LIMITATION OF RELIGIOUS FREEDOM TO CONFORM TO THE STANDARDS OF AN OPEN AND DEMOCRATIC SOCIETY

Summary

One has freedom of religion, not freedom from religion. This claim is common, but it rests on a misunderstanding of what real freedom of religion entails. The most important thing to remember is that freedom of religion, if it is going to apply to everyone, also requires freedom from religion. Why is that? One does not truly have the freedom to practice one's religious belief if one is not also required to adhere to any of the religious beliefs or rules of other religious.

Freedom from religion does not mean, as some mistakenly seen to claim, being free from seeing religion in society. No one has the right not to see churches, religious expression, and other examples of religious belief in our nation, and those who advocate freedom of religion do not claim otherwise.

What freedom from religion does mean, however, is the freedom from rules and dogmas of other people's religious beliefs so that people can be free to follow the demands of their own conscience, whether they take a religious form or not. Thus they have both freedom of religion and freedom from religion because they are two sides of the same coin.

1. Introduction

The word "religion" meaning to bind fast, comes from the Western Latin word *religare*. It is commonly, but not always, associated with traditional majority, minority or new religious beliefs in a transcendent deity or deities[1].

Religions and other beliefs bring hope and consolidation to billions of people, and hold great potential for peace and reconciliation. They have also, however, been the source of tension and conflict.

The question is, how does the state, in limiting religious freedom, conform to the standards of an open and democratic society based on human dignity, equality and freedom? The hope is that the conclusions will then be able to be extended to more controversial cases, in particular, involving limits on the right to freedom of expression[2].

1.1. First Amendment Baground

The first amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The two clauses, the Establishment Clause and Free Exercise Clause, have provided considerable grounds for litigation. One other reference to religion is found in the United States Constitution. Article IV provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

The central purpose of the Establishment Clause is to ensure governmental neutrality in matters of religion. "When government activities touch on the religious

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1. The guide developed by Michnel Roan, at the Tandem Project (*University of Minnesota Human Rights Centre*), http://www1.umm.edu/humanrts/edumat/studyguides/religion.html.
2 Demise Meyerson, *Rights Limited: Freedom of Expression, Religion and the South African Constitution*.

sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact[3].

Every religion has some form of institutional worship, whether it is conducted in a mosque, temple, church or otherwise. Organised religion is the most popular method by which persons of a religious faith express their religiosity. Thus, for practical purposes it is vital to consider, how wide and broad is the freedom to worship as a group[4].

The Canadian Supreme Court in *R v Big M Drug Mart Ltd* [5] made a distinction between an exercise clause and an establishment clause. The relevance of the establishment clause to the question of freedom of religion was carefully canvassed by the Court. It has been suggested that the establishment clause does not simply prohibit coercion but prevents endorsement and acknowledgement by the state of religion[6].

The Canadian Supreme Court held as follows:

> "The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religions belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Canadian Charter. Equally protected, and for the same reasons, are expressions and manifestations of

[3] *Gillette v United State* 401 US 437 (1971)
[4] Tommy Thomas, Freedom of Religion and Registration of Religious Groups: *The Journal of the Malaysian Bar*
[5] 18 DLR (4th)321
[6] Cachalia et al, *Fundamental Rights in the New Constitution*. See also Kevin "Seamus" Hasson, *The Right to be Wrong: Ending the Culture War Over Religion in America*, Encounter Books, 2005. http://en.Wikipedia.org/wiki/freedom of religion

religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a certain sectarian purpose."[7]

The right of free exercise of religion implies the right to free exercise of non-religion and no one should therefore be coerced into commitment to any religion. Consequently the free exercise clause is sufficient to forbid the state to coerce any minority group into a contrary belief.[8]

Zorach v Clauson[9], New York City established a release – time programme to enable students, whose parents have requested permission from the School to allow their children to leave the School for religious instruction at a particular time. The Applicant (Zorach), a parent whose children attended the New York public schools, challenged the programme on the constitutional basis.

The issue is whether the state may grant willing students permission to leave public school grounds during school hours in order to receive religious instruction else-where.

[7] *R v Big M Drug Mart Ltd* 18 DLR (4th) 321 in Cachalia et al *Fundamental Rights in the New Constitution*
[8] *Luynch v Donnelly* 465 US 668 (1984) read with *County of Allegheny v Greeter Pittsburgh* ACLU 492 US 573 see also *Everson v Board of Education of the Township of Ewing* 330 US 1 (1947)
[9] 343 US 306 (1952)

It was decided that there is no evidence of coercion on the part of the school officials. Only those students whose parents have requested their release were permitted to participate in religious instructions. Although the first amendment requires a separation of church and state, that separation is not absolute but it is well defined. Otherwise there would be hostility between the church and state. The religious groups would be unable to benefit from such basic government services. Clearly students may be released from school to attend religious holidays or observances. This release-time is no different in character, from religious holidays or observance.

Religion is an integral part of our society, although the state may not coerce religious observances, it may make provision for those citizens desiring to retreat to a religious sanctuary for worship or instruction.

Everson v Board of education[10], a local New Jersey board of education (the Respondent) authorized reimbursement to parents of the costs of using the public transportation system to send their children to school, irrespective as to whether it is a public or parochial school. Applicant (Everson) challenged the scheme as an unconstitutional exercise of state power to support church schools.

The issue is whether or not may a state school use public funds to assist student transportation to parochial as well as public school.

The establish clause was intended to erect a wall between church and state. It does not prohibit a state from extending its general benefits to all its citizens without regard to their religious belief. Reimbursement of transportation is intended solely to

[10] 330 US 1(1947). Freedom from religion does not mean, as some mistakenly seem to claim, being free from seeing religion in society. No one has the right not to see churches, religious expression, and other examples of religious belief in our nation and those who advocate freedom of religion do not claim otherwise, see http:// atheism. About.com/od/churchstatemyths/a/freedomfrom.htm. *Engle v Vitale* 370 US 421 (1962)

help children to arrive safely at school, regardless of their religion. It does not *per se* support any schools, parochial or public[11].

1.2. The History of Freedom of Religion

Freedom of religion and belief is considered by many to be a fundamental human rights. It is also a guarantee by a government for freedom of belief for individuals and freedom of worship for individuals and groups. Freedom of religion must also include the freedom not to follow any religion (irreligion) or not having belief in god (atheism).

The Universal Declaration of Human Rights adopted by the fifty eight Member States of the United Nations General Assembly on December 10, 1948, at the Palais de Chaillot in Paris, France explained freedom of religion and belief as follows:-

"Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice worship and observance"[12].

Freedom of religion as a legal concept is related to but not identical with religious

[11] *In Engel v Vitale*, cited above the question was may a state require daily recitation of a state-composed, nondenomination prayer. The Court held that no it does not require daily recitation. The first amendment leaves no place for official prayers to be recited as part of a religious program carried on by government. Even though recitation is voluntary and the prayer is non-denomination, the rule officially establishes the beliefs embodied in the prayer in violation of the Establishment Clause. The writing of prayers should be left to the people themselves.

[12] *Lemon v Kurtzman*, 403 US 602 (1971). The question was, may the state financially assist nonpublic schools if the use of the funds is sufficiently regulated to ensure their use for exclusively secular purpose. The Court held that the taxpayers' forced contribution to nonpublic schools violates the first amendment. By bringing financial aid to nonpublic schools into political arena, the state threaten to make religious preferences a significant political issue in the selection of public officials. These programmes are subjected to continual debate as funds are appropriated.

toleration, separation of church and state, or *laicite* (a secular state). Historically freedom of religion has been used to refer to the tolerance of different theological system of belief, while freedom of worship was defined as freedom of individual action. During history some countries have accepted some forms of freedom of worship, though in actual practice that theoretical freedom was limited through punitive taxation, repressive social, legislation, and political disenfranchisement. Compare examples of individual freedom in Poland or the Muslim tradition of dhimmis, literally "protected individuals" professing an officially tolerated non-Muslim religion.

1.3. United States of America and Freedom of Expression and Religion

The modern legal concept of religious freedom as the union of freedom of belief an absence of any state-sponsored religion, orginated in the United States. This issue was addressed by Thomas Pine in his pamphlet, and the State of Virginia Statute for religious Freedom was written in 1779 by Thomas Jefferson which state that:-

"No man shall be compelled to frequent or support any religious worship, nor shall be enforced, restrained, molested, or burdened in his body or good on account of his religious opinions or belief, but that all men shall be free to maintain, their opinions in matters of religion, and that the same shall in no effect their civil capacity."[13]

[13] Common Sense (1776). The greatest current threat to separation of church and state is in the public schools, the very place that Americans of every background first learn the critical values of freedom and

The United States has become a nation of many religious institutions which flourish under the freedom of legal protection by local, state and Federal governments. This protection is, though, not to be used as cover for illegal activities, as in the case of a Defendant who claimed smoking *marijuana* was part of her religious belief and practice.

"Those who seek constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms that this special sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in anti-social conduct that otherwise stands condemned"[14].

2. Prince v President of the Law Society, Cape of Good Hope and Others[15].

A South African Case Law

This paper will share views and experience on the particular case of allegedly infringements on religious freedom, the right which is protected in section 15(1) of the South African Bill of Rights[16]: "everyone has the right to freedom of conscience, religion thought, belief and opinion." What counts as a religion is of

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tolerance. And at a time when our population is growing increasingly diverse, those values are move important than ever. The public schools must make students from every background feel equally welcome if democracy is to endure, http://www.ad1.org/issue-religion-freedom/faith-freedom-print.asp. *Tilton v Richardson* 403 US 672 (1971). The question is whether the government may provide to religious colleges one-time construction grants, the use of which is limited to secular purpose. The Court held that this programme does not require continual financial relationships or dependencies, nor does it involve the type of comprehensive surveillance. The Court upheld the programme of one-time construction grant.

[14] *US v Kuch* 288 FSupp 439

[15] 1998 (8) BchR 976 (c)

[16] South African Constitution, Act 108 of 1996. See *also Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (cc)

course, an interesting but difficult question. Providing an answer to it is, however, not strictly necessary for the purposes of this paper. The freedom of religious issues is raised by legislation which limits actions motivated by religious convictions, as well as by legislation which limits the freedom to believe. It is true that the South African Constitution, particularly the Bill of Rights does not explicitly state this limitation, by contrast, for instance, with the European Convention on Human Rights and the International Covenant on Civil and Political Rights which state the limitation[17]. Article 9 of the European Convention states that everyone has the right to freedom of thoughts, consicience and religion, and to manifest his religion or belief, in worship, teaching, practice and observance. Article 18 of the International Covenant provides that freedom of religion includes the right to manifest one's religion and belief in worship, observance, practice or teaching.

Prince's case, applicant desired to qualified himself to be admitted as an attorney and had fulfilled most of the statutory requirements save for a period of community service in terms of section 2A(a) (ii) of the Attorneys[18]

The Law Society of the Western Cape Province declined to register his contract to perform community service with his principal adopting the view that Applicant was not a fit and proper person to be admitted as an attorney, as he had two previous convictions for the possession of dagga and had made it clear that he intended to continue to use

[17] Denis Meyerson, *Limited Rights: Freedom of Religion and the South African Constitution*.
[18] Act 53 of 1979. *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (cc). There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.

dagga in the future. Applicant was an adherent of the Rastafari religion. The Rastafarians use dagga for spiritual, medicinal, culinary and ceremonial purposes which it is alleged form an integral part of the religious practice of adherents of Rastafari religion. Applicant accordingly adopted the stance that the Law Society's decision had the effect of violating the constitutional guarantee of the right to freedom of religion in terms of section 15(1) of the South Africa Constitution[19], as well as the guarantee contained in section 31(1) of the South African Constitution which state that no one may be denied the right with other members of a religious community to practice their religion. It was also contended by the Applicant that the decision in question also infringed Applicant's right under section 22 of the Constitution, which provide that one has the right to freely choose his own profession. The Law Society's decision not to register applicant contract to perform community service brought about unfair discrimination against Rastafarians in contravention of section 9(3) of the Constitution. Applicant launched the instant proceedings in which he sought an order reviewing and setting aside the Law Society's decision and directing it to register his contract of community service. The Minister of Justice and the Attorney-General sought leave to intervene as Respondents in the application and such leave was granted.

2.1. Summary of the Arguments

[19] Act 108 of 1996. *Wittmann v Deutscher Schulverein, Pretoria and Others* 1999(1) BCLR 92 (T), Section 14 of the interim Constitution and section 15 of the final Constitution explain the nature of the right, the word "religion" in these provisions is not neutral but denotes a particular system of faith and worship, "religious observance" is an act of a religions charter. "Religious education" does not constitute "religious observance" even if religious instruction did not amount to religious observance, the Constitutions have conferred on State and State-aided educational institutions the right to conduct religious observances, provided that attendance at such is voluntary that right cannot be nullified e the right to abstain from them but choose not do so.

It was contended on behalf of the Applicant that his possession and the use of dagga for purposes of religious worship was constitutionally protected under the constitutional guarantees mentioned above. It was further argued that his possession and use of dagga for religious worship was permitted in terms of the exemption contained in section 4(6)(vi) of the Drug and Drug Trafficking Act[20]. The latter provides an exemption to prohibition contained in section 4 of the Act if the possessor "has otherwise come into possession of the substance in a lawful manner". As an alternative to his argument, it was contended that if Applicant's possession and use of dagga for religious purposes was prohibited by section 4 of the Act, that provision was unconstitutional and invalid in so far as it failed to exempt the possession and use for religious worship which was protected under the Constitution. As a final alternative argument, it was contended that if the prohibition was not unconstitutional, Applicant's possession and use did not in the circumstances render him unfit to be an attorney.

In opposing the relief sought by the Applicant, Fourth and Fifth Respondents (the Minister of Justice and the Attorney-General respectively) pointed to the body of expert opinion that regarded dagga as a potentially dangerous drug and also pointed to various United Nations conventions, to one of which South Africa was a party, which obliged contracting States to adopt measures to regulate and control the possession and use of that

[20] 140 of 1992. In *Regina v Kerr* (1986) 75 NSJ (2d) 305 (CA) the Nova Seotia Supreme Court, Appeal Dividion, upheld a conviction for possession of marijuana despite the defence which was raised that the possession of marijuana was in accordance with the appellant's religious beliefs. See also *State v Brashear*, 92 NM 622, 593 P2d 63 (1979). In terms of section 9(3) of the Constitution the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including religion. Section 9(5) provides that discrimination on any of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.

substance strictly. They also pointed to the fact that the Drug and Drug Trafficking Act[21] had been specifically enacted to bring South Africa into line with international norms in respect of the control of dependence-producing substances. Its terms had been formulated after careful consideration of the problems posed by the drug traffic in South Africa. In enacting the statute there had also been an attempt to bring the drugs law into line with the requirements of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance[22]. South Africa was obliged to adopt measures to ensure that the possession of certain drugs including dagga would be a punishable offence. On this basis Fourth and fifth Respondents argued that the prohibition contained in section 4 of the Act, in so far as it related to dagga was justifiable and accordingly valid and constitutional.

2.2. Brief Analysis of Other Countries Case Law

The concept of freedom of religion has been considered by the Canadian Supreme Court in the leading case of *Regina v Big M Drug Mart Ltd*[23]. Section 1 of the Canadian Charter of Rights and Freedoms provides that everyone has "the freedom of conscience and religion". *In casu*, the Canadian Supreme Court set aside the Lord's Day Act as

[21] Reference to above. There are other socially harmful consequences, so notorious, that we need not dwell on them. The prevention of drug abuse is plainly a legitimate governmental aim and an effective prohibition thereof a pressing social purpose, see *S v Gwandiso* (1996(1) SA 388 (CC). It is beyond doubt that the ban on the use and possession of cannabis in both Acts was imposed to protect society as a whole. See also *Ministry v Interim National Medical and Dental Council of South Africa* 1998 (7) BCLR 880 (CC). Lifting it partially to allow its uncontrolled use by one section of the community cannot leave society unaffected and adequately protected.

[22] Vienna Conference 1988

[23] (1985) 13 CCR 64. Appellant's counsel also relied on the following passage in the judgment (in an application for the removal of an attorney's name from the roll) *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T). "Nothing has been put before us which suggests in the slightest degree that the Respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind, nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the Respondent was obviously motivated by a desire to serve his fellow non-Europeans.

being in conflict with the right to freedom of religion. The Court described the right as follows:

"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

A similar approach to that of the Canadian Supreme Court was followed by the minority in the United States Supreme Court in *Employment Division Department of Human Resources of Oregon, et al v Smith*"[24]. *In casu*, the United States Supreme Court was called upon to decide whether an Oregon state prohibition of the possession and use of the hallucinogenic drug, by members of the North American Church for sacramental purposes violated the First Amendment to the US Constitution, which provides that Congress shall make no law prohibiting the free exercise of religion. The Court held that prohibition was not unconstitutional. The Court further held that a law violating the guarantee of religious freedom is unconstitutional only if that was its purpose. A generally applicable law with a neutral purpose did not violate that guarantee even if its

[24] (1990) 494 US 872. The judgement in *S v Mkhise* 1988(2) SA 868 (A) case must not be misunderstood or applied out of context. One of the questions in that case was whether the skills and proficiency of the person who had never been admitted as an advocate played any part in determining whether his appearance for the accused constituted a fatal irregularity. It is in this context that it was said that "it would be wholly impracticable to attempt to determine *ex post* facto whether consel concerned was a fit and a proper person" in the sense that this term is applied and understood in the (Admission of Advocates Act) i.e whether he is generally a person of integrity and reliability. See also *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T)

effect was to restrict certain persons in the exercise of their freedom of religious observance[25].

The minority concurred and held that a generally applicable law may impose a burden on the freedom of religious observance if its effect is to restrict the rights of some subjects in the exercise of that freedom. Such a restriction will, however, be upheld if it is shown to serve "a compelling state interest" and does not "by means narrowly tailored to achieve that interest"

The South Africa Constitutional Court has followed the approach of the Canadian Supreme Court, which is similar to that adopted by the minority of the United States Supreme Court in *Smith*[26]. The South African Constitutional Court has held that a law infringes the Constitution if either its purpose or effect is to invalidate a constitutional right[27].

The Court in *Hugo*[28] held that the South African Constitution envisages a two-stage enquiry. The first stage of the enquiry is to ascertain whether a law, by its intent or impact, infringes a right guaranteed by the Constitution. If it does, the second stage of

[25] *Smith* referred to above. *Muller v Allen* 463 215 388 (1983), the question is whether or not a state may permit parents to deduct from their income tax the cost of their children's education, including tuition paid to private sectarian school. The Court held that the deduction is limited to actual expenses incurred for the tuition, textbooks and transportation of dependents attending elementary or secondary school. The validity of the deduction depends on application of the three-part *Lemon* test.
[26] Cited above
[27] *President of the Republic of South Africa and Another v Hugo* 2(2) 1997 (4) SA 1 (CC)
[28] Referred to above. *Wittman v Deutscher Schulverein Pretoria and Others* 1999 (1) BCLR 92(T). A City mother planed to challenge in court the German School's decision to compel her daughter to do a subject without her consent. Ingrid Wittmann said her twelf year old daughter who is in standard 5 had been forced since 1990 to take religious education as one of her subjects. Mrs Wittmann said she had originally registered her daughter at the German School on condition she be exempted from religious education.

the enquiry ensues, namely whether the infringement is protected by the limitation clause of the Constitution in section 36. That section provides 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, equility and freedom, taking into account factors including those set out in paragraphs (a) to (e) of the section. In this respect South African Constitution is similar to the Canadian Charter. Section 1 of the Canadian Charter, "guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In *Big M Drug Mart*[29]. The Court held that "freedom (of religion) means that, subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

2.3. RATIO DECIDENDI IN PRINCE

The undisputed evidence is that cannabis is used by adherents of the Rastafarian religion as part of their religious observance. The prohibition in section 4(b) of the Drug Act[30] clearly has a serious impact on the rights of Rastafarians to practice their religion. It

[29] Referred to above. See also *Jocky Club of South Africa and others v Feldman* 1942 AD 340, 359. *LeRoux and Another v Grigg-Spall* 1946 AD 244.
[30] Referred to above. *Prince's* case, Is section 4 of the Drug Act unconstitutional because it fails to exempt the possession and use of cannabis for the purposes of religious worship? This question has already been dealt with. It is unnecessary to say anything further except that for the reasons already stated, the failure to except the possession and use of cannabis for religious purposes is not, unconstitutional.

does, as Counsel for the Applicant submitted, force them to choose between following their religious convictions or obeying the law.

Counsel for the Applicant further submitted that a relevant factor is that the integrity of the Drug Act would not be impaired by a very limited exemption which applies only to Rastafarians and only to their *bona fide* use of cannabis for the purpose of religious observance. The absence of such an exemption, it was argued, rendered section 4(b) of the Drug Act unfair.

Assuming that section 4(b) of the Drug Act does amount to unfair discrimination against Applicant and other Rastafarians, it is still necessary to consider whether this section could be justified by section 36 of the Constitution. It is unnecessary to set out again the consideration to which reference has been made in relation to religious freedom. Suffice is to say that those considerations apply, in the Court's judgment, equally to the question whether the violation against discrimination is justified. In the Court's judgment it was justified.

The factors to be considered in order to determine the unfairness or otherwise or discriminatory provision were listed in *Harksen v Lane No and Others*[31].

[31] 3(3) 1998 (1) SA 300 (CC). *Prince*'s case, section 4(b) of the Attorneys Act provides that any person intending to serve as an attorney and the articles of clerkship, shall submit to the secretary of the society "proof to the satisfaction of the society that he is a fit and proper person". In terms of section 5(2) of that Act, the secretary shall examine the contract of service lodged with him/her and shall, if satisfied that the contract of service is in order, "and that the Council has no objection to the registration thereof", register the contract in question. For this reason, the question, does the use and the possession of cannabis by applicant for religious purposes render him unfit to be an attorney is answered.

- The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage. In this regard Counsel for the Applicant argued that the Applicant is an adherent of the Rastafari religion and that as a small minority in a society organised and regulated on the basis of Christian-European values, he and other Rastafarians have in the past been marginalised and have suffered from patterns of disadvantages. The Court held that this argument is not convincing. The Court further held that there is no indication on the Applicant's papers of the extent of the Rastafari movement, nor that its inherents have been marginalised in the past or that they have suffered from patterns of disadvantages. Nor is there any basis upon which a court could possibly take judicial notice of the allegations forming the basis of these submissions.
- The nature of the provision and the purpose sought to be achieved by it.

  The provision in question, section 4(b) of the Drug Act, is aimed at controlling the possession and use of dependence producing substances.
- The extent to which the discrimination has affected the rights and interests of complainants and whether it has led to impairement of their fundamental human dignity or constitutes an imparment of a comparatively serious nature.

2.4. Choice of Profession

In terms of section 22 of the Constitution every citizen has the right to choose his/her profession freely. Counsel for Applicant argued that the criminalisation of the use or possession of cannabis in terms of section 4(b) of the Drug Act, even if such use or possession is for religious purposes, coupled with the attitude of the Law Society that anyone who intends to use cannabis in contravention of section 4(b) of the Drugs Act even if that is for religious purposes only, has the effect of excluding Rastafarians from the attorneys profession. It impaires the right to choose their profession freely, because it requires them to forsake their religious convictions in order to enter the profession[32].

Assuming that the Drug Act does not have that effect, section 4(b) is, for the reasons set out above in regard to religious freedom, justified in terms of the limitation clause contained in section 36 of Constitution.

3. The Position in other countries regarding possession and use of marijuana/dagga or drugs

In terms of section 39(c) of the South African Constitution when interpreting the Bill of Rights the court "may consider foreign law". In both the United States and Canada the

[32] *Prince's* case, the Law Society's reasons for arriving at its decision are that the Applicant has committed offences under the Drug Act and has expressed his intention of continuing to do so, albeit that the reason for this is that he contends that he is doing so in accordance with his beliefs. The attitude of the Law Society is that a person who commits offences of this kind and whose expressed intention is to continue to do so, is not a fit and proper person to join the legal profession. On the facts placed, before Court in this application and for the reasons stated, it cannot be said that the Law Society had acted in a manner which justifies the conclusion that it has failed to apply its mind properly or that it has acted so unreasonably that the inference is warranted that it did not apply its mind. The court cannot interfere with the Law Society's decision.

courts have affirmed the right of the state to pass generally applicable laws banning the possession and use of cannabis even for religious purposes.[33]

In order to decide whether the Fourth Amendment to the US Constitution gives Congress sufficient power to enact the Religious Freedom Restoration Act, the Court measured legislation against the free exercise standard enunciated in *Employment Division Department of Human Resources of Oregon, et al v Smith*[34]. It was held that the Constitution's Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.

That the First Amendment to the US Constitution extends fully to protect the freedom of religious belief is beyond question and a settled matter of law. This is the case even if the worshipper subscribes to a doctrine that is not a part of what is considered a "*bona fide* religion", if his/her belief is not in good faith or even if he/she has no religion at all, but holds "sincere and meaniful beliefs, intensely personal" which the law will perceive as tantamount to religious belief[35]. Despite the amendment's proscription that no law is to deny the free exercise of religion, not all burdens on religion are unconstitutional.

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[33] *Prince's* case above, over the years, various religious sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed, see *Regina v Kerr* (1986) 75 NSJ (2nd) 305 (CA)

[34] (1990) 494 US 872, 108 LED 2(d)876. See also *States v Lee*, 455 US 252 (1982)

[35] *Wisconsin v Yoder*, 406 US 205 (1972), when religious beliefs move from the private, intensive world to that of action (in some cabes inaction) in the name of religion in the physical world, then the Constitutional protection embodied in the Free Exercise Clause becomes more complex and elusive. The freedom to act is a conditional and relative one, and this Congress may prescribe and enforce certain conditions to control conduct in the interest of the public welfare and protection of society which may turn out contrary to a person's religious beliefs. See *Leary v United States* 383 F2d 851 (1967)

Native Americans have used peyote in religious ceremonies for thousands of years. The Native American Church, with some two hundred and fifty members, has historically enjoyed an exemption for "non-drug use of peyote in *bona fide* religious ceremonies, and members who were using peyote were exempted from registration. It was held that any person who manufactures peyote for, or distributes peyote to the Native American Church, however, there was a requirement of annual registration and the compliance with other requirements of law[36]. This was done until 1990 when the Court in *Smith* delivered a controversial judgment. It was stated that when a law is challenged as interfering with religious conduct, the constitutional inquiry must be based on three questions:

- Whether the challenged law interferes with the free exercise of religion.
- Whether the challenged law is essential to protect an overriding and compelling governmental interest and
- Whether accommodating the religious practice would unduly interfere with fulfillment of the government interest.

The "compelling-interest test", as it often called, required a standard of strict scrutiny to determine whether governmental action justifies the substantial infringement of a First Amendment Free Exercise right, and had been the Supreme Court's method of review for more than half a centuary.

City of Boerne, Petitioner v PF Flores, Archbishop of San Antonio and United States[37], the Religion Clause of the US Constitution represents a profound commitment to

[36] Section 137.31 of the Control Substance Act, Special Exempt Persons: Native American Church.
[37] US Supreme Court No. 95-2074 (June 25, 1997*) State of Hawaii v Chuck Andrew Blake* Report N05 B-89323 and B-92053: No 9424 (January 31, 1985), since Blake calimed that the use of marijuana is a religious practice, he had to establish that such practice is an integral part of a religious faith and that the

religious liberty. The Court further held that "our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with the general applicable law."[38]

State of Hawaii v Chuck Andrew Blake, in determining whether there is an unconstitutional infringement of the freedom of religion, the Court stated the following:

- Whether the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious beliefs.
- Whether the person's free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the person's religious practices, and
- Whether the state had a compelling interest in the regulation which justified such burden.

In appealing his conviction on two charges of knowingly possessing marijuana in violation of Hawaii Revised Statutes[39], the Defendant raised constitutional issue. The Defendant contended that the application of Hawaii Resived Statutes resulted in an unconstitutional deprivation of his right to the free exercise of religion known as Hindu Tantrism.

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prohibition of marijuana results in a virtual inhibition of the religion or practice of the faith. See *People v Mullins*, 50 Aol App 3d 61

[38] Report Nos B-89323 and B-92053: No 9424 (January 31, 1985). Appellate review of factual determination made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard.

[39] Hawaii Revised Statutes, section 712-1249 reads: promoting a detrimental drug in the third degree. A person commits the offence of promoting a detrimental drug in the third degree if he knowingly possesses any marijuana or any Schedule V Substance in any amount.

The following facts are not in dispute, On April 15, 1989, a police officer observed six persons, including Defendant, setting at the extreme end of Lincoln Park in Hilo, Hawaii. The officer saw five of them drinking from the same bottle of beer and smoking marijuana.

Appellate Court held that the trial Court's finding that the followers of Hindu Tentrism can freely practice their religion without marijuana was not erroneous, the law proscribing the possession of marijuana did not burden Defendant's practice of Hindu Tantrims and there was no unconstitutional infringement of Defendant's right of religious freedom[40].

The Court accepted that Hindu Tantrism is an accepted religion and that the Defendant is sincere in his beliefs. The Court weighed the conflicting evidence presented by the Defendant and found that the role of marijuana in Hindu Tantrism is in fact optional, and that the follows of Hindu Tantrism can freely practice, their religion without marijuana. The Court therefore concluded that Hawaii Statutes prohibiting marijuana place no burden on the exercise by Defendant of his religion[41]. The District Court made no specific findings whether Hindu Tantrism is a *bona fide* religion within the meaning of the First Amendment and whether Defendant sincerely believed in its doctrines. Instead, the Court assumed for the purposes of its decision that Hindu Tantrism is an accepted

[40] The First Amendment of the United States Constitution provides in pertinent part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The Fourth Amendment makes this immunity binding on the states. See *Wisconsin v Yonder* 406 US 205, 92 Sct 1526 and *Cantwell v Connecticut* 310 US 296, 60 Sct 900, 84 Led 1213 (1940)

[41] *Chuck Andrew Blake's* case *supra*, the district court concluded that assuming for *arguendo* purpose that the statute imposes a burden on Defendant's religious practice, the State does not have an interest in prohibiting marijuana of sufficient magnitude to override the Defendant's claimed religious interests. Defendant asserts that the district court erred in failing to find that Defendant's use of marijuana was essential to the practice of his religion and in finding that the state's interest in criminalizing the use of marijuana was compelling. The Court disagreed.

religion and Defendant was sincere in his religious beliefs. Since an Appellate Court is generally without authority to make findings, the Appellate Court accepted the District Court's assumptions and proceeded with the review.

Conclusion

There can be little doubt about the importance of the limitation in the war on drugs and that war serves an important pressing social purpose, the prevention of harm caused by the abuse of dependence-producing substance[42]. The abuse of drugs is harmful to those who abuse them and therefore to society. The government has a clear interest in prohibiting the abuse of harmful drugs. South Africa has an international obligations to fight the war against drugs subject to the Constitution.

The government objective in prohibiting the use and possession of cannabis arises from the belief that its abuse may cause psychological and physical harm. On the evidence of the experts on both side, it is common cause that cannabis is a harmful drug. However, such harm is cumulative and dose-related. Uncontrolled use of cannabis may lead to the very harm that the legislation seeks to prevent. Effective prevention of the

[42] *Bhulwana and gwandiso*, referred to above. The in *United State v Hardman* 297F3d (10th Cir 2002). The Controlled Substances Act does not and did not before the issuance of the injunction prohibit the plainfiffs from practicing their religion. The 1971 Convention on Psychotropic Substances does not and did not before the issuance of the injunction prohibit the religious use of the UDV's sacrament, hoasca. *Blake supra*, where the defence of freedom of religion in interposed to a marijuana change, it is not uncommon for the court to assume that the alleged religion is *bonafide* and the defendant is sincerely subscribed to its doctrine. See *United States v Middleton*, 690F2d 820 (11th Cir. 1982).

abuse of cannabis and the suppression of trafficking in cannabis are therefore legitimate government goals[43].

The government does not contend that the achievement of its goals requires it to impose an absolute ban on the use or possession of drugs. Nor was it contended that any and all uses of cannabis in any circumstances are harmful. The use and possession of cannabis for research or analytical purposes under the control of the government can hardly be said to be harmful, let alone an abuse of cannabis. Similarly, the use of cannabis for medicinal purpose under the supervision of a medical doctor cannot be said to be harmful. These uses of cannabis are exempted because they do not undermine the purpose of the prohibition.

The most important Section of the South African Bill of Rights is the so-called "limitation clause" laying down, as it does, the conditions under which a right protected by the Bill may permissibly be limited. This paper contributes to the understanding of the limitation clause.

[43] *Prince's* case. See also *OCentro Espirital Beneficiente Uniqo Do Vegetal, et al v John Aschcroft, et al*, at the outset it is important to recognize that the issue before court is not the plaintiff's right to believe (imposition of the plaintiffs' free exercise of their religious beliefs. What is at issue is their right to practice their religion. See *Hobbie v Unemployment Appeals Community*, 480 US 136 (1987). Compelling a party to forego a religious practice imposes a substantial burden on that party. Article 18(1) of the United Nation International Covenant on Civil and Political rights ratified by the United States in 1992 provides that everyone shall have the right to freedom of thought, conscience and religion.

RESUME

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