PARENTAL RIGHTS TO PARTICIPATE IN A CHILD'S PERSONALITY DEVELOPMENT AND ITS RELIGIOUS AND MORAL UPBRINGING AND THE CHILD'S RIGHT TO FREEDOM OF CHOICE: OBSERVATIONS ON THE FIELD OF TENSION CAUSED BY THE IRRATIONAL IN A HUMAN RIGHTS DISPENSATION

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SUMMARY

One of the factors that must be taken into account in child custody cases is the religious upbringing of the child. If the parents agree, there is normally no issue. The courts will not interfere, unless the parents' religious practices are not in the child's best interests. Courts have consistently held that the parents' autonomy in this regard is a fundamental right.

In this article the authors argue that religious upbringing is implicit in parenthood. At an early age a child does not have a choice. It is indeed strange to suggest that young children have a choice, as if it is presented to them on a menu. Parents have a right and a duty to promote the development of their children's character, value system and spiritual and moral well-being.

1 INTRODUCTION

In *Kotze v Kotze*[1] summons for divorce was issued on 21 October 2002 by agreement between the parties and the case was placed on the uncontested roll for 22 November 2002. One child, a boy, had been born from the marriage on 9 March 1999. The settlement agreement submitted to the court made provision for the normal custody and access arrangement, and had a specific paragraph that dealt with religious upbringing. There were two specific aspects provided for: (1) Both parties undertook to educate the minor child in a specific religion and further undertook that he would fully participate in all the religious activities of the Apostolic Church; and (2) The parties furthermore bound themselves by agreeing to live within a radius of 120km from the church. If one of them were due to move, a change of custody arrangement would have to be sought. The court, as upper guardian of all minor children, refused to make the first paragraph an order of court. The reasoning was that real freedom implies that one must also be free from indoctrination and coercion so that one can make one's own choices. The court felt that to force a child into a particular religious upbringing infringed on the child's freedom of choice. By implication, and paradoxically, the second paragraph was in fact made an order of court, restricting the parents' movement outside the defined radius of 120 km from the church address.

Within the context of the transmission of religion in a general sense this judgment is completely out of touch with universal practices and with the nature and essence of the education of religion. As far as value orientation and character building is concerned, it is very close to being bizarre. In the present article the interaction/conflict of parental rights in respect of the religious upbringing, value orientation, and character building of their children and certain fundamental rights is explained and subjected to a critical analysis.

2 RELIGION AND THE LIMITS OF RELIGIOUS ACTIVITIES IN A PLURAL SOCIETY

Defining religion is easier said than done. Pfeffer,[2] most probably with tongue in the cheek, says:

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1 2003 3 SA 628 (T).

2 "Equal Protection for Unpopular Sects" 1979-80 *New York University Review of Law and Social Change* 9-10 quoted by Davis "Joining a 'Cult'. Religious Choice or Psychological Aberation?" 1996-97 *Journal of Law and Health* 145 147 and by Williams "America's

> "If you believe in it, it is a religion or perhaps the religion; and if you do not care one way or another about it, it is a sect; but if you fear and hate it, it is a cult."

In *Davis v Beason*,[3] a 1890 decision of the Supreme Court of the United States, the following definition of religion was proffered:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose for reverence for his being and character, and of obedience to his will."[4]

In 1931 in *United States v Macintosh*[5] Hughes CJ reaffirmed that the "essence of religion is belief in a relation of God involving duties superior to those arising from any human relation". These viewpoints are strictly Christian-oriented.[6]

In 1943 a Federal Court[7] in the USA obviated a definition of religion:

> "It is unneccesary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words."

The general impact of the growing cultural and religious pluralistic societies, especially in western constitutional states (*regstate*), necessitated a reconsideration of the definition of religion within the concept of freedom of religion.[8] In 1944 in *United States v Ballard*[9] the Supreme Court of the USA explained in this regard:

> "[Freedom of religion] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy for followers of the orthodox faiths ... Men may believe what they can not prove. They may not be put to the proof of their doctrines or beliefs. Religious experiences which are real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."[10]

Opposition to New Religious Movements: Limiting the Freedom of Religion" 2003 *Law and Psychology Review* 171.

3 133 US 333, 342 (1890).

4 See too *Late Corp of the Church of Jesus Christ of Latter-Day Saints v United States* 136 US 1, 50 (1890).

5 283 US 605, 633-34 (1931).

6 See Feofanov "Defining Religion: An Immodest Proposal" 1994 *Hofstra LR* 307 363.

7 *United States v Kauten* 133 F2d 703, 708 (1943).

8 See for instance Choper "Defining 'Religion' in the First Amendment" 1982 *University of Illinois LR* 579: "[T]he scope of religious pluralism ... alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all." See too Bijsterveld "Freedom of Religion in the Netherlands" 1995 *Brigham Young University LR* 555; Devenish "Freedom of Religion, Belief and Opinion" 1995 *Obiter* 15; and Naidu "The Right to Freedom of Thought and Religion and the Freedom of Expression and Opinion" 1987 *Obiter* 59.

9 322 US 78, 86-87 (1944).

10 As quoted and edited by Feofanov 366.

Since then, decisions of US courts were not always reconcilable and, to put it mildly, were confusing.[11] Some scholars are of the opinion that a definition of religion is not possible and that insisting on a definition "would almost certainly add one more source of confusion to establishment doctrine".[12] According to Weiss,[13] a definition of religion as such is in conflict with the concept of freedom of religion since it prescribes to religions what they should be.[14] Choper[15] explains the complexity of religious pluralism and the problematics of the definitional issue in the USA as follows:

> "Moreover, the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all. Scholars have written volumes on the subject without reaching anything approaching agreement. Judicial as well as theological efforts to cabin the notion may take on the appearance of exercises in circularity, proposed definitions using as a starting point comparison to groups or beliefs that are stipulated as being religious. Thus, although a constitutional definition of 'religious belief' may be expressed as whether the belief 'occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God', or 'religion' may be described as 'the state of being ultimately concerned', these formulations may be no more useful when applied to specific cases than the words 'religious belief' and 'religion' themselves. Further, any definition of religion for constitutional purposes that certain beliefs (or groups) that are reasonably perceived or characterized as being religious by those who hold them (or belong to them) may be fairly viewed as judicial preference of some 'religions' over others. Indeed, the very idea of a legal definition of religion may be viewed as an 'establishment' of religion in violation of the first amendment."

Following an analysis of a variety of alternatives, Feofanov[16] defines religion "as a manifestly non-rational ... i.e. faith-based belief ... concerning the alleged nature of the universe, sincerely held".

Worldwide, scholars and courts are divided on the question of whether the Church of Wicca,[17] the Order of St Walburgia[18] or the Church of Satan[19] should be regarded as religions.[20] In *United States v Kauten*[21] a federal

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11 See Feofanov 363 and further; Labuschagne "Die Begrip 'Godsdiens' in Godsdiensvryheid: 'n Bewussynsantropologiese Ekskursie na die Evolusiekern van die Reg" 1997 *De Jure* 118 124-128.

12 Smith "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test" 1987 *Michigan LR* 266 298.

13 "Privilege, Posture and Protection: 'Religion' in Law" 1964 *Yale LJ* 593 604.

14 Adams and Emmerlich "A Heritage of Religious Liberty" 1989 *University of Pennsylvania LR* 1559 1663 correctly point out that "the definitional issue was largely unforseen by the Founders".

15 579-580.

16 385.

17 *Dettmer v Landon* (1985) 38 Cr LR 2018 (USDC EVA no 1090-A 8/25/85); Labuschagne 128.

18 Decision of a Court at the Hague (Netherlands) referred to by the Dutch Supreme Court (Hoge Raad; HR) in a decision of 31 October 1986, NJ 1987, 173; De Winter "Godsdienst als Alibi" 1996 *Nederlands Juristenblad* (*NJB*) 1 2.

19 Feofanov 404.

20 See generally Van Rooyen *Censorship in South Africa* (1987) 87; Rudolph *Sedes, Godsdiens en Publikasiebeheer* (LLD thesis, University of Pretoria, 1991) 265.

appeal court in the USA put the human conscience on par with a religious impulse:

> "[A] response of the individual to an inward mentor, call it conscience or God ... is for many persons at the present time the equivalent of what has always been thought a religious impulse."[22]

In the modern context, freedom of religion also includes the freedom to be non-religious.[23] In *Torcaso v Walkins*[24] Black J of the Supreme Court of the USA observed:

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

Belief in the existence and omnipresence of the ancestral spirits, which is still widely adhered to in African societies,[25] would also qualify as religion(s).[26] In addition, the belief in witchcraft still abounds in African societies.[27] In view of the violence and brutality engendered by witchcraft accusations,[28] it is inconceivable for it to be sanctioned in a constitutional state (*regstaat*).[29]

In *Kotze v Kotze*[30] Fabricius AJ defines religion as "the human recognition of superhuman controlling power, and specifically of a personal god or gods, entitled to obedience and worship".[31] Viewed against the background of the

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21 133 F2d 703, 708 (2nd Cir 1943).

22 See too Feofanov 339-340.

23 Devenish 17; and Labuschagne 130.

24 6 L Ed 2d 982, 987 n11 (1961); and Feofanov 351.

25 Du Plessis "Afrikareg en -Godsdiens" in De Kock and Labuschagne (eds) *Festschrift JC Bekker* (1995) 53 56-58.

26 Labuschagne 130.

27 Labuschagne "Geloof in Towery, die Regsbewussyndraende Persoonlikheid en die Voorrasionele Onderbou van die Regsorde: 'n Regsantropologiese Evaluasie" 1998 *SA Journal of Ethnology* (*SAJE*) 78-85; and Kaetzler *Magie und Strafrecht in Südafrika* (DIur thesis, Augsburg, 2001) 1 and further.

28 Labuschagne "Geloof in Toorkuns: 'n Morele Dilemma vir die Strafreg" 1990 *SACJ* 246.

29 See Niehaus "Witch-hunting and Political Legitimacy: Continuity and Change in Green Valley, Lebowa, 1930-1991" 1993 *Africa* 4; Nel, Verschoor, Calitz and Van Rensburg "Die Belang van 'n Antropologiese Perspektief by Toepaslike Verhore van Oënskynlike Motieflose Moorde" 1992 *SAJE* 85; Ludsin "Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law" 2003 *Berkeley Journal of International Law* 62 108; and Meissner *Traditional Medicine and its Accommodation in the South African National Health Care System with Special Attention to Possible Statutory Regulation* (LLD thesis, Unisa, 2003) 184 and further.

30 *Supra* 62.

31 In this regard he refers only to *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423(T) 449. See also Stubbs "Persuading thy Neighbor to be as Thyself: Constitutional Limits on Evangelism in the United States and India" 1994 *Pacific Basin LJ* 363 375 and the decision of the Indian Supreme Court in *Commissioner of Hindu Religious Endowments v Sri Laksmindra Thirta Swaniar* (1954 SCR 1005 1023-24): "Religion is certainly a matter of faith with individuals or communities and is not necessarily theistic ... A religion undoubtedly has its basis in a system of beliefs or doctrine which are

preceding exposition, it becomes obvious that this definition is not only anachronistic but is also devoid of realism and rationality. In all fairness, Fabricius AJ appears to be aware of this:

> "'Religious activities' are those practices, observances, rituals and rites which pertain either generally or particularly to any religion that recognises, obeys and worships a personal god or gods. It is, of course, impossible to provide a definitive all-embracing definition of 'religion' or 'religious beliefs' or 'religious activities' in the light of the diversity in this context, and developments in theology, and always considering the particular believer's perspectives."

As far as religious practices and rituals are concerned, Williams[32] correctly maintains that the state cannot "turn a blind eye to the actions of religious groups today because of the potential problems that can arise when zealous leaders put their followers into danger" as is exemplified by various recent tragedies.[33] Religious rituals which are nowadays almost unanimously deplored in constitutional states (*regstate*) include circumcision,[34] especially genital mutilation of females,[35] as well as discriminatory religious practices against females,[36] persons of homosexual orientation[37] and children.[38]

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regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."

32 180.

33 See too Williams 182: "Today there pervades a hatred and distrust for marginal religious groups that are seen as destructive and dangerous to its members, and the controls placed on such groups are not seen as burdens by the courts. Conflicts arise between the court system and religious movements when the religious movement propheses apocalyptic messages and separation from mainstream life. There will always be questions asking why religious observers practice in ways contrary to the mainstream. For example, the Al Qaeda terrorist group acts in the name of its Muslim faith, citing its religious beliefs as the motivating force behind the September 11, 2001 attacks against the United States. This, and any other deviant behaviour, is distrusted and hated and will continue to be as long as a threat exists against Americans' daily life and ideological mainstream."

34 Montagu "Mutilated Humanity" 1995 *The Humanist* 12; Van Vuuren and de Jongh "Rituals of Manhood in South Africa: Circumcision at the Cutting Edge of Critical Intervention" 1999 *SAJE* 23; and Labuschagne "Besnydenis en die Grense van Religieuse en Kulturele Gebruike in 'n Regstaat: 'n Regsantropologiese Perspektief" 2000 *SAJE* 55.

35 Maher "Female Genital Mutilation: The Struggle to Eradicate this Rite of Passage" 1996 *Human Rights Journal* 12; and Labuschagne and De Villiers "Circumcision and Female Genital Mutilation: A Human Rights and Anthropo-legal Evaluation" 1998 *SAPR/PL* 277.

36 Labuschagne "Psigokulturele Onderbou van Effektiewe Menseregte: Opmerkinge oor die Posisie van die Vrou in die Inheemse Reg" 1995 *Stell LR* 348; Wright "Marriage: From Status to Contract?" 1984 *Anglo-American LR* 17; Skolnick "The Social Contexts of Cohabitation" 1981 *American Journal of Comparative Law* 339; Labuschagne and Van den Heever "Liability for Adultery in South African Indigenous Law: Remarks on the Juridical Process of Psychosexual Autonomisation of Women" 1997 *CILSA* 76-96; and "Liability for Adultery in South African Indigenous Law: An Analysis of the Case Law" 1999 *CILSA* 98-125.

37 See Schimmel *Eheschliessungen gleichgeschlechticher Paare* (1996) 38-46; MacDougall "The Celebration of Same-sex Marriage" 2000-2001 *Ottawa LR* 235; Sarantakos "Same-sex Marriage: Which Way to Go?" 1999 *Alternative LJ* 79; Howard-Hassmann "Gay Rights and the Right to a Family: Conflicts between Liberal and Illiberal Belief Systems"

Religious practices and rituals involving maltreatment of animals are progressively denounced in, particularly, the western world.[39]

3 PARENTAL RIGHTS, INDOCTRINATION AND TRANSMISSION OF RELIGION

In early common law systems in Europe, the father had an almost absolute right to his child.[40] Although the absolute right a father had to life and death (*ius vitae necisque*)[41] in rudimentary societies had been in an accelerating process of being phased out[42] the legal status of children was in many respects still similar to that of chattel.[43] The mother had few rights and her view and interests were generally discarded. Nowadays parents, at least in theory, are treated equally, in particular as far as custodial rights are concerned.[44]

In *Kotze v Kotze*[45] Fabricius AJ opined in respect of parental rights/duties to religious education and upbringing of children as follows:

> "In this context it is often stated that it is 'useful' (if not essential) to ensure that a child belongs to a church, or adheres to a religion and partakes in its activities, so that

2001 *Human Rights Quarterly* 73; Labuschagne "Eengeslaghuwelike: 'n Menseregtelike en Regsevolusionêre Perspektief" 1996 *SAJHR* 534-548; and Singh "The Refusal to Recognise Same-sex Marriages – A Pandora's Box of Inequalities" 1999 *De Jure* 29-45. See too, Karst "The Freedom of Intimate Association" 1980 *Yale LJ* 624ff.

38 Bechen *Die strafrechtliche Bewertung der körperlichen Züchtigung in den Schulen* (DIur thesis, Cologne, 1961) 1 and further; Feshbach "Tomorrow is Here Today in Sweden" 1980 *Journal of Clinical Child Psychology* 107; and Greven *Spare the Child* (1991) 1ff. For further references, see Labuschagne "Tugtiging van Kinders: 'n Strafregtelik-prinsipiële Evaluasie" 1991 *De Jure* 23; "Ouerlike Geweldsaanwending as Skending van die Kind se Reg op Biopsigiese Outonomie" 1996 *TSAR* 577; and "Is die Kind se Reg op Geweldvrye Opvoeding en die Ouerlike Tugbevoegdheid Versoenbaar? Opmerkinge oor Onlangse Ontwikkelinge in die Duitse Reg in dié Verband" 2002 *De Jure* 327.

39 Labuschagne "Gewetensvryheid, Wetenskaplike Navorsing en die Diereregtelike Grense van Eksperimente met Diere" 1995 *SALJ* 698; "Religieuse Begrensing van Diereregte?" 1997 *SALJ* 471; Labuschagne and Crosby "Die Werweldier se Reg op Biopsigiese Integriteit" 1996 *THRHR* 72; Brüninghaus *Die Stellung des Tieres im Bürgerlichen Gesetzbuch* (1993) 14-18; Waldschütz "Die Stellung des Tieres im Rahmen der Schöpfungtheologie und der Philosophie des Lebendigen" in Harrer and Graf (eds) *Tierschutz und Recht* (1994) 37 46; Ziekow *Tierschutz im Schnittfeld von nationalem und internationalem Recht* (1999) 21; Caspar "Tierschutz in die Verfassung?" 1998 *Zeitschrift für Rechtspolitik* (*ZRP*) 441 444; and Röckle *Probleme und Entwicklungstendenzen des strafrechtlichen Tierschutzes* (DIur thesis, Tübingen, 1996) 35-38.

40 Barker and Hamman "The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends" 1979 *Washburn LJ* 482 483.

41 Rein *Das Kriminalrecht der Römer* (1844) 439-440; and Labuschagne "Aktiewe Eutanasie van 'n Swaar Gestremde Baba: 'n Nederlandse Hof Herstel die *Ius Vitae Necisque* in 'n Medemenslike Gewaad" 1996 *SALJ* 216.

42 Labuschagne "Kindermishandeling: 'n Juridiese Perspektief" 1976 *De Jure* 189 192-195.

43 See Von Bar *A History of Continental Criminal Law* (1916) 166-167.

44 Barker and Hamman 483; and Irving and Benjamin "Mobility Rights and Children's Interests: Empirically-based First Principles as a Guide to Effective Parenting Plans" 1996 *Canadian Family LQ* 249.

45 631.

> it can, at a more mature age, at that stage exercise its free choice. There is a fallacy in this argument. It fails to appreciate fully the nature of the human being within the framework of the imposition of religious dogma upon it. Indoctrination (in the neutral sense) and the slavish adherence to certain oft-repeated canons that seem to be generally accepted by one's peers as the only truth often not only negates, but essentially destroys a person's freedom of choice, inasmuch as it is extremely difficult[46] to free oneself from these bonds, even if one has the intellectual and emotional capacity to do so at a later stage. If a child is forced, be it by order of the parents, or by order of the Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution, and which is expressly referred to in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, which is part of the United Nations Convention on the Rights of the Child, of which the State is a signatory."

Religion, in some way or another, is inherently part and parcel of most human beings. For children, the practice, value and place of religion is mostly taught at the mother's knee, within family gatherings and also within a church or shrine as a meeting place for likeminded individuals. It is therefore generally accepted that religion starts at home and it is therefore primarily the parents' responsibility to give the child a religious upbringing.[47] Traditionally, the tenets and practices of religion are transmitted from one generation to another through indoctrination and disciplinary measures. The rise of alternative and aggressive religious movements, usually referred to as cults, within existing world-religions, are invariably viewed with suspicion and fear because of the idea that "members are brainwashed so as to lose all mind control and independent thought".[48]

Williams[49] elucidates:

> "The brainwashing technique purports to separate the cult member from the traditional mainstream ideology and bring them into fully believing and accepting the cult's ideology. Anti-cult activists believe that it is a method of control to subordinate new members and lead them to do irrational acts at the hands of fervent and authoritarian cult leaders. When over 900 members of the Jim Jones' People Temple killed themselves in a mass suicide, brainwashing gave a reasonable explanation for the tragedy. As concerns grew about these acts of defiance and counter-establishment teaching, people looked to deprogrammers to take their family members out of the cults and bring them back into an accepted reality by taking out all thoughts of the cult and reteaching the mainstream ... The act of deprogramming brings to the forefront many questions about rights of the cult members as well as civil liberties issues. Do these deprogrammers have the right to force a member of a new religious movement to accept the mainstream ideology and religious thought? Does this action

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46 See too Labuschagne "Menseregtelike en Strafregtelike Bekamping van Groeps-identiteitmatige Krenking en Geweld" 1996 *De Jure* 23 35-39.

47 *Cf* Marcus "Equal Protection: The Custody of the Illegitimate Child" 1971 *Journal of Family Law* 3 5: "The parental interest in the child most worthy of consideration is the instinctive, moral obligation of the parent to ensure that his child is raised and cared for as well as possible. The interest would include seeing the child is properly fed, sheltered and receives the appropriate secular and moral (religious) education." See further Frenz "Die Unterhaltsgarantie aus Art 6 GG nach der Sorgerechtsentscheidung des BVerfG vom 7.5.1991" 1992 *Neue Juristische Wochenschrift* (*NJW*) 160; and Bekink "Parental Religious Freedom and the Rights and Best Interests of Children" 2003 *THRHR* 246.

48 Williams 178.

49 *Ibid*.

> not fly in the face of the ... guarantee that an American can choose the method in which they practice their beliefs?"

Although these extremists' religious and dehumanising activities are of great concern, they do not detract from the importance of parental rights and duties concerning the religious and general upbringing of their children.[50]

The importance of the religious upbringing of a child is recognized in various ways. For example, in the *locus classicus* about the best interest of the child,[51] the court laid down certain criteria for the placement of children during divorce of which one is "(t)he ability of the parent to provide for the educational well-being and security of the child, both religious and secular". Section 7 of the Schools Act[52] recognises religious observances by public schools, provided they are not made compulsory for learners.[53] Religion is closely tied with culture and tradition. The new Children's Bill, 2002, an ambitious piece of legislation that creates a more integrated approach to deal with all children's matters in civil courts, recognises culture and tradition specifically as facts to be considered in deciding the best interest of the child. Section 6(1) of the Bill requires that whenever the best interest of the child standard is applied, the following factors must, among others, be taken into consideration where relevant:

> "The need for the child (i) to remain in the care of his or her parent, family and extended family; (ii) to maintain a connection with his or her family, extended family, tribe, *culture* or *tradition*."[54]

In other jurisdictions, religion is also recognized as important for the upbringing of a child. In the English Children's Act 1989 provision is, for example, made in section 8 for "Specific Issue Orders". This refers to specific orders a court may make on parental disputes which may arise in regard to specific issues. These orders include aspects such as medical treatment, surname of the child, as well as religious upbringing after divorce. In this regard one might take a leaf from the book of American jurisprudence. In terms of the First Amendment to that country's constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." Drobac[55] deals extensively with American case law on religion in child custody cases. The point of departure is that:

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50 *McCall v McCall* 1994 3 SA 201 (C) 204.

51 *Ibid*.

52 84 of 1996.

53 See, *eg*, *S v Lawrence* 1997 4 SA 1176 (CC) where the Constitutional Court held that the state may never require that attendance at religious observances be made compulsory.

54 Emphasis added.

55 "For the Sake of the Children: Court Consideration of Religion in Child Custody Cases" 1998 *Stanford LR* 1 3.

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[56]

In *Wisconson v Yoder*[57] the court also found that the free exercise of religious beliefs includes the right to direct the religious upbringing of one's children. Drobac's further discussion revolves mainly around cases where the courts had to weigh up the religion of one parent against that of the other and around harmful religious practices. The parental right and the free exercise of religious beliefs [including] the right to manage the religious indoctrination of one's children are according to Drobac[58] not an issue. This would seem to be so obvious that it hardly needs to be substantiated. However, in *Kotze v Kotze* Fabricius AJ, as was mentioned above, made some pronouncements that were based on a misunderstanding of religion and its role in family affairs. Our submission is that rather than eliminating religion, judges should regard it as an important, if not indispensable, factor in custody cases. If one of the parent's religious beliefs should threaten the child's physical or psychological welfare, custody should be awarded to the parent who is likely or willing to provide the child with an opportunity to practice a faith. Naturally, such as in *Kotze v Kotze*, where the child has not yet been initiated into a particular faith, the custody should be awarded to the parent who will raise the child in the faith of the natural parents.[59] It is actually absurd to talk about the religious upbringing of a three-and-a-half-year-old child as if at some time or another he or she will choose a faith from a menu. Faith is transmitted from parents to children. As stated by Boyer:[60]

> "After all, if you are a Protestant and you went to Sunday school, that was your main source of religious education. Similarly, the teaching of the *madrasa* for Muslims and *Talmed-Torah* for Jews seem to provide people with one version of religion. It does not seem to us that we are shopping in a religious supermarket where the shelves are bursting with alternative religious concepts."

What is more, one may speculate about religion or faith, but it is universal and provides children with a measure of certainty and security not provided in other areas of life.[61] Also, most children derive ethical and moral values from religion. Ellwood[62] explains:

> "Transformation, and above all the sometimes contracting role of religion to uphold the normative values of society, requires following certain standards of behaviour in this life. The ethical teachings of a religion are not in isolation from its transformative goals but either create the necessary preconditions for upward spiritual advance – such as the *niyama* or *yama*, constraints and advice that preclude serious yoga – or,

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56 *Prince v Massachusetts* 321 US 158 (1994).

57 406 US 205 (1972).

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59 See generally Weiltherton *Psychology and Child Custody Determinations* (1987) 80.

60 *Religion Explained: The Human Instincts that Fashion Gods, Spirits and Ancestors* (2002) 38.

61 Hurlock *Adolescent Development* (1967) 390.

62 *Introducing Religion: From Inside and Outside* (1983) 76.

like the Sermon on the Mount, suggest a perfectionist way of life that foreshadows here and now the Kingdom of Heaven."

Religion is indeed functional. According to Boyer:[63]

"Religion supports morality. No society could work without moral prescriptions that bind people together and thwart crime, theft, treachery, etc. Moral rules cannot be enforced merely by fear of immediate punishment which we all know to be uncertain. The fear of God is a better incentive to moral behaviour since it assumes that the monitoring is constant and the sanctions eternal. In the same way in most societies some other religious agency (spirits, ancestors, etc,) is there to guarantee that people behave."[64]

The bottom line is that parents have a right and a "duty" to participate in the development of their "children's personality, value system and their spiritual and moral, including religious, wellbeing",[65] as long as it serves their (the childrens') best interests. This brings us to the fundamental rights of children.

4 TOLERANCE IN A CONSTITUTIONAL STATE AND FUNDAMENTAL RIGHTS OF CHILDREN

In *Kotze v Kotze*[66] Fabricius AJ refers to section 15(1) of the Constitution of the Republic of South Africa[67] (hereafter "the Constitution"), which provides that everyone has the right of freedom of conscience, religion, thought, belief and opinion, and to section 15(2) which reads:

"Religious observances may be conducted at state or state-aided institutions, provided that – (a) those observances follow rules made by the appropriate public authorities ... (b) they are conducted on an equitable basis, and ... (c) attendance at them is free and voluntary."

Fabricius AJ proceeds by pointing out that as far as his knowledge is concerned the Apostolic Church is not a state or state-aided institution and that section 15(2), read with section 18 of the Constitution, which provides for a right to freedom of association, "is certainly indicative of an intent to ensure that participation in religious activities takes place only on a voluntary basis". In contrast to the USA Constitution, section 15 of the Constitution (as does, for instance, section 4 of the German Constitution) explicitly provides alternatives to the traditional concept of religion. No necessity, therefore, exists, as it does in the USA, for an artificial interpretation of the concept of religion.[68]

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63 27.

64 See too Labuschagne 1997 *De Jure* 132-133.

65 Labuschagne "Persoonlikheidsgoedere van 'n Ander as Regsobjek: Opmerkinge oor die Ongehude Vader se Persoonlikheids- en Waardevormende Reg ten Aansien van sy Buite-egtelike Kind" 1993 *THRHR* 414 428-429.

66 *Supra* 630.

67 108 of 1996.

68 See the decision of the German Constitutional Court (*Bundesverfassungsgericht*; *BVerfG*) of 14 December 1965, NJW 1966, 47; and Labuschagne "Die Regstatus van die

In *Kotze v Kotze*[69] Fabricius AJ correctly emphasised that the constitutional values of human dignity and the advancement of human rights and freedoms be given full expression and, if not, "the values of tolerance of diversity that the Constitution itself envisages[70] and without which the Bill of Rights chapter will merely be an ideal beyond the grasp of the persons it was intended for".[71]

In *Jackson v Jackson*[72] the Supreme Court of Kansas in the USA observed that "(r)eligious freedom ... should be faithfully upheld, and the religious teaching to the children by a parent or parents, regardless of how obnoxious the same might be to the Court, the other parent or the general public, should not and must not be considered as basis of making child custody orders". In commenting on this case, Barker and Hamman[73] correctly maintain that although religious beliefs are relevant in determining the best interests of a child, a court cannot use them as such to disapprove of parental decisions except where a parental decision, premised on religious tenets, manifests

Islamkopdoek: Opmerkinge oor die Begrensing van Religieuse Simbole en Gebruike in 'n Regstaat" 2002 *SAPR/PL* 382 385-387. See too Malan "Godsdiensvryheid as Prototipiese Mensereg: Op die Breuklyn tussen Republica Christiana en Staatsoewereiniteit" 2003 *THRHR* 408.

69 *Supra* 631.

70 Fabricius AJ 632 expresses a preference for the attitude of Dickson CJ of the Supreme Court of Canada in *R v Big M Drug Mart Ltd* (1985) 18 CCC (3d) 385: "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conducts. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ... Freedom must surely be founded in respect of the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is a right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear and hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and assimilation. But the concept means more than that. Freedom can primarily be exercised by the absence of coercion or constraint ... One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. What may appear good and true to a majoritarian religious group, or to the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view."

71 See too, Selove "Faith Profaned: The Religious Freedom Restoration Act and Religion in Prisons" 1996 *Yale LJ* 459 467-68; Rosier "Tolerantie en Religie. Over de Zaak Van Dijke en de Visie van het EHRM inzake Godslastering" 2000 *Rechtsgeleerd Magazijn Themis* 3; Heyns en Brand "The Constitutional Protection and Religious Human Rights in Southern Africa" 2000 *CILSA* 53 95; Labuschagne 2002 *SAPR/PL* 386-387; "Vanaf Goddellike tot Menslike Persoonlikheidsreg: 'n Regsantropologiese Evaluasie van die Ontstaan en Disintegrasie van die Misdaad Godslastering" 2001 *Stellenbosch LR* 484; and Malan 422-423.

72 181 Kan 1 309 P2d 705 (1957) quoted by Barker and Hamman 491.

73 491.

total disregard for the welfare of a child.[74] In *Kotze v Kotze*[75] Fabricius AJ correctly avers that the best interests of the child are of paramount importance in decisions concerning that child.[76] This principle is explicitly incorporated into our Constitution.[77] According to Fabricius AJ a parent should not be allowed to compel a child to attend church.[78] In this regard the best interests of the child should prevail over parental rights:[79]

> "This approach, I believe, would be in the best interests of the child. I have also not lost sight of the fact that a child is subject to parental control, and is also entitled to an education. This may involve the teaching of religion in whatever form, such as history of religion and ethics. In fact, to enable one to have a balanced view of life and its meaning, a wide knowledge of the topic is no doubt desirable. Such teachings must, however, firstly not deprive the parents of the right and opportunity to monitor the child's educational progress from time to time and to make appropriate adaptations, and, secondly, it must not place the child under obligations which effectively deprive it of its right to declare its religious belief, or the absence thereof, openly, and without fear and constraints."

In the case of young children in particular, this approach is totally out of touch with reality, if not bizarre. As far as the best interests of a child in religious and moral (value system) upbringing is concerned, the cult phenomenon, to borrow American terminology, creates far-reaching problems. The following eight features have been put forth to describe cults and cult leaders:[80]

> "1. Cult leaders are self-appointed, persuasive persons who claim to have a special mission in life or to have special knowledge; ... 2. Cult leaders tend to be determined and domineering and are often described as charismatic; ... 3. Cult leaders center venerations on themselves; ... 4. Cults are authoritarian in structure; ... 5. Cults appear to be innovative and exclusive; ... 6. Cults tend to have a double set of ethics; ... 7. Cults tend to be totalistic, or all-encompassing, in controlling their members' behaviour and also ideologically totalistic exhibiting zealotry and extremism in their world view; and ... 8. Cults tend to require members to undergo a major disruption or change in life-style."

Courts should protect children against harmful dogmas and practices of cults. Williams,[81] in her illuminating article, points out that mainstream America "feels threatened by new religious movements that allow and even encourage physical and sexual abuse, sexual deviation and experimentation,

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74 See too Labuschagne "International Parental Abduction of Children: Remarks on the Overriding Status of the Best Interest of the Child in International Law" 2000 *CILSA* 333 340-341.

75 *Supra* 631.

76 With reference to *Christian Education South Africa v Minister of Education* 2000 4 SA 857 (CC) par 40-41; and Labuschagne "Is die Kind se Reg op 'n Geweldvrye Opvoeding en die Ouerlike Tugbevoegdheid Versoenbaar? Opmerkinge oor Onlangse Ontwikkelinge in die Duitse Reg in dié Verband" 2002 *De Jure* 327.

77 S 28(2).

78 631-632. In this respect he relies on the views of Dickson CJ of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985) 18 CCC (3d) 385 (SCC) quoted in fn 70 above.

79 632.

80 Cult expert Singer quoted by Williams 172-173.

81 174.

and mass suicides".[82] Obviously, practices of this nature cannot be tolerated in a constitutional state (*regstaat*; and *Rechtsstaat*).

In *Kotze v Kotze*[83] Fabricius AJ, in refusing to endorse the "religion-agreement" of the parents, mentions that this paragraph not only imposes obligations on the parents, but also implies a duty on the minor child to engage fully in the religious activities of a particular church. He proceeds to explain:

> "It is obvious that the child had no say in the matter, and would most likely have no say in the future until he was intellectually and emotionally able to make an informed choice, if indeed such free choice would then be open to him without constraints such as fear, guilt and self-doubt, having regard to whatever dogma he had been subjected to in the meantime."

Rationally, this observation is undoubtedly correct, but, generally, religion is essentially irrational.[84] Until a child is of sufficient maturity to be able to take informed decisions of this nature, it is best if the parents provide guidelines and principles that are in broad terms the same. This does not detract from the child's ultimate choice when he or she reaches an age of sufficient maturity[85] to pursue a different religion. Once the concept of religion has been well entrenched in the upbringing of the child, later decisions are much easier. *In casu*, the child was only three years and six months old, and it is highly unlikely that he would have had sufficient maturity in any event to make any worthwhile decisions about religion himself. It is extremely difficult for children to divorce their own ideas from the collective ideas of the family and community in which they live. In the experience of the offices of family advocates, it is well advised to agree on important aspects such as religion after divorce so that as little as possible is changed that could affect the child negatively.

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82 She further states (174): "This destructive behaviour contributes to the general perception that any type of religious deviance that can fall under the heading of a cult is inherently evil and dangerous, and subsequently not worthy of protection under the First Amendment. Such practice is not seen as religious worship in the mainstream because of its violence and deviance from teaching of accepted religions. However, within that First Amendment right, the practice of religion 'is subject to limitations that are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'. Importantly, a religious movement does not have to embrace the ideals of those religions that are already established, but it does have to follow the protective and sometimes paternalistic laws of the nation first to ensure that no one is harmed when practising their religious beliefs."

83 *Supra* 629.

84 See Labuschagne and Bekker "Reason, Science and Progress: Observations on the Process of Dereligionisation of South African Law" 2004 *SAPR/PL* (forthcoming 2004) where it is pointed out that a process of dereligionisation is clearly discernible in man's socio-juridical value systems.

85 At which chronological age this "age of maturity" appears differs from individual to individual – see Anderson and Spijker "Considering the View of the Child when Determining her Best Interest" 2002 *Obiter* 365; Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 556; and Van der Linde "Access to Children: Involvement of the Unmarried Natural Father in the Decision-making Process – A European Perspective" 2003 *Obiter* 163 169-173.

The High Court, as upper guardian of all minors, is tasked with protecting and securing the best interests of children.[86] It should constantly be kept in mind that religion falls within the private sphere. This is indeed the essence of freedom of religion. We submit that a judge is not called upon to interfere with the private practice of religion, unless, in the case of children, a religious practice is not in the best interests of the children.[87] The court may also protect individuals from infringing upon state autonomy and *vice versa*. But to aver that it is a constitutional imperative that a child should grow up in a religious vacuum is tantamount to state interference in the private sphere of the practice of religion. In *Allsop v McCann*[88] the judge also followed our line of thought. He remarked, *inter alia*, that "the law must therefore remain neutral in deciding upon religious matters in the sense that there is no *a priori* legal preference".[89]

It should perhaps be noted that by refusing to make a particular clause in the settlement agreement an order of court, the court does not take away the liberty of the parties to bind each other by way of agreement. In circumstances where it is not made an order of court, however, it may well not be enforceable. The family advocate's system deals often with acrimonious disputes about religion. In practice these are the most difficult ones to resolve, especially so when after separation, parties practice different religions. Religion is a complex concept, often confusing adults and children alike and to come to terms with the multiple facets thereof, is at best extremely difficult. Religion is also an acquired behaviour taught to children mostly by their parents. We find in practice that to subject a child at too young an age to different religious dogmas could have more negative influences than positive ones. The result is often that the child becomes confused, which can sometimes lead to a rejection of parental values.

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86 *Kotze v Kotze supra* 630 relying on *Shawzin v Laufer* 1968 4 SA 657 (A) 662-663; *Terblanche v Terblanche* 1992 1 SA 501 (W) 504; and *Girdwood v Girdwood* 1995 4 SA 698 (C) 708 where Van Zyl J stated that: "As upper guardian of all dependent and minor children this court has an inalienable right and authority to establish what is the best interest of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority."

87 Cf Williams 180-181: "Religious groups must look at how government action is affecting their practice and how much further the infiltration of the state into the church is poised to go. The government cannot turn a blind eye to the actions of religious groups today because of the problems that can arise when zealous leaders put their followers into danger ... Most people recognize that there is a role to be played by the government in the monitoring and regulations of religious practice, but the breadth of that role must allow for the rights of individuals to be upheld."

88 2000 3 All SA 475 (C) 476.

89 Cf Kriele "Religiöse Diskriminierung in Deutschland" 2001 *ZRP* 495 499-500.

5 CONCLUSION

There is more to religion than meets the eye. Armstrong[90] explains:

> "(M)y study of the history of religion has revealed that human beings are spiritual animals. Indeed, there is a case for arguing that Homo sapiens is also Homo religiosus. Men and women started to worship gods as soon as they became recognizably human; they created religions at the same time as they created works of art. This was not simply because they wanted to propitiate powerful forces but these early faiths expressed the wonder and mystery that seems always to have been an essential component of the human experience of this beautiful yet terrifying world. Like art, religion has been an attempt to find meaning and value in life, despite the suffering that flesh is heir to. Like any other human activity, religion can be abused but it seems to have been something that we have always done. It was not tacked on to a primordially secular nature by manipulative kings and priests but was natural to humanity."

Humanism, an important philisophical source of fundamental (human) rights, can be seen as a modern form of religion. In the words of Schneider:[91]

> "Humanist religion is primarily an effort to free religious faith and devotion from the dogmas of theistic theologies and supernaturalist psychologies".[92]

Humanism provides some directions, but it has not replaced traditional religions – not by a long way. We still have to see how it works. It has not provided all the answers.

In conclusion, Fabricius AJ in *Kotze v Kotze* should have welcomed the agreement of the parents. There was no reason to interfere. Unfortunately, the distorted view of religious freedom might constitute some form of precedent. Notionally another court, lawyer or a family advocate may take it up literally when there is a dispute about the religious upbringing of a child. The message of the judge to all concerned is not to bother. The choice is the child's, if and when it has "the intellectual and emotional capacity to do so at a later stage".

The irrational, that is, those parts of the human being's make-up which are not rationally founded or cannot be explained rationally, cannot be wished or formulated away. Law, in the meantime,[93] should respect it in principle and accommodate it to the extent that it does not run counter to the precepts of human dignity as well as other primary or fundamental rights[94] and it should, in the first instance, serve the best interests of children.

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90 *A History of God* (1993) 3.

91 "Religious Humanisation" in Kutz (ed) *The Humanist Alternative: Some Definitions of Humanism* (1973) 65.

92 631.

93 See too, Labuschagne and Bekker 2004 *SAPR/PL* (forthcoming).

94 See too, Pienaar "The Effect of Equality and Human Dignity on the Right to Religious Freedom" 2003 *THRHR* 579 589-590.