

Affirmation and celebration of the ‘religious Other’ in South Africa’s constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?

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Summary

In this article it is argued that there are examples in South African constitutional jurisprudence on religious and related rights where, in addition to being respected and protected, these rights have indeed and in effect also been promoted and fulfilled as envisaged in section 7(2) of the Constitution. This has been achieved through reliance on a jurisprudence of difference affirming and, indeed, celebrating otherness beyond the confines of mere tolerance or even magnanimous recognition and acceptance of the Other. The said jurisprudence derives its dynamism from memorial constitutionalism which, as is explained, is one of three leitmotifs of significance in constitutional interpretation in South Africa (the other two being transitional and transformative constitutionalism). Memorial constitutionalism understands the South African Constitution as both memory, (still) coming to terms with a notorious past, and promise, along the way towards a (still) to be fulfilled, transformed future. How a jurisprudence of difference feeds into and, indeed, sustains memorial constitutionalism is shown by analysing some selected judgments on guarantees for religious and related rights in the South African Constitution. The examination of relevant case law peaks towards consideration of the Constitutional Court

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judgment in MEC for Education: KwaZulu-Natal and Others v Pillay and Others 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC), assessed by the author to be a jurisprudential high point in memorial constitutionalism pertinent to religious and related rights. It is argued, in the final analysis, that recent (especially) Constitutional Court jurisprudence dealing with the assertion of religious and related entitlements, couched as equality claims, has increasingly been interrogating, with transformative rigour, 'mainstream' preferences and prejudices regarding the organisation of societal life, inspired by a desire to proceed beyond – and not again to resurrect – all that used to contribute to and sustain marginalisation of the Other.

1 Introduction

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important.¹

The constitutional right to practise one's religion ... is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.²

These *dicta* from two different judgments of the South African Constitutional Court confirm what is generally accepted: Religious rights are, no doubt, 'brilliantly blue' freedom rights³ – internationally, domestically (at least in 'open and democratic societies'), and historically thus respected – and the South African Constitution,⁴ enjoining (in section 7(2)) the state to *respect* the rights in the Bill of Rights, can thus rightly be understood to ward off strong-arm interference with the autonomous individual's rights to freedom of conscience, religion, thought, belief and opinion⁵ ('religious and related rights' for short).⁶

¹ *Christian Education SA v Minister of Education* 2000 10 BCLR 1051 (CC); 2000 4 SA 757 (CC) para 36, *per* Sachs J.

² *Prince v President, Cape Law Society* 2001 2 BCLR 133 (CC) para 25, *per* Ngcobo J.

³ See L du Plessis *An introduction to law* (1999) 169 as to distinguishing first generation ('blue'), second generation ('red') and third generation ('green') rights. See also L Henkin 'The internationalisation of human rights' in L Henkin *et al* (eds) *Human rights: A symposium* (1977) 6 and sec 2.2 below.

⁴ Constitution of the Republic of South Africa 1996.

⁵ Eg sec 15(1).

⁶ Sachs J in *Christian Education SA* (n 1 above) para 36 elaborated on the first of the two *dicta* above, with remarks applicable also to the second of the two *dicta* above. 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. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual

Freedom to believe (or not to believe) may, as a matter of fact, be so vital to an individual that the state will forsake its constitutional obligation as guardian of such individual's religious rights and liberties if, adopting a hands-off attitude, it merely *respects* these rights and liberties, and does not also (pro-)actively *protect* them against threats and debilitation. This section 7(2) of the South African Constitution indeed, and in so many words, also requires, but then proceeds to instruct the state also to *promote* and *fulfil* (all) the rights in the Bill of Rights, including religious and related rights. This is activist language, in conventional human rights discourse more readily associated with the implementation and advancement of 'red' (socio-economic) and 'green' (environmental and peoples') rights.

In this article it will be argued that there are examples in South African constitutional jurisprudence on religious and related rights where courts, in addition to showing respect for and protecting these rights, have indeed and in effect, without necessarily referring to section 7(2), proceeded to promote and fulfil them, invoking (what by analogy with a 'politics of difference'⁷ may be called) a *jurisprudence of difference*. This jurisprudence affirms and, indeed, celebrates Otherness beyond the confines of mere tolerance or even magnanimous recognition and acceptance of *the Other*, and derives its dynamism from what will in due course be depicted as *memorial constitutionalism* which, as will be explained,⁸ is one of three *leitmotifs* of significance in constitutional interpretation in South Africa. The other two are transitional and transformative constitutionalism. *Transitional constitutionalism* portrays the Constitution as a bridge from a culture of authority in apartheid South Africa to a culture of justification in the 'new South Africa'.⁹ *Transformative constitutionalism*, in the words of Klare,¹⁰

connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law ... a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word.

Memorial constitutionalism understands the South African Constitution as both *memory*, (still) coming to terms with a notorious past,

and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

⁷ Advocated by, amongst others, IM Young *Justice and the politics of difference* (1990).

⁸ See sec 4 below.

⁹ E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31-32.

¹⁰ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

and *promise*, along the way towards a (still) to be fulfilled, transformed future. The 'still' in brackets suggests that there has not been a transition that can be likened to a non-recurrent crossing of a bridge, from a culture of authority to a culture of justification, for instance.¹¹

How a jurisprudence of difference feeds into and, indeed, sustains memorial constitutionalism will be shown once the course of South African case law on religious and related rights has been considered (and assessed) in terms of a model of *leitmotifs*, with reference to some selected judgments. This case law narrative will to a large extent be determined by anticipated reliance on a model of this sort, emphasising that South Africa's religious and related rights jurisprudence since 1994 cannot be thought of as a grand narrative progressing towards climactic fulfilment beyond the confines of (mere) tolerance, recognition and acceptance of (the religious idiosyncrasies) of the Other. Both the highs and the lows through which this jurisprudence has proceeded will therefore be part of the 'storyline' of this article. The examination of the case law will peak towards the Constitutional Court judgment in *MEC for Education: Kwa-Zulu-Natal and Others v Pillay and Others*,¹² a jurisprudential high point in a memorial constitutionalism pertinent to religious and related rights, though by no means an unproblematic final word on all the various facets of guaranteeing these rights under the South African Constitution.

In the discussion that follows, the context in which religious and related rights (as fundamental human rights) enjoy protection in South Africa will briefly be looked at, with reference to the religious demography of the country (as 'factual' context) and to the constitutional and legal framework for the protection of the said rights (as 'institutional' context). The case law selected for consideration will be dealt with next, focusing mainly on various modes of judicial engagement with 'the [otherness of the religious] Other'. Finally, conclusions appropriate to (and integrating) the two main themes of the article — namely, affirmation and celebration of the (religious and cultural) Other and memorial constitutionalism — will be drawn.

2 The context for the protection of religious and related rights

2.1 Religious demography¹³

The statistical picture of religious affiliations among the 79,02% black African, 8,91% coloured, 2,49% Indian (or Asian) and 9,58% white

¹¹ See also in this regard AJ van der Walt 'Dancing with codes — Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 295-296 and W le Roux 'Bridges, clearings, labyrinths: The architectural framing of post-apartheid constitutionalism' (2004) 19 *SA Public Law* 634.

¹² 2008 2 BCLR 99 (CC); 2008 1 SA 474 (CC).

¹³ Based on 2001 census statistics.

South Africans is as follows: Protestant 51,7% (including Pentecostal and charismatic churches); African independent churches 23%; Catholic 7,1%; Islam 1,5%; Hindu 1,2%; African traditional beliefs 0,3%; Judaism 0,2%; no affiliation or affiliation not stated (the majority of these persons probably adhere to traditional, indigenous religions) 15%. A considerable majority of the population indicates religious affiliations. Most South Africans are Christians of some sort, spread over 34 groupings and several thousand denominations. The more than 4 000 African independent churches hold a majority position among the Christian denominations in South Africa.

2.2 Relevant constitutional provisions

Section 15(1) of the South African Constitution entrenches the right(s) to 'freedom of conscience, religion, thought, belief and opinion'. Arguably this includes the unstated right not to observe any religion and not to believe. Significantly absent from section 15(1) — and other provisions of the South African Constitution dealing with the entrenchment of religious and related rights — is a provision akin to the 'establishment clause' in the First Amendment to the Constitution of the United States of America, stating that '[c]ongress shall make no law respecting an establishment of religion ...' Comparable language intimating that the state and religious institutions (or 'establishments') must be strictly separate(d) does not, in other words, appear anywhere in the written text of South Africa's Constitution. That section 15(1) guarantees of religious and related rights were indeed not meant to erect a wall of separation between church and state also appears from section 15(2) of the Constitution, which explicitly authorises the conduct of religious observances at state or state-aided institutions (for example schools, prisons and state hospitals). Such observances must, however, follow rules made by appropriate public authorities¹⁴ and take place on an equitable basis,¹⁵ while attendance must be free and voluntary.¹⁶

Section 15(3)(a) of the Constitution authorises legislation recognising marriages concluded under systems of religious personal or family law. No *right* is entrenched, however, and the envisaged legislation will not necessarily be exempt from constitutional challenges, for the said recognition is required to be consistent with both section 15 and the Constitution as a whole.

Section 9(1) of the Constitution guarantees equality before and equal protection and benefit of the law. Section 9(3) then proceeds to proscribe unfair discrimination 'against anyone on one or more grounds' and continues to explicitly list examples of 17 such grounds. Included in this list are religion, conscience and belief. The protection

¹⁴ Sec 15(2)(a).

¹⁵ Sec 15(2)(b).

¹⁶ Sec 15(2)(c).

of religious entitlements under the equality clause is arguably on a level with (and indispensable to) the protection that section 15(1) affords, as indeed appears from *MEC for Education: KwaZulu-Natal and Others v Pillay and Others*.¹⁷

Section 31(1) of the Constitution augments the guarantees of religious rights in sections 15(1) and 9(3) – at the instance of, amongst others, religious minorities – by recognising (without guaranteeing outright) the right of persons belonging to cultural, religious or linguistic communities to enjoy their culture, practise their religion and use their language. They may also 'not be denied the right' to form, join and maintain cultural, *religious* and linguistic associations and other organs of civil society. A Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities must monitor the realisation of section 31 entitlements.¹⁸

Some other constitutionally-entrenched rights do not mention religion and belief by the name but (have the potential to) enhance and sustain religious and related practices. The section 16(1) guarantee of a right to freedom of expression, for instance, also caters for the need of religious individuals and communities freely to 'speak out' in the name of their religion and to criticise and challenge social and political structures and policies in terms of its teachings. Section 16(2), however, limits the exercise of this right by prohibiting propaganda for war,¹⁹ the incitement of imminent violence²⁰ and 'hate speech', in other words, 'advocacy of hatred based on race, ethnicity, gender or religion ... that constitutes incitement to cause harm'.²¹

Other entrenched rights demonstrably supportive of typical religious doings are the rights to freedom of association²² and movement,²³ as well as the rights to assemble, demonstrate, picket and present petitions.²⁴ It is also important for religious communities to know that they have a right to just administrative action (where action of the executive branch of government stands to impact on their activities), which includes a right to written reasons for administrative action adversely affecting their rights.²⁵ Religious individuals and groups furthermore have a right of access to information required for the exercise or protec-

¹⁷ n 12 above; see sec 3.6 below.

¹⁸ Sec 185 of the Constitution.

¹⁹ Sec 16(2)(a).

²⁰ Sec 16(2)(b).

²¹ Sec 16(2)(c) (my emphasis). The general limitation clause (sec 36 – see below) arguably also caters for such limitations. Specific limitations which are (also) subject to a general limitation clause raise technical problems of their own (albeit not insurmountable).

²² Sec 18.

²³ Sec 21(1).

²⁴ Sec 17.

²⁵ Secs 33(1) & (2).

tion of any of their rights.²⁶ The socio-economic entitlements in, for instance, sections 26 and 27 of the Constitution are relevant in relation to, for example, the charitable work of religious communities.

All rights in the Bill of Rights have to be construed *in context*, and especially in line with generally applicable interpretive precepts articulated in, for instance, the founding provisions in chapter 1 of the Constitution (especially in sections 1 and 2), in section 7 with its reading instructions pertaining to the Bill of Rights (chapter 2), and in the Preamble to the Constitution. Section 39 requires the following with regard to the interpretation of the Bill of Rights:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

All rights entrenched in the Bill of Rights are limitable pursuant to stipulations of a general limitation clause (section 36) requiring limitations to be (only) in terms of law of general application; reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; and compliant with the demands of proportionality (some of which are explicitly spelt out).²⁷

The general limitation clause does not preclude or override specific limitations provided for in any provision entrenching a particular right itself, or in other provisions of the Constitution. As was pointed out above, the right to freedom of expression in section 16 is, for instance, specifically limited not to apply to undesirable forms of expression (such as hate speech).

Finally, as intimated in the introductory paragraph above,²⁸ section 7(2) of the Constitution, enjoining the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights', can be key to an *affirmation* and *celebration* of Otherness in (and through) the construction of, *inter alia*, religious and related rights. Respect for and protection of such rights are easy to reconcile with the conventional wisdom that a bill of rights is

²⁶ Sec 32(1).

²⁷ When limiting a right, the following factors must be taken into account so as to comply with proportionality (secs 36(1)(a)-(e)): (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

²⁸ See sec 1 above.

primarily a shield against (and the fundamental rights it entrenches are trumps counteracting) excesses in the exercise of power by the mighty state. The state must accordingly (and if needs be can be compelled to) refrain from interference with such rights, and is furthermore charged with the duty to ward off (external) threats against them. Guarantees of freedom from interference with and threats to individuals' rights have traditionally been associated with the protection of 'blue' or freedom rights, among which religious and related rights are very prominent. The injunction in the second part of section 7(2), namely that the state must *promote* and *fulfil* the rights entrenched in the Bill of Rights, is premised on the enhanced insight that constitutional guarantees of human rights are also reconcilable and, indeed, commensurate with the notion of a *freedom to(-wards)* the individual's (as well as groups' and communities') self-realisation and fulfilment, and that it is proper for the state to take positive action to achieve these objectives. This insight has led to the increasing inclusion of 'red' (or socio-economic) and 'green' (or environmental and group or peoples') rights in 'new constitutions' worldwide, and the South African Constitution provides telling evidence of that trend.²⁹ It has also opened the door to an affirmative understanding of 'blue' or freedom rights as not only claims to non-interference with instances and exercises of individual autonomy, but also as part of an arsenal of entitlements to the realisation and fulfilment of individuals', groups' and communities' unique existence and identity. That groups and communities are included in this endeavour is certainly what section 31 of the Constitution can be read to say, albeit in a somewhat restrained vein, for, as was indicated above, the section entitles persons belonging to cultural, religious and linguistic communities to a *non-denial* of certain rights pertaining to their membership of any such community.

The South African Constitutional Court has, in a number of judgments, invoked section 7(2) of the Constitution to saddle organs of state with duties to take positive and even pre-emptive action so as to ensure optimum implementation of constitutionally entrenched rights in instances where it was thought that circumstances so required.³⁰ This has not been done explicitly in relation to religious and related rights, but, as will appear from the discussion below, recent developments in religious rights jurisprudence are commensurate with the idea

²⁹ In eg secs 26 & 27 of the Constitution. See in general Du Plessis (n 3 above) 169 and Henkin (n 3 above) 6. On the notion of 'new constitutions', see B-O Bryde 'The constitutional judge and the international constitutionalist dialogue' (2005-2006) 80 *Tulane Law Review* 208.

³⁰ Eg *S v Baloyi (Minister of Justice Intervening)* 2000 1 BCLR 86 (CC); 2000 2 SA 425 (CC) para 11; *Carmichele v Minister of Safety and Security & Another* 2001 10 BCLR 995 (CC); 2001 4 SA 938 (CC); *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA and Others v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA) para 27; *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC); 2000 11 BCLR 1169 (CC) para 20.

of promoting and fulfilling the (religious and related) rights entrenched in the Bill of Rights.

3 Judicial engagement with the religious Other

The case law examples considered under this heading illustrate six different judicial dispositions towards religious Otherness, namely:

- first, wariness of the Other;
- second, understanding yet restraining the Other;
- third, (unfulfilled) consideration for the Other;
- fourth, othering the Other;
- fifth, resurrecting the (memory of the departed) Other,
- finally, affirming and celebrating the Other.

The full ambit and impact of each of these responses will only appear once they have (also) been evaluated in terms of a jurisprudence of difference informing the interpretive *leitmotiv* of memorial constitutionalism.³¹

3.1 Wariness of the Other: *S v Lawrence*; *S v Negal*; *S v Solberg*³² (the *Seven Eleven* case)

Three employees of what used to be known as Seven Eleven chain stores were convicted in separate cases in a magistrate's court of contravening section 90(1) of the Liquor Act³³ proscribing wine sales on Sundays. On appeal before the Constitutional Court, one of the appellants, Solberg, challenged the constitutionality of this statutory provision, contending that the prohibition of wine sales on Sunday infringed, amongst others, the right to freedom of religion³⁴ of those citizens who have no religious objection to such sales. As the Constitutional Court's first case dealing with religious and related rights, *Seven Eleven* was well positioned to be a benchmark precedent on the protection of these rights, but the circumstances in which it was handed down were not conducive to meeting this expectation. First, the full record of the evidence before the court *a quo* was not before the Constitutional Court because the appellants did not follow the proper procedure in bringing their cases to the latter forum. Second, the *Seven Eleven* case was not really perceived as dealing with religious freedom, but rather with commercial interests. No religious groups, for instance, presented the Court with their understanding of the nature and scope of (the

³¹ Secs 4 & 5 below.

³² 1997 10 BCLR 1348 (CC); 1997 4 SA 1176 (CC).

³³ 27 of 1989.

³⁴ At the time entrenched in sec 14(1) of the interim Constitution (the precursor to sec 15(1) of the final Constitution).

right to) religious freedom. The appellants (including Solberg) thus challenged section 90(1) as primarily an infringement of their right to participate freely in economic activity — a right then explicitly guaranteed in section 26 of the interim Constitution, but absent from the 1996 Constitution. The Constitutional Court unanimously held that there was no merit in this challenge. This left Solberg with a challenge arising from a concern she had not seriously contemplated when she sold wine on a Sunday, namely the protection of her right to freedom of religion. As to this challenge, six judges of the Constitutional Court agreed that the appeal should be dismissed, but they were divided four to two on the reasons for this. Three judges thought that the appeal should be allowed, using essentially the same legal arguments that the minority of two judges in the first group used.

Chaskalson P, in a judgment reflecting the sentiments of the four, held that equality concerns were not really at issue in the *Seven Eleven* case, because the appellant, Solberg, relied solely on the freedom of religion clause in the interim Constitution to challenge section 90(1) of the Liquor Act. This meant that the Court was called upon to deal with issues of free religious exercise only. Had the appellant also explicitly relied on the non-discrimination provision in the equality clause,³⁵ the kind of concern for which the US establishment clause caters might have entered into the picture.³⁶ On the issue of free exercise, Chaskalson P took his cue from a *dictum* in the Canadian case of *R v Big M Drug Mart Ltd* (1985).

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.³⁷

Chaskalson P elaborated as follows:³⁸

I cannot offer a better definition than this of the main attributes of freedom of religion. But as Dickson CJC went on to say, freedom of religion means more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord's Day Act did; it compelled believers and non-believers to observe the Christian Sabbath.

Central to both of these *dicta* is an understanding of the right to freedom of religion as primarily the freedom right of an individual not to be coerced to do anything against her or his religious beliefs (or non-beliefs) — a right to be respected, in other words, and possibly

³⁵ Sec 8(2) of the interim Constitution.

³⁶ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 10 BCLR 1348 (CC); 1997 4 SA 1176 (CC) paras 99-102.

³⁷ 13 CRR 64 97.

³⁸ *Lawrence* (n 36 above) para 92.

protected, but hardly susceptible to promotion and fulfilment by the state.³⁹

O'Regan J, articulating the constitutional concerns of the five, thought that the guarantee of a right to freedom of religion at any rate includes entitlement to even-handed treatment and therefore religious equality. This prompted the conclusion that section 90(1) indeed encroached on the right to religious freedom. Sachs J and Mokgoro J, however, thought that this encroachment was trivial and thus constitutionally justified on the strength of the general limitation clause in the interim Bill of Rights.⁴⁰ They accordingly held that section 90(1) had to survive constitutional impugment.⁴¹

O'Regan J (on behalf of at least three of the five) succinctly expressed her disagreement with the line of reasoning of the four in the following terms:⁴²

I ... cannot agree with Chaskalson P when he concludes that because the provisions do not constrain individuals' 'right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs', there is no infringement of section 14 ... In my view, the requirements of the Constitution require more from the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions [are] necessary component[s] of freedom of religion.

The approach of the four is commensurate with a wariness of (the motives of) the appellant Solberg, an 'outsider Other' as far as the protection of religious rights was concerned, but seeking freedom of religion protection nonetheless, primarily out of concern for her ability to trade freely. As active participant in free economic activity, she was presumably also not a disadvantaged or marginalised Other. This may explain why the four took a narrow view of her right to freedom of religion, and resorted to a strategy of secularist sanitisation to remove certain issues relating to Sunday observance from the arena of constitutional protection for this right of hers — hence the argument that Sunday is actually a general day of rest and that legislation proscribing wine sales on that day is not really of religious consequence.⁴³

The five sought the real reason for the statutory prohibition of wine sales on Sundays in the religious significance of the day, evidenced by the fact that other 'closed days' for the sale of wine (in addition to Sun-

³⁹ To use the terminology of sec 7(2) of the Constitution. It must be added, in all fairness, that the interim Constitution in terms of which the *Seven Eleven* case was adjudicated, contained no provision akin to sec 7.

⁴⁰ Sec 33 of the interim Constitution. The comparable provision in the final Constitution is sec 36.

⁴¹ *Lawrence* (n 36 above) paras 165-179.

⁴² *Lawrence* (n 36 above) para 128.

⁴³ *Lawrence* (n 36 above) paras 95 & 96.

days) are indeed Christian holidays.⁴⁴ According to the reasoning of the five, the real religious rights issue in the *Seven Eleven* case therefore was how to even-handedly treat Christians objecting to the sale of liquor on their holy day and non-objecting Christians and non-Christians, who do not really mind such sales, irrespective of whether such treatment benefits the Other not really concerned with asserting a right to freedom of religion primarily for religious reasons. To the five, overprotection of the Other, in the sense just described, is acceptable if satisfaction of the demand for even-handed treatment makes it inevitable. Two of the five at any rate sought to avert possible overprotection of Solberg's religious freedom rights, holding, as was pointed out above, that the infringement of these rights complained of was justifiable in terms of the general limitation clause in the transitional Constitution.⁴⁵

3.2 Understanding and yet restraining the Other: *Christian Education SA v Minister of Education*⁴⁶ (the *Christian Education* case)

An organisation of concerned Christian parents approached a high court to strike down section 10 of the South African Schools Act,⁴⁷ which proscribes corporal punishment in any (public or independent/private) school. The applicants contended that, according to their religious beliefs, corporal punishment was a rudiment in the upbringing of children. The High Court, in refusing the application, *inter alia* pointed out that the applicants' reliance on biblical authority prompted the conclusion that only the parents of children (and not school officials *in loco parentis*) were entitled to administer corporal punishment.⁴⁸

The case was taken on appeal to the Constitutional Court,⁴⁹ where Sachs J handed down a carefully-reasoned judgment dismissing the appeal. The gist of Sachs J's reasoning was that section 10 of the Schools Act imposes a constitutionally-acceptable limitation (that is, one surviving scrutiny in terms of the Constitution's general limitation clause⁵⁰) on parents' free exercise of their religious beliefs. He deliberately refrained from expressing any view on what, in constitutional terms, the implications of parents' own exercise of their religious belief in corporal punishment for their children might be. However, according to Sachs J, a statute that precludes parents from authorising a school to administer such punishment does not, if all relevant considerations

⁴⁴ As O'Regan J in her minority judgment quite correctly pointed out; *Lawrence* (n 36 above) para 125.

⁴⁵ Sec 33.

⁴⁶ n 1 above.

⁴⁷ 84 of 1996.

⁴⁸ *Christian Education SA v Minister of Education of the Government of SA* 1999 9 BCLR 951 (SE).

⁴⁹ *Christian Education SA* (n 1 above).

⁵⁰ Sec 36.

are carefully weighed, impose a constitutionally untenable limitation on the parents' free exercise of *their* religious beliefs. Sachs J under-emphasised one important issue, namely, what schools (and teachers) should at any rate be permitted to do in a country where a modern day constitution entrenching fundamental rights in accordance with stringent standards of democracy is in place. A line of reasoning catering for this kind of concern would have been commendable, because it would have proceeded beyond the adjudication of a religious rights issue in a strictly libertarian and individualistic, free exercise vein.

In a significant postscript to his judgment, Sachs J lamented the fact that there was no one before the Court representing the interests of the children concerned.⁵¹ He thought that the children, many of them in their late teens and coming from a highly conscientised community, would have been capable of articulate expression. 'Although both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name.' A *curator ad litem* should thus have been appointed to represent the interests of the children, whose contribution would have 'enriched the dialogue'.

The result of the *Christian Education* judgment is inevitably to restrain those who are 'the Other' in relation to mainstream constitutional values and norms — in other words, the parents and teachers in favour of corporal punishment for the learners — from fully concretising their religious beliefs regarding the role of appropriate punishment in the upbringing of children. This does not, however, amount to an outright othering of the Other, because the extraordinary significance of their religion *for them* is acknowledged (albeit but in the words of the *dicta per* Sachs and Ngcobo JJ cited right at the beginning of this article⁵²) and the restraints on their behaviour are, as far as possible, restrained. Sachs J's remarks about listening to the learners themselves also signals a desire to avoid excluding (as opposed to restraining) the religious Other in the situation.

3.3 (Unfulfilled) consideration for the Other: The Prince saga⁵³

Gareth Prince, a consumer of *cannabis sativa* (or 'dagga', as it is locally known) for spiritual, medicinal, culinary and ceremonial purposes as an integral part of practising his religion as Rastafarian, successfully completed his law studies to a point where, qualification-wise, he became eligible to be registered as a candidate attorney doing community service. He had twice been convicted of the statutory offence of possessing *cannabis*, however, and this raised doubts about his fitness

⁵¹ *Christian Education SA* (n 1 above) para 53.

⁵² And in n 6 above.

⁵³ *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C); *Prince v President, Cape Law Society* 2000 7 BCLR 823 (SCA); 2000 3 SA 845 (SCA); *Prince* (n 2 above); *Prince v President, Cape Law Society* 2002 3 BCLR 231 (CC); 2002 2 SA 794 (CC).

and propriety to be registered as a candidate attorney, especially in the light of his declared intention to continue using *cannabis*. The Law Society of the Cape of Good Hope refused him registration, whereupon he challenged the Society's decision in the Cape High Court.⁵⁴ The Court held that the statutory prohibition on the use of *cannabis* was meant to protect public safety, order, health and morals and that these considerations outweighed (and thus limited) the right of Rastafarians to practise their religion through the use of *cannabis*. The Court thus refused to overturn the Law Society's decision.

Prince appealed to the Supreme Court of Appeal.⁵⁵ His appeal was dismissed and he then lodged an appeal with the Constitutional Court. A divided court eventually dismissed the appeal with a five to four majority⁵⁶ but, before doing so, handed down quite a significant interim judgment.⁵⁷ In the course of this judgment, the Court *per* Ngcobo J intimated that neither the applicant nor the respondents in the *Prince* case had — in the course of the litigious proceedings commencing in the Cape High Court — adduced sufficient evidence for any court finally to decide the crucial controversies involved in the case. From Prince the Court needed more evidence as to precisely how and in which circumstances Rastafarians smoke *cannabis* as part of their religious observances. From the respondents the Court needed evidence elucidating the practical difficulties that may be encountered should Rastafarians be allowed to acquire, possess and use *cannabis* strictly for religious purposes.

The case was postponed in order to give both sides the opportunity to adduce the required evidence. This was quite extraordinary in a final court of appeal, since parties are normally required to adduce all the necessary evidence at the time when an action is brought in the court of first instance. Only in rare circumstances are litigants allowed to adduce additional evidence on appeal. The Constitutional Court, however, thought that such circumstances existed in the *Prince* case, and Ngcobo J explained:⁵⁸

[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest — it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use *cannabis* exposes them to social stigmatisation ... Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state

⁵⁴ *Prince* (1998) (n 53 above).

⁵⁵ *Prince* (2000) (n 53 above).

⁵⁶ *Prince* (2002) (n 53 above).

⁵⁷ *Prince* (n 2 above).

⁵⁸ *Prince* (2000) (n 53 above); *Prince* (2001) (n 53 above) para 26.

should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.

The Court was thus leaning over backwards to accommodate the concerns of a vulnerable, religious minority and the final judgment of the Constitutional Court (going against Prince)⁵⁹ did not necessarily undo the positive signals of caring for Prince and his community as ‘the vulnerable Other’ in the interim judgment. The *ratio* underlying the majority of the Court’s final decision is that it is impossible for state agencies involved in enforcing the overall statutory prohibition on the use of *cannabis* to make any form of allowance for the use of small quantities of the substance for religious purposes without actually compromising the justifiable objectives of the overall prohibition. The minority of the Court did not dispute the legitimacy of criminalising the possession and use of *cannabis* in general, but argued that it was feasible for the state agencies involved to lay down and police conditions for Rastafarians’ limited use of *cannabis* for religious purposes.

What mars and restricts judicial consideration for the (Rastafarian) Other in the *Prince* case is not so much the result at which the majority of the Constitutional Court in the final judgment arrived, but the failure of any court involved in the saga to address Prince’s real concern, namely, whether as a persistent consumer of *cannabis* for religious purposes — a controversial Other due to his religious beliefs and, especially, practices — he is a fit and proper person to be a candidate attorney. Prince was othered not because judicial consideration for his peculiar religious beliefs was wanting, but because he was not taken seriously with regard to what really mattered to him, namely his career prospects as an attorney aspirant.

3.4 Othering the Other: The Bührmann-Nkosi saga⁶⁰

From 1966 to 1981, Grace Chrissie Nkosi, with her late husband and their children, lived on the Bührmann family farm, De Emigratie, in the district of Ermelo, Mpumalanga. The couple were both farm labourers. The family then moved to a neighbouring farm where Mr Nkosi passed away in 1986. With the permission of Mr Gideon Bührmann, who in 1970 had taken charge of the farming operations on De Emigratie from his father (the Nkosis’ previous employer), Grace returned to De Emigratie where she continued to live with her two sons. As from 28 November 1997 Grace, in terms of the Extension of Security of Tenure Act (ESTA),⁶¹ became ‘an occupier’ of the land with the right to reside

⁵⁹ *Prince* (2002) (n 53 above).

⁶⁰ *Bührmann v Nkosi* 2000 1 SA 1145 (T); *Nkosi v Bührmann* 2002 1 SA 372 (SCA).

⁶¹ 62 of 1997.

on and use it,⁶² as well as rights to a family life in accordance with her culture⁶³ and to freedom of religion, belief, opinion and expression.⁶⁴ ESTA also entitles any person (and not only an occupier) to visit and maintain family graves on someone else's land subject to certain conditions.⁶⁵ ESTA was enacted very much with the plight (and the constitutional rights) of black 'vassals' on white farms in mind, empowering them, to a modest extent, *vis-à-vis* the white landlords at whose mercy they traditionally had been.

Grace's son, Petrus, born on De Emigratie in 1968, died in 1999 and Gideon refused Grace permission to bury him on the farm (where he had also been living legally). Gideon approached the High Court in Pretoria for an order prohibiting the burial. A single judge (Cassim AJ) refused the order. Gideon then successfully appealed to a full bench of the High Court in Pretoria, whereupon Grace unsuccessfully appealed to the Supreme Court of Appeal.

Grace's contention that she had a right to bury Petrus on the farm was based, first, on the allegation that in 1968 they (the family) buried one of her grandsons on a piece of land pointed out by Bührmann senior (Gideon's father) for family burials. Seven family members had subsequently been buried there. Secondly, Grace alleged that, according to her custom and religious belief, a family member who passes away is only physically but not also spiritually separated from those left behind, and a deceased thus has to be buried in a place where the surviving family members can communicate spiritually with him or her on a daily basis. Her late husband and his mother performed the rituals necessary to declare and introduce the piece of land allocated for burial purposes as 'home for the ancestors'. In this sense the dead are conceived of as 'the departed'.

Both the full bench of the Pretoria High Court and the Supreme Court of Appeal thought that the issue they had to decide was how to weigh Grace's right to her religious and cultural beliefs against Gideon's right (of ownership) to his land. The majority of the Court in Pretoria and a unanimous Supreme Court of Appeal did not have much difficulty to conclude that the latter's property right weighed heavier, and that the right to freedom of religion 'has internal limits'.⁶⁶

⁶² Sec 6(1) of the Act.

⁶³ Sec 6(2)(d).

⁶⁴ Sec 5(d).

⁶⁵ Sec 6(4).

⁶⁶ *Nkosi & Another v Bührmann* (n 60 above) para 49.

Satchwell J, in the Pretoria High Court, voiced the sentiments of the majority of that Court (and, eventually, also of the Supreme Court of Appeal) as follows:⁶⁷

The Constitution clearly envisages that the second respondent [Ms Nkosi] is free to hold and act upon her religious convictions and that she is not to be interfered with or discriminated against in regard thereto. However, we were referred to no authority and I know of none which imposes on a private individual a positive obligation to promote the religious practices and beliefs of another at one's own expense. If such were envisaged either by the Constitution or the Extension of Security of Tenure Act, each occupier who professed a religion or set of beliefs would be entitled to require of the landowner that he permit the erection of a church or tabernacle or other place of worship on his land in circumstances where the occupier's religion required adherents to gather together with symbols of faith in an enclosed building. Conceivably, the landowner could be obliged to make separate allocations of land for such purposes in respect of each denomination or sect or religion professed by individual occupiers.

Freedom of religion, belief and opinion, no less than other rights, must be exercised within the parameters of the Constitution and in the present case where reliance is placed upon section 5 of the Extension of Security of Tenure Act.

These words were uttered with a monumental flair, strikingly manifested in the extremity of certain parallels that Satchwell J drew. For the judge, what Grace Nkosi was asking was akin to asking a landowner permission to erect a church or tabernacle or other place of worship on his or her land. Ngoepe JP's lone, dissenting voice in the Nkosi-Bührmann saga stands in sobering contrast with Satchwell J's exaggeration:⁶⁸

[T]here is already an area for burial; other employees ... bury on that farm with the appellant's [Gideon's] permission; the area the appellant loses to the grave is probably 1m by 2m; and ... in terms of the law as it stands, the respondent [Grace] will in any case still be entitled to visit ... existing ... graves. I am not persuaded that the loss of a 1m by 2m area constitutes

⁶⁷ *Bührmann v Nkosi & Another* 2001 1 SA 1145 (T) 1155D-F. The Land Claims Court previously in *Serole and Another v Pienaar* 2000 1 SA 328 (LCC); [1999] 1 All SA 562 (LCC) voiced similar sentiments on the applicability of ESTA rights to justify the procurement of a right to bury a family member on someone else's land: 'Permission to establish a grave on a property could well amount to the granting of a servitude over that property. The owner of the property and all successors-in-title will, for as long as the grave exists, have to respect the grave, not cultivate over it, and allow family members to visit and maintain it. Although the specific instances of use in sec 6(2) are set out 'without prejudice to the generality' of the provisions of secs 5 and 6(1), they still serve as an illustration of what kind of use the legislature had in mind when granting to occupiers the right to 'use the land' on which they reside. The right to establish a grave is different in nature from the specific use rights listed in sec 6(2). It is, in my view, not the kind of right which the legislature intended to grant to occupiers under the Tenure Act [ESTA]. Such a right could constitute a significant inroad into the owner's common law property rights. A court will not interpret a statute in a manner which will permit rights granted to a person under that statute to intrude upon the common law rights of another, unless it is clear that such intrusion was intended.'

⁶⁸ *Bührmann v Nkosi & Another* (n 67 above) 1161F-G.

such a drastic curtailment of the appellant's right of ownership as to justify denying the respondent the right I have already described in detail.

What the majorities in both the Pretoria High Court and in the Supreme Court of Appeal held and advanced as reasons for their findings amounted to a decided othering of Grace Nkosi: Her (esoteric and eccentric) religious and cultural beliefs branded her as the Other whose claims were simply not regarded as a match for more revered mainstream property entitlements.

A provision⁶⁹ has since been included in ESTA, proclaiming a right to bury a deceased 'occupier' on the land where he or she lived in accordance with the deceased's and the family's religious and/or cultural beliefs, but on the condition that an established practice of burial in respect of that land exists. This right extends to the burial of family members of an occupier who die while living with him or her on the land. The new statutory provision, which would have resolved the Nkosi-Bührmann issue in Grace's favour, was challenged unsuccessfully in the case of *Nhlabathi and Others v Fick*⁷⁰ in the Land Claims Court. The Court held that the impugned provision does not constitute a deprivation of property in breach of section 25(1) of the Constitution.

3.5 Resurrecting the (memory of the departed) Other: *Crossley and Others v National Commissioner of South African Police Service and Others*⁷¹ (the Crossley case)

Mark Scott-Crossley, a white farmer, and three of his black employees, Simon and Richard Mathebula and Robert Mnisi, stood accused of the murder of an ex-employee of Scott-Crossley, one Nelson Chisale. (The charges against Mnisi were eventually withdrawn because he had turned state witness.) Chisale, after having been dismissed by Scott-Crossley, returned to the latter's farm to collect his belongings, whereupon he was severely assaulted and — allegedly while still alive — thrown to a pride of white lions in an encampment at the Mokwalo Game Farm near Hoedspruit in the Limpopo Province. Chisale's remains — a skull, broken bones and a finger — were later found in the lion camp.

On 12 March 2004, Scott-Crossley and the two remaining accused sought an urgent interdict in the Pretoria High Court to stay Chisale's funeral, which was planned for the next Saturday morning at 06:00 in the Maboloka village near the town of Brits in the Northwest Province.⁷² The applicants wanted a pathologist, designated by their attorneys on their behalf, to examine the remains of the deceased in order to assess (and challenge, if necessary) forensic evidence to be adduced at the criminal

⁶⁹ Sec 6(2)(dA).

⁷⁰ 2003 7 BCLR 806 ; [2003] 2 All SA 323 (LCC).

⁷¹ [2004] 3 All SA 436 (T).

⁷² The case has been reported as *Crossley & Others v National Commissioner of South African Police Service & Others* [2004] 3 All SA 436 (T).

trial. A number of state officials involved in the investigation were joined as respondents, and none of them opposed the application.

Patel J, who heard the application, eventually dismissed it because the applicants had failed to establish urgency. The applicants' attorneys, for quite some time before the application was brought, had been in contact with the state's expert witness who was to conduct the necessary tests, and they were well aware of the fact that the prosecution was not going to comply with their request to preserve the deceased's remains for further tests. The application could and should therefore have been brought at an earlier stage, and its 'urgency' a day before the planned funeral was, in the Court's view, attributable to the applicants' own procrastination.

In the course of his judgment Patel J, however, also attended to substantial constitutional considerations without clearly indicating if and how they had a bearing on his eventual findings. He, for instance, made much of the applicants' neglect to inform the family of the deceased of the application that they were bringing and to consider joining them as respondents. According to the applicants, it was difficult to trace the deceased's relatives, but some of relatives learnt from the press about the application nonetheless and showed up at the hearing. They were Ms Fetsang Jafta, a niece of the deceased, and her uncle, Mr Terrence Mashigo, the manager responsible for community participation affairs in the office of the Executive Mayor of the Madibeng Local Community. Patel J afforded the latter an opportunity to address the Court on behalf of the family, and afterwards thought that he did so with solemnity and dignity, and that any attempt to summarise the relevant portions of his address would do an injustice. Mr Mashigo's address was therefore quoted *verbatim* in the judgment. Mashigo mainly explained why, in view of certain ritual preparations that had already been made, the family's custom and belief impelled the burial of the deceased at 06:00 the Saturday morning, and he furthermore voiced indignation at the applicants' claim that they could not track down the deceased's family to inform them of the application. The fact that the Court was considering the family's constitutional rights seriously met with Mr Mashigo's acclaim.

Looking rather clinically at the situation, an expert legal observation will probably be that the issue Patel J had to decide was how to reconcile the religious and cultural rights of Nelson Chisale's relatives with the applicants' right to a fair trial.⁷³ He held that in the particular situation the right to dignity of both the deceased and his relatives trumped the applicants' right to a fair trial, and he advanced the African proverb or saying *umuntu ngumuntu ngabanye abantu* (a person is a person through other people) as 'a further *raison-d'être*' for the refusal of the

⁷³ As intimated previously, it was actually not really necessary for the court to make a finding in this regard because it had already found against the applicants on the issue of urgency. However, Patel J did express a view on the constitutional issue.

application.⁷⁴ The Court verbalised its understanding of *ubuntu* as follows: '*Ubuntu* embraces humaneness, group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, humanity, morality and conciliation.'⁷⁵

The judgment in the *Crossley* case was an attempt to reclaim humanity and dignity for the deceased, Nelson Chisale, and his (extended) family, given the gruesome way in which he as a human being was reduced to a plastic bagful of bones and his family was bereft of a loved one in a most barbaric way. This is what Terrence Mashigo in his address to the Court was also pleading for. Mashigo was speaking for the observance of tradition, but also much more for the resurrection of the family's dignity, ravaged not only by the (mal-)treatment meted out to the deceased, but also by the applicants' (and, in particular, Scott-Crossley's) arrogant claim that they (the family — by blood, by affinity and, above all, by *ubuntu*) were not traceable and therefore not contactable. Such a trivialisation of a family's identity in a matter as weighty as the burial of one from the fold is a serious assault on the humanity of all. Mashigo, for instance, insisted that carrying an identity document and being employed were decisive in carving out Chisale's identity as a (known) member of a (knowable, extended) family. That is contrary to the popular belief that an identity document confers but a number-like identity on its holder — mainly for impersonal official purposes.

The Court heeded Mashigo's plea on behalf of the family, powerfully invoking the right to human dignity coupled with *ubuntu*. The Court did take the applicants' right to a fair trial seriously, but also did not treat it as a preferential freedom right likely to trump the family's 'more esoteric' rights.⁷⁶ The *contextualisation* of both parties' rights was the first step towards construing and concretising these rights, and not — as was the case in the *Nkosi-Bührmann* judgment(s) — an *exaggeration* of a threat one party's rights hypothetically posed to a right of the other party. Patel J, in the peculiar circumstances of the case, actually did what Ngoepe JP tried to achieve in the *Nkosi-Bührmann* case, namely, to appeal to practical wisdom or 'common sense' by not conceiving of constitutional rights in an essentialist, all-or-nothing manner, and not ranking them (albeit intuitively) as 'lesser' (esoteric religious and cultural) and 'greater' ('blue' or freedom) rights.

The *Crossley* judgment is a judicial in memoriam for the late Nelson Chisale, unable literally to resurrect him from the dead, but resurrecting, nonetheless, the dignity of all who, in the situation, are distinguishable

⁷⁴ *Crossley* (n 72 above) para 18.

⁷⁵ As above. As pointed out previously, the word *ubuntu* appeared in the Preamble to South Africa's interim Constitution — there associated with the need for national reconciliation in order to overcome the atrocities and divisions of the past (see sec 3 above).

⁷⁶ See eg *Crossley* (n 72 above) paras 11-13 for the Court's consideration of this right and a discussion of the possibilities for realising it for purposes of the criminal trial.

as the Other, and this includes the (dignity of the) departed Other — the deceased himself, in other words.⁷⁷

3.6 Affirming and celebrating the Other: *MEC for Education: KwaZulu-Natal and Others v Pillay and Others*⁷⁸ (the Pillay case)

Sunali Pillay, a teenage Hindu girl, came from a previously-disadvantaged community, but as a learner at the Durban Girls' High School — a state school, but one of the most prestigious schools in the country, nonetheless, and pedagogically on par with any private school⁷⁹ — she enjoyed the privilege of an excellent education. Sunali's privileged education carried with it the duty to obey the school's exemplary code of conduct, duly adopted by the governing body of the school in consultation with learners, parents and educators. A learner's parents must sign an

⁷⁷ For completeness sake and for the record, it should be mentioned that Scott-Crossley and Mathebula were tried and convicted of murder in the High Court, Circuit Local Division for the Northern Circuit, sitting at Phalaborwa. The former was sentenced to life and the latter to 15 years' imprisonment. Subsequently, Scott-Crossley successfully appealed against his conviction of murder and his sentence. The Supreme Court of Appeal partially upheld the appeal, setting aside his conviction for premeditated murder and the sentence of life imprisonment, substituting a verdict of guilty of being an accessory after the fact to murder, and reducing the sentence to five years' imprisonment. See *S v Scott-Crossley* 2007 2 SACR 470 (SCA).

⁷⁸ n 12 above.

⁷⁹ The school is a former 'Model C school' — the code name for an advantaged, previously all-white state school, better resourced and staffed by far than its previously (and mostly still) all-black, all-coloured and all-Indian/Asian counterparts in townships and residential areas that used to be demarcated along racial lines (and have mostly remained segregated in actual fact, up to this day). In time the Model C schools increasingly opened their doors to learners of 'other race groups', and some of them have done pretty well in achieving a high participation rate of learners from diverse ethnic origins and cultural backgrounds, contributing favourably to their diversity profiles. In this regard, the Durban Girls' High School got an excellent report card from no less an authority than the Chief Justice of the Republic of South Africa himself (*MEC for Education: KwaZulu Natal & Others v Pillay & Others* (n 12 above) para 125): 'Durban Girls' High School, the school at issue in this case, is one of the exceptions. Although historically it was a school for white girls under apartheid law, that has changed dramatically in the last 15 years. Now, we were told from the bar, of its approximately 1 300 learners, approximately 350 are black, 350 are Indian, 470 are white and 90 are coloured. Moreover, it is an educationally excellent school which produces fine matriculation results. It is at the cutting edge of non-racial education, facing the challenges of moving away from its racial past to a non-racial future where young girls, regardless of their colour or background, can be educated. This context is crucial to how we approach this case.' For many a learner other than white attending a Model C school, instead of, eg, a local school in a segregated ('non-white') township or residential area, is still very much a token of social mobility upwards. Though not nearly as 'expensive' as private schools, the school fees of a Model C school can be quite substantial, and the families of the majority of children of school-going age in South Africa will probably not be able to afford these fees from the family income. The state has cut down on its subsidies for these schools in order to effect a more equal and equitable distribution of means among all state schools in the country. At Model C schools, learners and their parents thus have to pay for access to certain 'luxuries' but, above all, to a 'high standard' of education.

undertaking that they will ensure their child's compliance with the code. Wearing a school uniform is obligatory in terms of the code, and with it the only jewellery allowed are 'ear-rings, plain round studs/sleepers ... ONE in each ear lobe at the same level' and wrist watches in keeping with the school uniform. Especially excluded is 'any adornment/bristle which may be in any body piercing'.

For Sunali Pillay trouble started when, upon reaching physical maturity, and as a form of religious and cultural expression, her nose was pierced and a gold stud was inserted. The school, not taking kindly to this contravention of its jewellery stipulations, gave Sunali permission to wear the stud until the piercing had healed, but thereafter to remove it or else face disciplinary proceedings in terms of the code. Navaneethum Pillay, Sunali's mother, was requested to write a letter to the school explaining why, as a form of religious and cultural expression, Sunali had to wear a nose stud. A state school is not allowed to promote or advantage any religion or religions above others. In line with the spirit of the Constitution, the state in general does not regard itself as 'secular' or indifferent to religion, but as religiously neutral, striving to treat different religions even-handedly.⁸⁰

In her letter to the school Mrs Pillay explained that she and Sunali came from a South Indian family and that they intended to maintain their cultural identity by upholding the traditions of the women before them. Insertion of the nose stud is part of a time-honoured family tradition. When a young woman reaches physical maturity, her nose is pierced and a stud inserted indicating that she had become eligible for marriage. The practice is meant to honour daughters as responsible young adults. Sunali, Mrs Pillay claimed, wore the nose stud not for fashion purposes, but as part of a religious ritual and a long-standing family tradition, and therefore for cultural reasons too.⁸¹

The school management refused to grant Sunali an exemption to wear the nose stud. Mrs Pillay, complaining of discrimination, eventually took the case to an equality court, which found in favour of the school. The Pillays successfully appealed to the Durban High Court, whereafter the school appealed to the Constitutional Court which handed down the judgment presently under discussion, dismissing the appeal.

The majority of the Constitutional Court, *per* Langa CJ, found, first, that *in casu* a combination of the school's refusal to grant Sunali an exemption and the provisions of the school's code resulted in the discrimination against Sunali. The problem with the code is that it does not provide for any procedure to obtain an exemption from the jewellery stipulations and at any rate excludes nose studs from its list of

⁸⁰ JD van der Vyver 'Constitutional perspective of church-state relations in South Africa' (1999) 2 *Brigham Young University Law Review* 670-672. On conditions provided for in sec 15(2) of the Constitution, religious observances may even be conducted at such schools.

⁸¹ *Pillay* (n 12 above) para 7.

jewellery that may be worn with the school uniform. The code thus compromises the sincere religious or cultural beliefs or practices of a learner or learners like Sunali, but not those of other learners. This latter group thus constitutes a comparator showing up the discrimination against Sunali and others in a similar position.

The norm embodied by the code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them. In my view, the comparator is not learners who were granted an exemption compared with those who were not. That approach identifies only the direct effect flowing from the school's decisions and fails to address the underlying indirect impact inherent in the code itself.⁸²

In determining whether Sunali was indeed discriminated against, the Court pointed out that it did not really make a difference whether the discrimination was on religious or cultural grounds, especially since⁸³

Sunali is part of the South Indian, Tamil and Hindu groups which are defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition. Whether those groups operate together or separately matters not; combined or separate, they are an identifiable culture of which Sunali is a part.

At the same time, however, religion and culture as grounds on which discrimination can take place should not be collapsed, because 'religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community'. The two can nonetheless overlap, so that 'while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural'.⁸⁴ From this, the Court significantly concluded that⁸⁵

[c]ultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people.

While Sunali sincerely believed that the nose stud she wore was part of her religion and culture, the evidence showed that it was not a mandatory tenet of either her religion or her culture. Does that in any way

⁸² *Pillay* (n 12 above) para 44. See also *Young* (n 7 above) 168: 'Integration into the full life of the society should not have to imply assimilation to dominant norms and abandonment of group affiliation and culture. If the only alternative to the exclusion of some groups defined as Other by dominant ideologies is the assertion that they are the same as everybody else, then they will continue to be excluded because they are not the same.'

⁸³ *Pillay* (n 12 above) para 50.

⁸⁴ *Pillay* (n 12 above) para 47.

⁸⁵ *Pillay* (n 12 above) para 53.

lessen or detract from (or perhaps even annul) the school's discrimination against her? The Court thought not:

Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other ...

A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'. One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.⁸⁶

In considering whether the discrimination was unfair, the Court explored the notion of 'reasonable accommodation', concluding that its absence *in casu* rendered the discrimination against Sunali unfair.⁸⁷ A number of other legal issues of significance were also raised in the *Pillay* judgment, but only the issues most pertinent to a jurisprudence of difference⁸⁸ and the affirmation and, indeed, celebration of the Other, have so far been (and will in this article be) looked at.

Pillay is one of the most telling examples of a Constitutional Court judgment promoting and fulfilling constitutional rights in accordance with section 7(2) of the Constitution — even though in the judgment itself only passing reference is made to this subsection, and then not even in a context where any of the main issues in the case is dealt with.⁸⁹ What makes this judgment one of its kind is the fact that it deals with religious and cultural rights in a very particular vein. The vindication of the religious and cultural Other in a context of educational privilege is straightforward and unequivocal. This appears from the judicious and level-headed manner in which Langa CJ disposes of matters of considerable controversy with, in the Court's own words, '[a]t the centre of the storm a tiny gold nose stud'.⁹⁰ Much ado about a nose stud!

Perhaps it is of significance that it was a nose stud, and not an ornament as conspicuous as a nose ring — or a headscarf or a facial veil — or as dangerous as a *kirpan*, the metal dagger of religious and cultural significance worn by Sikh men. But on a 'slippery slope scenario' a tiny nose stud is likely to turn into any of these — just as in *Bührrmann*

⁸⁶ *Pillay* (n 12 above) paras 63-64.

⁸⁷ Of reasonable accommodation, the court said the following (*Pillay* (n 12 above) para 73): 'At its core is the notion that sometimes the community, whether it is the state, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.'

⁸⁸ See sec 1 above.

⁸⁹ *Pillay* (n 12 above) para 40 n 18.

⁹⁰ *Pillay* (n 12 above) para 1.

*v Nkosi*⁹¹ Satchwell J feared that a grave of one metre by two metres might turn into a church or tabernacle!⁹² Langa CJ in the *Pillay* case showed a preparedness to face the slippery slope or, even worse, a possible parade of horrors, stoically:⁹³

The other argument raised by the school took the form of a 'parade of horrors' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to *bona fide* religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horrors', but a pageant of diversity which will enrich our schools and, in turn, our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the school, it may refuse to permit it.

This *dictum* demonstrates, without explicitly stating, that affirmation and celebration of the Other bring with them *liberation* — especially from fear for the unknown. This 'demonstration' is of vast significance in a South Africa too often (still) plagued by fears leading to, and resulting from, an othering of the Other.

The *Pillay* majority judgment is probably not perfect in every way, and some of the conceptual and strategic choices that especially the majority made are debatable. O'Regan J who, in her minority judgment, is wholly in agreement with the results of the majority judgment, poses questions nonetheless about possible alternative routes to the same destination and, for instance, draws a sharper distinction between religion and culture and the constitutional rights pertaining to them than Langa CJ in the majority judgment does.⁹⁴ For present purposes, however, this debate is not of pressing importance.

4 The evaluative model: Pillay and memorial constitutionalism

The *Pillay* case bears out Young's thick conception of 'quality equality' depicted in the following terms:⁹⁵

⁹¹ *Bühmann v Nkosi* (n 60 above).

⁹² See sec 3.4 above.

⁹³ *Pillay* (n 12 above) para 107.

⁹⁴ *Pillay* (n 12 above) paras 143-146.

⁹⁵ Young (n 7 above) 173.

A goal of social justice ... is social equality. Equality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realise their choices.

For Sunali Pillay, distribution had determined access to a 'privileged school context', but full *participation* and *unconstrained inclusion* finally had to determine the meaningfulness of her 'presence' as beneficiary-Other in that context. A *dictum* from Langa CJ's judgment in *Pillay*, dealing with the protection of voluntary (as opposed to obligatory) religious practices,⁹⁶ is premised on a jurisprudence of difference⁹⁷ which conduces and, indeed, insists on the achievement of 'quality' participation and inclusion, mindful of a South African history of denied participation and decided exclusion:

The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity; it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. 'We cannot celebrate diversity by permitting it only when no other option remains.'⁹⁸

This *dictum* resounds a 'not again!', a *nie wieder!*, as clarion call of a memorial (or *Mahnmal*) constitutionalism⁹⁹ in South Africa, maintaining that the Constitution both *narrates* and *authors* our nation's history. Two constitutions since 1994 have thus archived as well as effected transition in South Africa. A constitution memorialises the past, but is also a monument triumphantly shedding the shackles of what went before, and setting the nation free to take thought (and responsibility) for the future. Memorial constitutionalism is, as was intimated previously,¹⁰⁰ a *constitutionalism of memory*, in a South Africa (still) coming to terms with its notorious past, but eventually also a constitutionalism of *promise* moving along the way of (still) getting to grips with a fulfilled and transformed future.

Memorial constitutionalism, as interpretive *leitmotiv*, calls attention to and affirms the power of the unspectacular, non-monumental Constitution as a vital (co-)determinant of constitutional democracy. The

⁹⁶ And elaborating on two previously cited *dicta* in *Pillay* (n 12 above) paras 63-64 — see sec 3.6 above.

⁹⁷ Sec 1 above.

⁹⁸ *Pillay* (n 12 above) para 65.

⁹⁹ A *leitmotiv* in constitutional construction previously identified — see sec 1 above.

¹⁰⁰ Sec 1 above.

memorial Constitution coexists with the monumental Constitution,¹⁰¹ kindling the hope that, duly *and simultaneously* acknowledged, the coexistence of the Constitution's monumental and memorial modes of being — which, at a glance, may seem to be at odds — will be mutually inclusive, constructive and invigorating.

Monuments and memorials have memory in common, but in distinct ways: A monument celebrates; a memorial commemorates. The difference in (potential) meaning(s) between the two may be subtle, and some dictionaries may even indicate that 'celebrate' and 'commemorate' are synonyms, but according to memorial constitutionalists they are not really or, at least, not exactly synonymous. Heroes and achievements can be celebrated or lionised. The same does not apply to anti-heroes, failures and blunders: They may be remembered, yes, but they can hardly be celebrated. 'Commemorate' is a feasible synonym for 'remember', while 'celebrate' is an exultant or jubilant mode of remembering. The closeness in meaning of 'celebrate' and 'commemorate' is not lamentable, however. On the contrary, it conduces their coexistence — contradictions notwithstanding. The German idea of a *Denkmal vis-à-vis a Mahnmal* neatly captures the said contradictions. A *Denkmal* can celebrate (and may even commemorate), but a *Mahnmal* inevitably also warns (and may even castigate).¹⁰² It is restrained *Mahnmal* constitutionalism that has resounded, in post-apartheid South Africa, the 'not again' that inspired constitutionalism in, for instance,

¹⁰¹ The image of the Constitution as monument and memorial emerged from legal scholars' engagement with the work of the South African philosopher, Johan Snyman, on the politics of memory. J Snyman 'Interpretation and the politics of memory' (1998) *Acta Juridica* 317-321. For South African legal scholars' engagement with the work and ideas of Snyman, see L du Plessis 'The South African Constitution as memory and promise' (2000) 11 *Stellenbosch Law Review* 385-394; LM du Plessis 'The South African Constitution as monument and memorial, and the commemoration of the dead' in R Christensen & B Pieroth (eds) *Rechtstheorie in rechtspraktischer Absicht. Freundesgabe zum 70. Geburtstag von Friedrich Müller* (2008) 189-205; K van Marle 'Lives of action, thinking and revolt — A feminist call for politics and becoming in post-apartheid South Africa' (2004) 19 *SA Public Law* 607-612; D Cornell & K van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 202-203; W le Roux 'Undoing the past through statutory interpretation: The Constitutional Court and marriage laws of apartheid' (2005) 26 *Obiter* 529-530.

¹⁰² Monuments and memorials are aesthetic creations, and memorial constitutionalism contends that a constitution may, with interpretive consequences, be thought of as such a creation too. W le Roux 'The aesthetic turn in the post-apartheid constitutional rights discourse' (2005) 1 *Journal for South African Law* 107 refers to 'the aesthetic turn in post-apartheid constitutional rights discourse': '[T]he aesthetic turn in post-apartheid constitutionalism could be interpreted as a direct response to the need for a non-scientific and non-formalised style of public reasoning. That the rejection of science as a model of constitutional law should have resulted in a turn towards art (traditionally regarded as the direct opposite of science) is not at all surprising.'

a post-Holocaust Germany too.¹⁰³ On the strength of *Mahnmal* constitutionalism, human dignity as a value has, for instance, gained an upper hand in South Africa's constitutional project in general, and in the Constitutional Court's equality jurisprudence in particular.

Pillay is (to use a Dworkinian metaphor¹⁰⁴) a chapter in a constitutional chain novel rigorously interrogating issues of identity and difference. A resoluteness not to repeat the injustices of the past has resulted in the affirmation of the status and dignity of several vulnerable groups and categories of persons who, under a culture of authority, had been marginalised and stigmatised for their non-compliance with 'mainstream' morality and the latter's preconceptions about how societal life is best organised. Emblematic of the courts' (and especially the Constitutional Court's) affirmative endeavours are the confidence and forthrightness with which, unperturbed by the conventional public-private divide, they have addressed deficiencies in laws regulating intimate relationships. Landmark judgments in this regard have been *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*¹⁰⁵ (the criminalisation of sodomy was found to be unconstitutional), *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁰⁶ (the Court read words into a statutory provision to extend immigration benefits that 'spouses' of South African nationals enjoyed, to same sex life-partners), *Satchwell v President of the Republic of South Africa and Another*¹⁰⁷ (words were read into a statutory provision conferring financial benefits on a judge's 'surviving spouse' so as to extend such benefits to a same-sex life partner) and *Daniels v Campbell NO and Others*¹⁰⁸ (a surviving 'spouse' reaping benefits from legislative provision for maintenance was held to include a partner in a Muslim marriage). *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*¹⁰⁹ (*Fourie* case), the Constitutional Court judgment in which the statutory and common law exclusion of same-sex life partnerships from the ambit of 'marriage' was held to be unconstitu-

¹⁰³ L du Plessis 'German *Verfassungsrecht* under the Southern Cross. Observations on South African-German interaction in constitutional scholarship in recent history with particular reference to constitution making in South Africa' in F Hufen (ed) *Verfassungen – Zwischen Recht und Politik. Festschrift zum 70. Geburtstag für Hans-Peter Schneider* (2008) 531.

¹⁰⁴ R Dworkin *Law's empire* (1986) 228-238.

¹⁰⁵ 1998 12 BCLR 1517 (CC); 1999 1 SA 6 (CC).

¹⁰⁶ 2000 1 BCLR 39 (CC); 2000 2 SA 1 (CC).

¹⁰⁷ 2002 9 BCLR 986 (CC); 2002 6 SA 1 (CC).

¹⁰⁸ 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC).

¹⁰⁹ 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC).

tional, constitutes a high-water mark in the evolution of constitutional jurisprudence on issues of identity and difference.¹¹⁰

5 The pre-Pillay narrative and a memorial jurisprudence of difference

It was previously remarked that (and briefly explained why) *Seven Eleven*, which could have been a benchmark precedent on the protection of religious rights, was unfortunately too bad a case to make really good law.¹¹¹ Comparing *Seven Eleven* with *Pillay* from the perspective of memorial constitutionalism tempts one to infer that the absence of a traditionally disadvantaged and religiously othered Other in the former case inhibited resolute reliance on a jurisprudence of difference, especially also because the claimant in the case was very much an entrepreneurial wolf in religious sheep's clothes, claiming protection of a *religious* right for *non-religious* reasons. However, as demonstrated in *Pillay*,¹¹² deprivation in a material sense is no precondition to social marginalisation sufficiently serious to call for constitutional redress. The persistent successes of the South African gay and lesbian community in constitutional litigation (in the cases previously referred to)¹¹³ followed from their demonstrated preparedness to fight for their rights from the very earliest stages of constitutional democracy in South Africa, and to do so in a systematic and organised manner.¹¹⁴ They lodged their litigious attacks on anti-gay and -lesbian legislation and state action from a position of relative privilege with access to the very best legal aid. Whatever (material) privileges they enjoyed could, however, not undo the severity of their marginalisation, which appropriately counted

¹¹⁰ For further reference to this case, see sec 5 below. For more examples of the said jurisprudence, see *Du Toit & Another v Minister for Welfare and Population Development & Others* 2002 10 BCLR 1006 (CC); 2003 2 SA 198 (CC); *J & Another v Director-General Department of Home Affairs & Others* 2003 5 BCLR 463 (CC); 2003 5 SA 621 (CC); *Farr v Mutual and Federal Insurance Co Ltd* 2000 3 SA 684 (C). In *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC), a majority of the Constitutional Court thought that there was no way in which the benefits for 'surviving spouses' considered in *Daniels v Campbell NO & Others* 2004 7 BCLR 735 (CC); 2004 5 SA 331 (CC) could be extended to heterosexual life partners. The judgment in *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC) is mostly regarded as an undesirable aberration in relation to its predecessors engaging with the 'meaning of "spouse" issue' — see in this regard Le Roux (n 101 above) 543-545; S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

¹¹¹ Sec 3.1 above.

¹¹² Sec 3.6 above.

¹¹³ Sec 4 above.

¹¹⁴ The inclusion in sec 9(3) of the Constitution of sexual orientation as one of 17 explicit grounds on which unfair discrimination is prohibited, is, eg, traceable to a vigorous gay and lesbian lobby during the drafting stages of South Africa's very first democratic Constitution, the Constitution of the Republic of South Africa Act 200 of 1993, which took effect on 27 April 1994.

among apartheid's 'never again' evils, clamouring for redress drawn from the memorial Constitution.

A comparison of the adjudicative strategies in *Seven Eleven* and *Pillay*, tangibly influenced by the litigious route for which the *dominus litis* in each case had opted, gives pause about reliance on religious equality in addition to (or perhaps even instead of) religious freedom, in litigation on the realisation of religious and related entitlements. It will be remembered that in *Seven Eleven*, four of the nine judges thought that if a constitutional complainant in her or his pleadings contends that a law is unconstitutional because it infringes the right to freedom of religion, the Court cannot of its own accord test the constitutionality of the impugned legislation with reference to religious equality claims too. Five of the judges, however, thought that the Court *in casu* could entertain questions relating to the even-handed (and therefore equal) treatment of people of different religious convictions and affiliations under the impugned legislation. The approach of the five is to be preferred, first, because it was premised on a systematic (or 'coherent') reading of the constitutional provisions entrenching religious freedom¹¹⁵ and equality¹¹⁶ respectively, in the context of the Bill of Rights and the Constitution as a whole and, second, because it duly accounted for the effect of equality as a constitutional value¹¹⁷ in determining the meaning of (the right to) religious freedom.¹¹⁸

Reliance on equality in *Pillay* resulted in a much more potent and far-reaching affirmation of the religious and related rights of the claimant than was the case in *Seven Eleven*. *Pillay* was brought — and decided by three courts of which two were specialised equality courts — as an equality complaint. Why then could it end up as such a powerful assertion of the claimant's religious and cultural rights (and identity, one could add)? A comparator, called for when dealing with an equality complaint, facilitates the detection of Otherness and of disparities involved in conventional dealings with the matter complained of. This 'discovery', in its turn, shows up inarticulate preferences and biases underlying supposedly neutral norms, and interrogates the even-handedness of the effects of such norms. All these considerations were but marginally present in *Seven Eleven*, but were prominent in *Pillay*. However, invoked as listed grounds for the prohibition of discrimination, 'religion' and 'culture' were not treated with exemplary

¹¹⁵ Sec 14(1) of the interim and sec 15(1) of the 1996 Constitution.

¹¹⁶ Sec 8(2) of the interim and sec 9(3) of the 1996 Constitution.

¹¹⁷ Secs 33(1)(a)(ii) & 35(1) of the interim and secs 1(a), 7(1), 36(1) & 39(1)(a) of the 1996 Constitution.

¹¹⁸ Two of the five judges, it will be remembered, did not think that the constitutional claim to even-handed treatment in the circumstances of *Seven Eleven* was powerful enough to warrant an impugnement of legislation constraining it, while the remaining three judges thought that it was.

definitional precision in *Pillay*. In a case like *Christian Education*,¹¹⁹ for instance, which focused on freedom of religion as the *substance* of a constitutional right, conceptual accuracy was more the order of the day and the judgment handed down by Sachs J has indeed become a landmark for definitional orientation in dealing with key concepts in religious and related rights discourse — the milestone that *Seven Eleven* could have been. The claimants in *Christian Education* were not religious Others, but were part of a mainstream Christianity privileged enough to sustain a system of private schools. The Constitutional Court showed much genuine understanding for the religious entitlements of these claimants, affording the said entitlements the consideration of articulate conceptual analysis — also to demarcate them and duly restrain their exercise. The memorial moment in *Christian Education* was Sachs J's suggestion that the learners themselves should have had the opportunity to express their views on the issue of corporal punishment in Christian schools. This judicial afterthought modestly challenged a deep-seated belief (and prejudice), namely that (even) in weighty matters concerning their upbringing and education, children should be seen and not heard.

The memorial moment in the interim *Prince* judgment, with the Constitutional Court insisting that Prince and, with and through him, the Rastafarian community, should be afforded the fullest possible opportunity to be heard — precisely because they are religious Others — is of considerable significance, but could not prevent the eventual othering of Prince as outcome of the saga.¹²⁰ The Court, in its final judgment, paid much attention to the question of the possible effects of allowing, as religious observance, conduct conventionally regarded as a threat to the good order in society. (Actually the Court in *Pillay* had to deal with a similar question in relation to a more limited community, namely a school.) By a narrow majority, the Court in *Prince* finally concluded that it could not hand down a judgment licensing such conduct, but in the process the Court as a whole also failed to address Prince's actual concern, namely his fitness and propriety to practise as an attorney. Especially this oversight resulted in a non-fulfilment of the consideration that the Court so encouragingly afforded Prince in the interim judgment.

The *Bührmann-Nkosi* cases can hardly be described as anything other than a blatant othering of a claimant belonging to a traditionally marginalised group (of farm-workers and -dwellers), by vastly exaggerating possible threats that her observance of a burial rite, required by her religion and culture, could pose to a farmer's property rights.¹²¹ All that may be noted in a positive vein is that the effect of this judgment has been undone by legislation catering for precisely the

¹¹⁹ Sec 3.2 above.

¹²⁰ Sec 3.3 above.

¹²¹ Sec 3.4 above.

type of predicament in which Grace Nkosi found herself with regard to the burial of her son. The *Crossley* judgment, on the other hand, was a remarkable (albeit sad) celebration of the dignity of a member of the same marginalised group featuring in *Bühmann-Nkosi*.¹²² This judgment sounded a 'never again' warning that duly resurrected the memory of a departed Other and honoured the concerns of those caring about him. It was an instance of memorial constitutionalism *par excellence*.

6 Conclusion

The Constitutional Court's equality jurisprudence in relation to issues of identity and difference has increasingly been interrogating, with transformative rigour, 'mainstream' preferences and prejudices regarding the organisation of societal life, inspired by a desire to proceed beyond — and 'not again' to resurrect — all that used to contribute to and sustain marginalisation of the Other. In this article it was shown that this has happened in cases dealing with the right to freedom of religion (and related rights) too. In the previously referred to *Fourie* case,¹²³ religious considerations operated in the background, but were significantly present nonetheless. Reflecting on an appropriate response to gay and lesbian Otherness, Sachs J observed that¹²⁴

[t]he acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

Commenting on religious objections to gay marriages, the Court expressed the view that¹²⁵

[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.

These two *dicta*, read together, indicate that there are important challenges involved in negotiating the shoals between the Scylla of strongly-held religious beliefs and the Charybdis of affirming and celebrating an Otherness whose marginalisation has been justified — and may even have been called for — by those very beliefs. In a constitutional

¹²² Sec 3.6 above.

¹²³ *Fourie* (n 109 above); sec 4 above.

¹²⁴ *Fourie* (n 109 above) para 60.

¹²⁵ *Fourie* (n 109 above) para 95.

democracy, this dilemma must be confronted head-on and openly, in other words, publicly. The good news is that, as a result of cases like *Fourie* (and probably *Pillay* too), rigorous debate is already taking place *in public* on taboos formerly relegated to (and hidden away in) 'the private sphere'. The bold assertions of the Constitutional Court on the affirmation and celebration of the Other challenge all religions with simultaneously lofty and magnanimous ideas about 'doing unto Others' to also make themselves heard. At least they, and everyone protected under and empowered by the South African Constitution, may rest assured that 'our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation'¹²⁶ and that 'neither the Equality Act¹²⁷ nor the Constitution require (*sic*) identical treatment. They require equal concern and equal respect.'¹²⁸ Quality equality is what it is all about, and that is what makes of every voice in a debate on issues of identity, however controversial, a contribution to a politics (and eventually a jurisprudence) of difference, heeding the memorial moments in our constitutional project.

¹²⁶ *Pillay* (n 12 above) para 92.

¹²⁷ That is, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹²⁸ *Pillay* (n 12 above) para 103.