

THE NEW CALEFRAGIA CASES BEFORE THE SOUTH AFRICAN COURTS

Heinz Klug
University of Wisconsin Law School

Church-State Relations and Religious Liberty: Comparative Perspectives
September 22-23, 2008, University of Notre Dame

INTRODUCTION

Health Services are designated in Schedule 4 of the Constitution as an area of concurrent national and provincial legislative competence in South Africa's system of regionalism – or as it is termed in the Constitution: Co-operative government. The Constitution states that government in the Republic is “constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated” (s 40(1)). Chapter 3 of the Constitution also contains a set of principles of co-operative government and intergovernmental relations that require the different spheres of government and organs of government within each sphere to respect and co-operate with one another (s 41(1)) and most pertinently for our problem, to make “every reasonable effort” and “exhaust all other remedies” before taking an intergovernmental dispute to a court for resolution (s 41(3)).

In practice the government has in accordance with s 41(2)(a) established “structures and institutions to promote and facilitate intergovernmental relations,” and in the area of health services the government first created a coordinating body or MinMEC made up of the Minister of Health and the nine provincial Members of Executive Committees (MECs) who are in charge of health services in the nine provinces. After Parliament passed the National Health Act (Act 61 of 2003), which came into force in 2005, a new statutory co-ordinating body was created. This body, the National Health Council, replaced the health MinMEC and includes, in addition to the political heads of health, the relevant senior civil servants including the Director-General of Health in the National Department of Health and the nine heads of provincial health departments. Thus both the licensing exemptions and the policy of providing conditional national funding to private religious institutions would, in the South African context, most likely have been

discussed and co-ordinated between the national and provincial levels of government within the National Health Council.

CLAIMS THAT THE NATIONAL AND PROVINCIAL LAWS ARE AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION

While the South African Constitution protects freedom of religion for individuals (s 15(1)) and the exercise of this freedom together with other members of the community (s 31(1)), there is no specific guarantee against the establishment of religion. When this question arose in the context of cases addressing the right to freedom of religion the Constitutional Court held that there is no establishment clause in the Constitution. In *S v Lawrence; S v Nagel; S v Solberg* (1997 (4) SA 11176 CC) in which the defendants challenged their convictions under the liquor Act for selling alcohol on Sundays and Christmas Day as a violation of their right to religion, the Court explicitly noted that “[O]ur Constitution deals with issues of religion differently to the US Constitution” (para. 100). Justice Chaskalson then argued that to impose an obligation on the state similar to that imposed by the establishment clause in the US Constitution “would have far reaching implications beyond the apparent scope and purpose” (para 101) of the clause in the South African Constitution. Instead, Justice Chaskalson suggests that the problem of the state favoring a particular religion is addressed in the South African context by the equality principle, which prohibits unequal treatment and discrimination on the basis of a list of enumerated, but not exclusive grounds, including religion.

While the Constitutional Court has relied on the definition of freedom of religion described by Canadian Supreme Court Justice Dickson in the Big M Drug Mart case (See, *S v Lawrence*, para 92 and *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757 (CC) para. 18) it refused to follow the Canadian Supreme Court’s holding that the purpose of the Lord’s Day Act was constitutionally fatal and instead distinguished the Liquor Act by arguing that it had a wider set of purposes than merely requiring respect for days of significance to Christians. While this is similar in outcome to the US cases involving challenges to Sunday laws, the approach in South Africa is to acknowledge that such laws may impose a burden on

other religions but then to hold when applying a limitations clause analysis that the state is justified in imposing the particular regulation.

Finally, the South African Constitution includes a specific provision that provides explicitly that “religious observances may be conducted at state or state-aided institutions” (s 15(2)), on condition that: “those observances follow rules made by the appropriate authorities” (s 15(2)(a)); “they are conducted on an equitable basis” (s 15(2)(b)); and “attendance at them is free and voluntary,” (s 15(2)(c)). In discussions of this section the Constitutional Court has reiterated that the right to freedom of religion includes at least: “(a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce ones religious beliefs publically and without fear of reprisal; and c) the right to manifest such beliefs by worship and practice, teaching and dissemination.” (Prince v President, Cape Law Society, 2001 (2) SA 388 (CC) para. 38.) Furthermore the Court has argued that implicit in the right is the “absence of coercion or constraint.” Thus instead of a prohibition on the establishment of religion the South African Constitution acknowledges that organs of the State and institutions funded or related to the State may engage in religious observances so long as there is neither coercion or the favoring of one particular religion over others.

CONSTITUTIONALITY OF THE PROVINCIAL EXEMPTIONS

In the New Calefraga Case the province has enacted two exemptions allowing both the Ayurvedic Society on the one hand and the Devine Mercy Hospital on the other hand to avoid conditions imposed by the regular licensing procedure so long as the group in question has a “sincere religious objection” to either the restrictions of standard medical practice, in the case of the Ayurvedic Society, or to acts of sterilization or abortion, in the case of the Roman Catholic Sisters of Mercy. While in South Africa it would be constitutional for the provincial legislatures to pass such legislation in terms of their concurrent legislative powers, there is a chance that these exemptions would be ineffective under South Africa’s system of co-operative government so long as they were in conflict with nationally legislated licensing standards. If there were no nationally legislated standards then these exemptions would be legitimate.

They would remain vulnerable however if challenged either on the grounds that they violate other rights protected in the Bill of Rights, such as the guarantee that “everybody has the right to bodily and psychological integrity, which includes the right - (a) to make decisions concerning reproduction” (s 12 (2)) or if they conflict with other statutory provisions such as those providing for access to abortion as part of the state’s Constitutional duty to provide access to reproductive health care (s 27(1)(a)). While not many cases have as yet come before the South African courts there are indications in the jurisprudence which indicate that the Courts are likely on the one hand to give more weight to individual rights claims over the claims of religious communities and on the other hand to be more sympathetic of the state’s attempts to regulate behavior despite claims by religious individuals and groups that these regulations impact their ability to practice their religious beliefs.

In the first instance, a religious community challenged the National Education Act’s prohibition of corporal punishment of juveniles (Christian Education South Africa v Minister of Education, 2000 (4) SA 757), arguing that the prohibition violated their religious duty to ensure that their children were disciplined according to their understanding of the scriptures. In the second instance an individual claimed his religious freedom was infringed upon by the refusal of the Cape Law Society to register him as an article clerk as part of his admission to the legal profession. In this case (Prince v President, Cape Law Society, 2001 (2) SA 388 (CC)) Mr Prince argued that as a Rastifarian he is required to use cannabis as part of his religion and that despite two prior convictions he intended to continue to exercise his faith in this way and that it was unconstitutional for the Cape Law Society to refuse to register his article clerk position on the grounds that he was an unsuitable candidate to become an attorney.

In both of these cases the Constitutional Court found that the facially neutral statutes – prohibiting corporal punishment and the possession of cannabis – violated the claimants rights to practice their religion guaranteed by the Constitution, but that in both cases the infringements on the right to religion were justified under the limitations clause of the Bill of Rights which holds that “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," (s 36(1)). Application of the limitations clause takes into account a list of factors laid out in the Constitution (s 36(1)(a)-(e)), which have in the jurisprudence of the Constitutional Court become different elements in what is effectively a balancing test which serves to resolve situations of conflicting rights as well as giving the state a margin of appreciation in its attempt to balance the respect of rights with the needs of regulation.

Furthermore, it should be noted that the Constitutional Court has explicitly rejected any suggestion that the Courts would interrogate the sincerity of a religious belief, instead the Court will accept as genuine any belief that is shown to be held by a particular religion or community. As Justice Ngcobo argued in the Prince Case:

as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice. (Prince, para. 42).

CONSTITUTIONALITY OF THE NATIONAL FUNDING CONDITIONS

While 97 percent of provincial funding is provided from revenue collected by the national government, resources are distributed among the different levels of government according to specific formulae which sees the national government retaining about 38 percent of post-debt

servicing revenue while provinces and local governments receive 57 percent and 5 percent respectively (see, Health & Democracy, Adila Hassim, Mark Heywood and Jonathan Berger eds., SiberInk: Cape Town, 2007, pp. 76-77). This distribution of resources, defined as equitable shares, is determined by the Finance provisions of the Constitution (s 213-215) which include, in addition to a process for allocating equitable shares, the provision that the national government may provide other allocations of funds from the national government's share of revenue and place "any conditions on which those allocations may be made" (s 214(1)c)). Thus, in the South African case, it is perfectly constitutional for the national government to set conditions for the distribution of national equitable share funds. In fact, approximately 20 percent of provincial health department budgets are based on conditional grants which are primarily used to "protect special health programmes or start up new programmes" (Hassim et al, p 87).

As far as the particular conditions imposed by the national government in the New Calefraga Case is concerned, the South African Court's might very well find that they amount to impermissible impositions on the rights of these communities to practice their religions, however, there is also evidence from the jurisprudence that indicates that the Courts are likely to find such impositions justifiable under the limitations clause, especially where the hospital concerned is the only full-service hospital in the province. This analysis is supported by a case in the High Court in which the Court argued that the individuals involved had waived their religious freedom rights when they choose to enroll their child in a private (although partially state-funded) school which required the child to attend religious observances and education classes (Wittmann v Deutscher Schulverein, Pretoria, 1998 (4) SA 423 (T)). Conversely, since the Sisters of Mercy are free to refuse to accept state funds they too might have to accept that they have waived their right to religious freedom when they decided to accept the funds. Finally, as far as the equal protection conditions are concerned the South African courts are likely to uphold equality requirements as these are considered central to the promise of South Africa's post-apartheid Constitution, yet at the same time the Courts have already, in one case, made an exception for members of the clergy. In the case of the Church of the Province of Southern Africa, Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration, 2002 (3) SA 385 (LC) the Labour Court held that an ordained priest is not an 'employee' as defined in

the 1995 Labour Relations Act.

It seems highly unlikely, under these circumstance, that the two groups would have any claim, under the South African Constitution, that the imposition of conditions designed to either uphold medical standards or to ensure access to particular health care in an area in which there is only one full-service hospital, would be a violation of their right to religious freedom. Even if such a violation were to be acknowledged there is even a greater chance that the limitation of the groups religious freedom rights would be considered justifiable under the Constitution's limitation of rights provisions.