that of the parents, may lead to decisions rejecting the wishes of parents. In other words, the view of the state about this is being substituted more and more for the view of parents. Signatories to the Charter believe that the right of parents in this regard requires greater respect than what is being allowed generally by court judgments, and the Charter hopes to activate and promote this approach through Article 7. Consideration should be given, as well, to allowing different *means* (for example parental education in relation to controversial subjects) towards objectively justifiable state *ends*. Such a more nuanced approach seeks to reconcile differing viewpoints (parental and state) rather than trumping one with the other. As with accommodation in health care the proper approach may well involve a more understanding and nuanced approach from state authorities and courts in relation to the goals of the state and the particular concerns of objecting parents. The onus should be on the state to show why alternative means fail to satisfy the state’s goals and not on the parents to prove that harm will result to their children.

Note that the approach of the Charter is to promote interaction between education authorities and parents and is therefore more balanced and tolerant within a multi-religious society. For example, parents should have the right and freedom to ask that all viewpoints on, for instance, controversial matters like evolution and sex education be brought to the attention of their children and not only

one viewpoint. With this approach the Charter is a more advanced document advocating a more mature treatment of religion in society than the all or nothing, black and white approach we find in some countries, where religious convictions are simply swept off the table as unacceptable or invalid when it comes to everyday issues. The result of this all or nothing approach is that only one view is allowed, which is simply inconsistent with the reality that every society reflects many different views. This is a recipe for conflict, because the question then becomes, who determines which views are the valid ones? Whose viewpoints will be taught in school? And what happens to all those whose views are “disallowed”?

Instead, the Charter advocates a broad and inclusive approach, acknowledging the plural, multi-religious nature of society, and promoting tolerance, flexibility and reasonable accommodation of all views and convictions so as to minimise tension and maximise respect for difference. We believe that this reconciliatory approach best contributes to the realization of mutual respect, equality, democratic principles, social justice, human rights, and national unity. The Charter is not an outdated, reactionary or narrow-minded document: it is a sophisticated attempt, based on accepted international and national legal principles, and the legal experience in a variety of countries, to support the objectives of the *Constitution* and advance the cause of human rights in a diverse society giving maximal respect to diversity as a ground for human (not just religious) freedom.

#### **Article 7.2: Right and Limits to Particular Religious Ethos in Education**

It follows from the fact that we carry our convictions with us, also into public places such as schools, that a public school may reflect a particular religious or other ethos. (Also note **Article 4.4**, providing for religious observances in public places such as schools.) Logically, this ethos will reflect the beliefs or convictions of the majority in the school. However, this ethos must be practised in an equitable, free, voluntary and non-discriminatory way. The rights of minorities must be respected and no-one in school may be victimised or discriminated against because their beliefs or convictions differ from those of the majority. The Charter, alongside the *Constitution*, challenges schools to develop mechanisms and processes to ensure that these conditions are met. Because of certain court decisions in other countries there may be a suggestion that allowing a learner to “opt-out” of religious exercises somehow attacks the “dignity” or respect for the learner. As discussed above, in **Article 4.4** we reject this approach as failing to properly understand a conciliatory approach balancing the rights of association and religious beliefs with the principles of accommodation.

#### **Article 7.3: Private Religious Education Rights and More on the Importance of Opting Out**

This provision recognises the right to establish private educational institutions on the basis of a particular religion, philosophy or faith, and the right to observe and impart religious convictions. Such a private institution may refuse to promote, teach or practice other beliefs or convictions. Parents apply to and contract with such an institution on a voluntary basis, and it should be accepted that they cannot then object on behalf of their children to the religious activities of the institution. To allow an objector to change a school effectively subordinates religious rights in association to individual rights. The right of “exit” exists and is preferable as a last resort should accommodation be impractical or impossible. There is no right to obliterate the belief frameworks of a single ethos school because a learner may object to the religious or philosophical viewpoint of the school. We view alternative approaches that misapply appropriate accommodation as a misunderstanding of how the principles of reconciling different beliefs should operate properly alongside respect for diversity and accommodation.

#### **Article 8: Right to Receive and Provide State Subsidized Religious Education**

Freedom of religion includes the principle that every person has the right to receive and provide religious education, training and instruction. As in the case of all education, the state may choose to subsidise such education. This is another example of the approach in South Africa in terms of which

the state is not prohibited from involvement in religious matters, but indeed has a positive duty to promote and facilitate the exercise of the right to religious freedom (section 7(2) of the *Constitution*). The only condition is that when the state does engage with religion, for example to subsidise religious education or training, it has to act impartially, and may not favour anyone or discriminate against anyone. It would make sense for the state to maximally consult with the religions themselves both to ensure credibility of programs and to minimise any fears of religious communities. Care should also be given to the principles of accommodation and alternative delivery so that diverse *means* are not confused with the *ends* the state wishes to achieve. (see notes on **Article 7.1** above)

### **Article 9: Freedom of Religion is Institutional as well as Individual and Public as well as Private**

As in the case of several other rights in the *Constitution*, not only individuals are entitled to the right to religious freedom. The *Constitution* expressly provides that a body or institution (juristic person) is entitled to the rights in the *Bill of Rights* to the extent required by the nature of the right and the nature of the juristic person (section 8(4)). Religious bodies and institutions are therefore also entitled to religious freedom. Article 9 of the Charter reflects this. Having regard to what happened in certain other countries two errors should be avoided: religious freedom must not be *individualized* at the expense of its collective dimensions nor should religious beliefs be *privatised or marginalised* at the expense of validly public dimensions.

### **Article 9.1: Religions Free to Determine Confessions, Doctrines and Order, and Role and Limits of Law in Relation to These**

This provision explains what the religious freedom of religious bodies and institutions means. In the same way individuals may determine for themselves if and what they believe, every religious institution has the right to determine for itself what it believes, as expressed in its confessions, doctrines, ordinances and other documentation, and how to apply them. Religious bodies and institutions also have the right to regulate their own internal affairs. This includes the right to regulate their –

- organisational structures and procedures,
- the ordination, conditions of service, discipline and dismissal of office-bearers,
- the appointment, conditions of employment and dismissal of employees and volunteers, and
- membership requirements.

Of course, we cannot live together in peace and harmony if institutions in society, such as religious institutions, take decisions on these matters without regard to the society around them. Religious institutions should be held accountable in terms of principles of tolerance, fairness, openness and accountability. We often see office-bearers or employees taking religious institutions to court because they believe they were treated unfairly or inconsistently with proper procedures. The actions of a religious institution may be tested on the basis of principles applicable throughout society that embody standards of procedural fairness and natural justice that we believe should apply in all situations.

### **Article 9.2: Independence of Religious Associations**

Elsewhere we explain that the state has a duty to respect, protect, promote and facilitate the right to religious freedom (**Article 3**). This provision confirms that this duty on the state also applies in the case of religious institutions. The state must recognise the authority of religious institutions over their own affairs, and the state must govern justly, constructively and impartially in the interest of everybody. Recognition of a legal presumption in favour of diversity and the limits of law in relation to internal matters of religion alongside generally applicable principles of procedural fairness and natural justice, are important to achieve justice, fairness and respect for difference within a constitutional order such as South Africa. Developing legal recognition of how these principles

interact is an aspect of the evolution of both legal and societal maturity and a rejection of the domination of the past.

### **Article 9.3: Internal Religion Matters Free from State and Judicial Interference**

This Article emphasises an important consequence of the independence of religious associations, in that the state, including the courts, may not regulate or prescribe matters concerning religious confessions, doctrines and ordinances. This actually reflects a long-standing principle in our law that the state should not make laws on religious matters, and courts should not decide cases on the basis of religious confessions, doctrines and ordinances. This is because the matters of religious doctrine, confessions and ordinances are not matters over which courts may rightly claim jurisdiction as they have no expertise in relation to religion's revelations. In addition, should courts delve into this area, they would diminish the independence that religious associations need to stand outside the state and would entangle the courts in the internal aspects of religious dogma -- something beyond the proper purview of the law.

### **Article 9.4: The Right to Confidentiality of Internal Religious Matters**

This provision flows from the religious freedom of institutions and reflects the existing legal position in South Africa. The right to privacy (section 14 of the *Constitution*) dictates that the internal affairs and communications of a religious institution are confidential and must be respected accordingly. So, the point of departure is that religious communication is privileged, and its confidentiality must be respected. However, the interests of justice always prevail and, when necessary to dispense justice, a court of law may order that the confidentiality of religious communication be lifted though this needs to be understood as exceptional as it always risks interfering with the pastoral dimension of religious practices and that trust that guarantees of confidentiality bring.

### **Article 9.5: Religious Institutions Subject to Laws of General Applicability**

The Charter accepts the reality that religious institutions exist and function within society, are therefore part of society, and that in principle they are therefore subject to the law. As a matter of fact, a religious institution carries a particular responsibility to teach its members good citizenship and the importance of observing the law in the interest of society as a whole (the "common good"). A religious institution may also not act in a way that is blatantly illegal, for example to force its members to perform acts or rituals that are physically harmful or may damage or destroy the property of others, or to force minors to marry. **(See also the last paragraph of article 4)** However, if a religious institution, while exercising the rights guaranteed in the Charter in a lawful way, feels it cannot in good conscience observe a particular law, it must be able to justify itself on the ground that it is inconsistent with its beliefs and convictions which it may adhere to in terms of the Charter.

Sometimes a law may even contain exemptions on religious grounds, precisely to accommodate those who disagree on the basis of their beliefs or convictions. An example is the Civil Union Act, which provides that religious marriage officers are not compelled to solemnise marriages between persons of the same sex. This is as it should be. Note again that the approach followed in this provision does not imply that a religious institution, or its leaders, may break the law. The right not to observe a particular law with which one disagrees, is not a licence for illegal behaviour. Similarly, it is necessary to recall that diversity depends upon difference being respected and that law should not be used as a means of homogenizing society. There are those ("civic totalists") who wish everyone to believe as they do on matters where we should allow differences of opinion. Maintaining a space for difference of beliefs, sometimes on matters that are deeply held by those who believe otherwise, particularly in relation to political issues of the day such as sexual orientation, gender rights or religious beliefs, however, is one of the marks of a mature and respectful society and a recognition of law understood within its proper bounds. Due to the importance of diversity in relation to freedom of persons, associations and society itself, the onus

should be on those who wish to challenge the presumption of diversity to show why some greater good obtains that requires legal regulation and restriction. The hurdle for such a rebuttal should be significant since the dignity and freedom of difference is what is at stake.

#### **Article 10: State may allow Tax and Charitable Benefits to Religions**

As part of its duty to create a positive and safe environment for the effective exercise of religious freedom (**Article 3.1**), the state may allow tax, charitable and other benefits to religious institutions. Again, the condition is that the state must act impartially, and may not allow such benefits for one religion or religious institution and not another. Nothing prevents the state from allowing such benefits to other institutions as well.

#### **Article 11: Religious Right to Raise Funds and Voluntary Support**

Like all voluntary associations, a religious institution has the right to perform different actions to further its objectives, and to receive, manage and spend money for that purpose. Of course, we expect from religious institutions as responsible bodies to govern themselves in financially sound and responsible ways and to act in the best interest of their members.

#### **Article 12: Religious Right to Perform Works of Upliftment for Members or Others and to Solicit Funds in Relation to Same**

It is in the nature of religious institutions to conduct relief, upliftment, social justice, developmental, charity and welfare work in society. This provision recognises this as a right and provides specifically that religious institutions may conduct these kinds of activities in accordance with their ethos, beliefs and convictions, irrespective of whether they receive state-aid, or whether they serve people with other convictions. Religions often perform “outreach” to those who are not within their own religion and it would be a significant truncation of religious action to attempt to limit them to only serving their own adherents. This follows on **Article 3** which provides that the state must act impartially, may not force anyone to act in a certain way, and may not discriminate against anyone on the basis of their beliefs or convictions. This provision therefore prevents the state from forcing a religious institution to act inconsistently with its beliefs and convictions, or to refrain from acting in accordance with its beliefs and convictions, for example by setting conditions for its financial aid to the institution’s activities.

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