

# Respecting individual religious autonomy at secular public universities in South Africa

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## Abstract

The implementation of mandatory COVID-19 vaccination policies by several South African public universities highlighted the interpretive struggles of a secular polity regarding freedom of religion or conscience. Such workplace policies relied on the claim that society's collective interests took precedence over the individual's constitutional rights. In essence, the policies allowed for accommodating conscientious objectors, but in reality, the conditions for objection went beyond prioritizing collective interests and neglected the constitutional duty to protect human rights. This article examines how the restrictive vaccination policies of public universities reveal the shortcomings in secular polity's engagement with and appreciation for individual religious self-determination.

## Keywords

Human rights, freedom of conscience, COVID-19, vaccination mandate, conscientious objection, reasonable accommodation, *ubuntu*.

## 1. Introduction

Democratic South Africa's challenges in upholding the constitutionally protected right to religious freedom<sup>2</sup> are apparent not only in human rights jurisprudence but also in the influence of 'secular polity.'<sup>3</sup> An illustrative example of the

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2 Religious freedom is used here as a short-hand reference for the right to freedom of conscience, religion, thought, belief, and opinion ("FoRB"). The two main provisions regarding the protection of FoRB in South Africa are sections 15 and 31 of the *Constitution of the Republic of South Africa, 1996* (hereinafter *Constitution*). In addition, several auxiliary and interrelated rights in the Constitution are of importance for the full enjoyment of religious freedom, including sections 7, 8, 9, 10, 14, 16, 18 and 36.

3 The meaning of the term 'secular' (including its derivatives, such as 'secularity' and 'secularism') is further discussed in Part 2. "What is meant by the broader term 'polity' is any secular organized structure

latter involved the implementation of mandatory COVID-19 vaccination policies (MVPs)<sup>4</sup> in the workplace as a response to the global pandemic.

In early March 2020, South Africa saw its first confirmed COVID-19 case, leading to a disaster declaration and a subsequent national lockdown.<sup>5</sup> Almost a year later, the national vaccination program began, providing voluntary shots.<sup>6</sup> During that period, the governing directive<sup>7</sup> neither explicitly authorized nor implicitly prohibited MVPs in the workplace, instead opting for the implementation of context-specific measures where and to the extent deemed necessary.<sup>8</sup> Nevertheless, some employers argued that they had both the ethical duty and legal authority to mandate vaccination as a precondition for continued employment,<sup>9</sup> ostensibly establishing workplace MVPs to meet occupational health and safety obligations.<sup>10</sup> Based on available scientific evidence, vaccination was deemed the most crucial measure to address the public health crisis.<sup>11</sup> The drafting and implementation of COVID-19 MVPs became a highly controverted area of competing rights and interests.<sup>12</sup> Employers assumed that, since the virus had been considered deadly, it was

justifiable to limit the constitutional rights of their employees without further considerations. Failure to successfully convince employees – to vaccinate – with concrete scientific evidence meant that employers had

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of human society above the family level, one based on some form of hierarchy and involving at least a generally accepted potential for coercion,” J. Rudevskis, “Why Freedom of Religion Matters,” in A. Portaru (ed.), *A ‘Precious Asset’? Analyzing Religious Freedom Protections in Europe* (2020), 10-11.

- 4 In the context of this essay, the term MVP will specifically denote the mandatory COVID-19 vaccination policy, unless a broader interpretation is inferred.
- 5 C. Ramaphosa, “Statement by President Cyril Ramaphosa on Measures to Combat COVID-19 Epidemic” (15 March 2020). Available at: <https://bit.ly/3HCiYrV>.
- 6 S. Fokazi, “‘Can I Close My Eyes?’ Ramaphosa Has Covid-19 Jab with Khayelitsha Hospital Staff.” TimesLIVE. Available at: <https://bit.ly/48Uv6R1>. The first COVID-19 vaccines were validated for use by the World Health Organization (WHO) in early December 2020. See the WHO website, “Coronavirus Disease (COVID-19): Vaccines.” Available at: <https://bit.ly/42mPUxO>.
- 7 “Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces,” Government Gazette, 4 June 2020, No. 43400. Available at: <https://bit.ly/481cA8a> (hereinafter “Direction”). Public university MVPs were enacted under the *Direction*.
- 8 In June 2022, the “Direction” was replaced with the “Code of Good Practice: Managing Exposure to SARS CoV-2 in the Workplace,” Government Gazette, No. 46596, 24 June 2022. Section 12, read along with section 5(1)(b)(i), made explicit provision for workplace MVPs and necessitated reasonable accommodation for any employee who refused to be vaccinated. By the time of enactment, the COVID-19 pandemic was essentially over, rendering it obsolete.
- 9 Discovery, “Our Position on SA-Based Employee Vaccinations,” 2 September 2021. Available at: <https://bit.ly/3vY0Nxc>.
- 10 See section 9(1) of the *Occupational Health and Safety Act* 85 of 1993. See also the right to an environment that is not harmful to health or well-being, guaranteed by section 24 of the *Bill of Rights* (Chapter 2 of the Constitution).
- 11 Discovery, “Our Position.”
- 12 Due to scattered implementation and possibly COVID-19 psychological fatigue, the enforcement of MVPs led to several legal disputes, among which the most noteworthy were *Mulderij v Goldrush Group* (GAJB24054-21) [2022] ZACCMA 1 (18 January 2022); *Gideon J Kok v Ndaka Security and Services* (FSWK2448-21) CCMA (25 January 2022); and *Tshatshu v Baaroque Medical (Pty) Ltd* (GAB) 20811-21) CCMA (22 June 2022).

to make vaccination mandatory through internal policies. The employers failed to take cognisance of the concerns of their employees.<sup>13</sup>

The mandatory vaccination trend spanned diverse sectors, with many employers seeking ways to address financial challenges amid the global lockdown, exacerbated by a national recession and widespread unemployment. Several public universities also opted for compulsion.

As social justice institutions<sup>14</sup> and organs of the state,<sup>15</sup> public universities are uniquely positioned to express the views of civil society while also representing the government's stance. Therefore, this contribution reflects on the cases of secular public university MVPs in South Africa, especially the preconditions for reasonable accommodation<sup>16</sup> based on religious or conscientious objections,<sup>17</sup> highlighting deficiencies in this secular polity's engagement with and appreciation for religious freedom.<sup>18</sup> To place these deficiencies in context, the scope and protection of religious freedom in secular South Africa is outlined. Subsequently, the temporal and contextual rationale underlying public university MVPs is briefly considered. Lastly, the shortcomings in the formulation of the preconditions for conscientious objections and their causal impact on individual religious freedom is evaluated.

## 2. Religious freedom in South Africa

To understand religious freedom in South Africa, it is essential to first contextualize the human rights framework. South Africa's transformative and relatively contemporary Constitution<sup>19</sup> was established as a consequence of, and in reaction to, the country's particular history of inequality, repression, and authoritarianism, associated with apartheid.<sup>20</sup> In its effort to reshape South Africa's moral landscape

13 K. Mqoboli and M. Nondima, "Mandatory Vaccination Unlawful: Has the CCMA Finally Seen the Light?" De Rebus, 1 October 2022. Available at: <https://bit.ly/3SEgejN>.

14 M. Tight, *Academic Freedom and Responsibility*. Society for Research into Higher Education (1988), 132.

15 Section 239 of the Constitution defines an organ of state as "any other functionary or institution exercising a public power or performing a public function in terms of any legislation." Public universities are conferred with the constitutional rights and obligations under section 8 of the Bill of Rights.

16 Reasonable accommodation in this context "aims at relaxing generally applicable rules in order to guarantee a more substantive equality in which the specificities of everyone are taken into account." G. Caceres, "Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the 'Transposability' of an American Concept in the French Secular Context?" In K. Alidadi et al. (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*. Ashgate Publishing (2012), 284.

17 The terms 'religious objections' and 'conscientious objections' may be used interchangeably, although 'conscientious objections' may be preferable as it may be more objectively descriptive of the grouping of freedoms and diverse views protected in section 15(1) of the Bill of Rights.

18 For a broader discussion on this topic, see J. Epp Buckingham et al. (eds.), "The Impact of the COVID-19 Pandemic on Religious Minorities," *IJRF* 16(1) (2023). Available at: <https://ijrf.org/index.php/home/issue/view/vol16/56>.

19 *Constitution of the Republic of South Africa*, 1996.

20 *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) [26]. Section 1 read with the Preamble of the *Constitution*.

and overcome historical human rights violations, constitutional jurisprudence incorporated the spirit of *ubuntu* from traditional African religion into its human rights philosophy.<sup>21</sup> This notion denotes a view of humaneness that is profoundly and decidedly communitarian: “a person is a person through other persons.”<sup>22</sup> Despite its substantive ambiguity, this philosophy has become an implicit hermeneutical lens through which the Constitutional Court has interpreted constitutional values, and through which the content and scope of rights have been determined.<sup>23</sup> Apart from the *ubuntu* philosophy, South Africa’s secular position has had a profound contextual effect on religious freedom, which will be discussed below.

### 2.1. ‘Constitutional secularity’ in South Africa

According to Barry Bussey, “True freedom is dependent upon respect for a diversity of views, including religious beliefs and practices.”<sup>24</sup> To give effect to this adage, the Bill of Rights<sup>25</sup> protects, supports, and tolerates *all* religions and beliefs, which may be exercised freely and openly and must not be relegated to the private sphere.<sup>26</sup> Consequently, South Africa may be regarded as a ‘constitutional secularity’ or a ‘political secularist state’ with no established or official religion, implying that religion is separated from political and legal interference.<sup>27</sup> ‘Constitutional secularity’ (as distinct from doctrinal secularism) infers inclusivity, epitomising open-mindedness towards religious pluralism and a neutral framework for religion-state relationship.<sup>28</sup>

As an ‘equality right,’ section 9 prohibits unfair discrimination, resulting in “a non-discriminatory implementation of freedom of religion or belief for every-

21 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; separate but concurring judgment of Justice Yvonne Mokgoro, paras 300 to 317. *Ubuntu* was also referenced in the epilogue of the *Constitution of the Republic of South Africa Act 200 of 1993* (Interim Constitution).

22 L. Du Plessis, “South Africa,” in G. Robbers (ed.), *Encyclopedia of Law and Religion* (2015), 8. Available at: <https://bit.ly/47WYUuX>. For some interpretations, see L. Mbigi and J. Maree, *Ubuntu: The Spirit of African Transformation Management*. Knowledge Resources (1995).

23 *City of Tshwane Metropolitan Municipality Afriforum and Another* [2016] ZACC 19, par 11.

24 B. W. Bussey, “Responding to Limitations of the Public Square,” *IJRF* 10(1/2) (2017), 103.

25 The Bill of Rights represents chapter 2 of the Constitution.

26 P. De Vos and W. Freedman (eds.), *South African Constitutional Law in Context* (2018), 488.

27 For purposes of this paper, a ‘constitutional secularity’ is distinguishable from doctrinal secularism, which constitutes a comprehensive secular belief system that promotes an intolerant secular order based on ideological superiority and exclusivity. “By ‘secularism,’ I mean an ideological position that is committed to promoting a secular order as an end in itself.” W. C. Durham, Jr., “Religious Freedom in a Worldwide Setting: Comparative Reflections,” in M. A. Glendon and H. F. Zacher (eds.), *Universal Rights in a World of Diversity: The Case of Religious Freedom*, Pontifical Academy of Social Sciences (2012), 368. See also D. A. Leatt, *The State of Secularism: Religion, Tradition and Democracy in South Africa*, Wits University Press (2017), 8; H. Bielefeldt, N. Ghanaea and M. Wiener, *Freedom of Religion or Belief: An International Law Commentary*. Oxford University Press. (2016), 35-36; Panel of Constitutional Experts, “Freedom of Religion and the Secular State,” 2 June 1995 (CP002065.MEM), 3. Available at: <https://bit.ly/3UtOEXM>.

28 Durham, “Religious Freedom,” 368: “By secularity, I mean an approach to religion-state relations that avoids identification of the state with any particular religion or ideology (including secularism itself) and that provides a neutral framework capable of accommodating or cooperating with a broad range of religions or beliefs.”

one.”<sup>29</sup> Consistent with inclusivity and tolerance, the “absence of coercion or constraint” is the overriding principle,<sup>30</sup> and religion or similar observances remain significant and visible in South African politics and public life.<sup>31</sup>

A related fundamental principle that fortifies South Africa’s secular nature is the “non-entanglement doctrine”<sup>32</sup> under which a certain degree of autonomy is granted to religious communities. Accordingly, South African courts should not “embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of ... belief.”<sup>33</sup> As a result, human rights jurisprudence reveals a measure of restraint in disputes that intersect with religion and their tenets of faith;<sup>34</sup> such disputes will preferably be adjudicated on other applicable legal grounds.<sup>35</sup> Within this contextual secular setting, the right to and limitations of religious freedom in South Africa will be briefly noted.

## 2.2. Framework of religious freedom in South Africa

Religious freedom is an extensive and fundamental human right in both domestic and international human rights law.<sup>36</sup> This is because religion and belief are expressions of human dignity and equality,<sup>37</sup> whether individually or in associ-

29 H. Bielefeldt, “Misconceptions of Freedom of Religion or Belief,” *Human Rights Quarterly* 35(1) (2013), 55-56. See also Bielefeldt et al., *Freedom of Religion or Belief*, 358.

30 *S v Lawrence; S v Negal; S v Solberg* (CCT38/96, CCT39/96, CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (6 October 1997), paragraph 92.

31 Leatt, *The State of Secularism*, 1. For a deeper exploration of religion in South Africa, see Du Plessis, “South Africa.”

32 E. F. J. Malherbe, “Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdienstvryheid,” *Journal of South African Law* (2006), 650.

33 *Christian Education SA v. Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE), 958 (S. Afr.), confirmed in *Christian Education v. Minister of Education* 2000 (4) SA 757 (CC) (S. Afr.) (hereinafter *Christian Education*). Similarly, see the approach by the Equality Court in *Strydom v. Nederduitse Gereformeerde Gemeente, Moreletta Park* 2009 (4) SA 510 (Equality Court, TPA) (S. Afr.). Also see I. Currie and J. De Waal, *Bill of Rights Handbook*, 6th ed. (2013), chapter 15.

34 *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002) paras 42 and 48 (hereafter *Prince*). See also the case of *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) (hereinafter *Pillay*). See also Du Plessis, “South Africa,” 3.

35 G. A. Du Plessis and W. N. Nel, “The Dimensional Elements of the Right to Freedom of Religion or Belief in the South African Constitution: An Evaluation in Light of International Human Rights Standards,” *Journal for Juridical Science* 46(1) (2021), 40.

36 Regarding the international legal framework, FoRB is guaranteed as a fundamental human right in article 18 of the *Universal Declaration of Human Rights* (UDHR; 1948) and article 18 of the *International Covenant on Civil and Political Rights* (ICCPR; 1966). See C. Walter, “Religion or Belief, Freedom of, International Protection,” in R. Wolfrum and A. Peters (eds.), *Max Planck Encyclopaedia on Public International Law* (2021), 864; paragraph 1 of the UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience, and Religion in Terms of Article 18 of the ICCPR*. CCPR/C/21/Rev.1/Add.4, 20 July 1993 (hereafter *General Comment No. 22*).

37 “Religion” is a protected ground in terms of the UDHR and ICCPR; UNGA, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UNGA Res 36/55, 73rd plenary meeting, 25 November 1981; and in the context of persecution, article 7(1)(h) of the *Rome Statute of the International Criminal Court*, Doc. A/CONF.183/9 of 17 July 1998 in force 1 July 2002 (hereafter *Rome Statute*). A religious group is considered a protected group in terms of article 2 of the UNGA, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948; and article 6 of the *Rome Statute*.

ation with others. Furthermore, it is a multifaceted right,<sup>38</sup> comprising a range of dimensional elements and core values.<sup>39</sup> The South African Constitution protects a religious conscience and a religious practice component (section 15), an associative religious practice component (section 31),<sup>40</sup> and an equal treatment component (section 9).<sup>41</sup> However, this contribution focuses solely on section 15.

### 2.2.1. *Scope and nature of section 15*

Section 15(1) states, “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.” It protects the following core values of religious freedom through which diverse beliefs are accommodated.<sup>42</sup>

First, the Constitution does not require a strict separation between the state and religious bodies,<sup>43</sup> provided that “the state act even-handedly in relation to different religions.”<sup>44</sup>

Second, freedom “implies an absence of coercion or constraint ... [which] may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.”<sup>45</sup>

Third, the right belongs to everyone. Depending on the nature of the right and the entity involved,<sup>46</sup> religious freedom may be exercised by natural or juristic persons, potentially extending to all associations, whether formally recognized or not.<sup>47</sup>

Fourth, the essence of the concept includes the right to freedom of religious expression;<sup>48</sup> “the right to declare religious beliefs openly and without fear of hindrance or reprisal.”<sup>49</sup>

38 H. Bielefeldt, *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010 - 2016*. Religious Freedom Series (IIRF), vol. 3, 2nd ed., Bonn (2017), 341.

39 These normative core values constitute a set of minimum standards regarding the scope of protection of FoRB. See *General Comment No. 22*. For a detailed discussion, see W. N. Nel, *International Criminal Accountability for Religious Persecution in Terms of the Rome Statute: A Taxonomy of Crimes Against Humanity of Religious Persecution* (2019), chapter 5. Available at: <https://repository.up.ac.za/handle/2263/72657>.

40 For a detailed discussion, see Currie and De Waal, *Bill of Rights Handbook*, 628, 633; and De Vos and Freedman, *South African Constitutional Law*, 491-492. The practise of religion in community with others is explicitly protected through related rights, but “cannot be used to shield practices which offend the Bill of Rights.” *Christian Education* (2000), paragraph 26.

41 Section 15, read with sections 31 and 9. See Currie and De Waal, *Bill of Rights Handbook*, 315; De Vos and Freedman, *South African Constitutional Law*, 482.

42 De Vos and Freedman, *South African Constitutional Law*, 483.

43 *Lawrence* (1997), paragraph 119. This is even more apparent when reading section 15(2).

44 *Lawrence* (1997), paragraphs 121-122 (emphasis added). The equality principle compels the government to abstain from supporting or adopting an official belief position as this may, directly or indirectly, “force people to act or refrain from acting in a manner contrary to their religious beliefs.” *Prince* (2002), paragraph 38.

45 *Lawrence* (1997), par 92.

46 Section 8 of the Bill of Rights.

47 I. M. Rautenbach and R. Venter, *Rautenbach-Malherbe Constitutional Law*. 7th ed. LexisNexis (2018), 273-274, when read in conjunction with section 18 of the Constitution regarding associative rights.

48 When read with section 16 of the Bill of Rights.

49 *Lawrence* (1997), paragraph 92; *Christian Education* (2000), paragraph 18, quoting Dickson CJ in *R v Big M Drug Mart* [1985] 1 SCR 295 336. When interpreting the Bill of Rights, a South African court may consider foreign law; see section 39(1) of the Constitution.

Fifth, freedom of religion includes both the *right to have a belief* and the *right to manifest [practice] such a belief*;<sup>50</sup> without postulating a firm divide between the public and private dimensions.<sup>51</sup>

Sixth, an equality-based approach in this regard ensures religious pluralism, which is not limited in scope to traditional notions of faith, but can be expanded to include conscience, religion, thought, belief and opinion.<sup>52</sup> As a result, an extensive interpretation is attached to this right, effectively including a wide range of profound existential worldviews.<sup>53</sup>

### 2.2.2. Section 15 and the general limitation clause

The Constitution provides a general limitation clause (section 36).<sup>54</sup> In the case of disputes involving a conflict of competing constitutional rights, the court will apply the “proportionality test,”<sup>55</sup> which entails the “weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests” with an aim of conciliation.<sup>56</sup>

To give effect to this approach, *no* right, whether fundamental or not, has an absolute character and may be limited in accordance with the preconditions in section 36.<sup>57</sup> Therefore, every right has boundaries, informed by the intersecting or diverging rights of others and by important contextual social concerns. In this setting, the advancement of fundamental human rights takes on a community-oriented focus, rather than a hierarchy of rights. As a result, limitations on in-

50 *Christian Education* (2000), paragraph 19. This includes the freedom to engage in all the practices and observances associated with a belief openly and publicly, without fear of hindrance or reprisal, when read with sections 15(2) and 31; see De Vos and Freedman, *South African Constitutional Law*, 488-500.

51 *Christian Education* (2000), paragraph 19.

52 P. Farlam, “Freedom of Religion, Belief and Opinion,” in S. Woolman, T. Roux and M. Bishop (eds.), *Constitutional Law of South Africa* (2013), chapter 41, 13.

53 Currie and De Waal, *Bill of Rights Handbook*, 316.

54 Section 36, limitation of rights, states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

55 Malherbe, “Enkele kwelvrae,” 673-701.

56 *Makwanyane* (1995), paragraphs 103-104; *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568, paragraph 21; *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC), paragraphs 26-27. In these cases, the Constitutional Court formulated a two-staged approach to the limitation of rights. First comes a threshold enquiry, aimed at determining whether the enactment in question constitutes a limitation on one or more guaranteed rights. If there is indeed a limitation, the limitations exercise ensues, which essentially requires a weighing of the nature and importance of the right(s) that are limited, together with the extent of the limitation, against the importance and purpose of the limiting enactment.

57 Confirmed in section 7(3) of the Constitution.

dividual rights are more readily justified in favour of the collective interest than communal rights. Nevertheless, any right, whether individual or communal, may be limited. This includes both the internal freedom of religious conscience and the external freedom of religious practice.<sup>58</sup> However, in line with the non-entanglement doctrine, “it is difficult to imagine how the freedom to believe can ever be legitimately restricted by the state.”<sup>59</sup> While manifestations are more likely to be subjected to constitutional limitations,<sup>60</sup> “not every practice claiming to be an exercise of the freedom of religion ... is treated as such by the courts.”<sup>61</sup>

In summary, South Africa’s secular stance and contextual approach to constitutionality have significant implications for interpreting religious freedom and justifying limitations of this right. When viewed concurrently and holistically, the Bill of Rights protects all the core values and dimensional elements guaranteed under international human rights law. Although both dimensions, whether exercised individually or collectively, may be limited under section 36, courts have shown an inclination to avoid limitation clause analysis where possible, preferring to attempt to restrict the scope of the right.<sup>62</sup> It is especially in this area that the principle of reasonable accommodation is used, rather than a balancing or limitation of rights. Against this established framework of religious freedom in South Africa, attention now turns to public university MVPs.

### 3. The reasoning behind public university MVPs

Most public universities in South Africa are statutorily established residential universities, providing contact teaching and research along with limited distance-learning options, and hosting community engagement initiatives on their campuses. On this basis, public universities argued that they serve societal interests and thereby justified their blanket limitation of individual rights. Essentially, they said, in “balancing the collective right of the ... community to health and safety, against individual rights to bodily integrity, freedom of religion, belief and opinion, the prevailing view is that the collective right takes precedence.” Aligned with academic freedom, typically, an article of this nature would attribute references of MVPs to the respective universities. However, given the controversy surrounding these policies, doing so here could have posed personal concerns and

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58 Du Plessis and Nel, “Dimensional Elements,” 47. For a discussion of the “substantive equality” approach in the realisation of human rights in South African constitutional law, see C. Albertyn, “Substantive Equality and Transformation in South Africa,” *SAJHR* 23(2) (2007) 253-276.

59 D. Meyerson, *Rights Limited* (1997), 2, quoted in Currie and De Waal, *Bill of Rights Handbook*, 323.

60 E.g., the freedom to express religious views that incite violence or advocate hatred – read with section 16 of the Constitution.

61 Currie and De Waal, *Bill of Rights Handbook*, 320.

62 Currie and De Waal, *Bill of Rights Handbook*, 320.



reputational repercussions for the implicated institutions. Accordingly, specific university MVP references have been omitted.<sup>63</sup>

At the time of writing, access to MVP documents from public universities was no longer publicly available.<sup>64</sup> Among the 26 public universities in South Africa, at least six prominent institutions implemented MVPs in response to the pandemic.

Certain prominent features were common in these university MVPs. Failure to comply with the mandate resulted in disciplinary measures, including potential dismissal as a last resort.<sup>65</sup> In most instances, public university MVPs permitted employees who adhered to an “anti-vaccine ideology”<sup>66</sup> to object to being vaccinated on religious or conscientious grounds, and eligible employees were reasonably accommodated. However, the formulation of the preconditions for reasonable accommodation had significant implications for the interpretation of individual religious freedom. Part four of this article will further scrutinize the shortcomings of the preconditions for conscientious objections and their effect on individual religious freedom.

#### **4. Interpretive consequences for religious freedom**

In principle, prioritizing collective interests is reasonable and justifiable in the South African context. However, the implementation of public university MVPs did not effectively serve public interests. Moreover, the formulation of the preconditions for conscientious objections exceeded what was required to prioritize collective interests and displayed a general neglect of the constitutional duty to protect human rights.<sup>67</sup> Accordingly, these universities exceeded the scope of their designated public functions by unjustifiably restricting individual religious freedom without requisite due diligence.

##### **4.1. Proof of faith or religious beliefs**

Exemption applications reasonably necessitated the disclosure of the applicant’s religious beliefs to ground an objection. However, public university MVPs exceeded a mere disclosure of belief in their requirements. Evidently, policymakers intended that conscientious objections must be grounded in a profound belief conviction, necessitating extensive corroborating proof. To exemplify this argu-

63 For verification, contact me at [wnnel@uj.ac.za](mailto:wnnel@uj.ac.za).

64 For a summary of the mandatory vaccination policies of South African universities, see Careerwise, “Universities in South Africa That Require Proof of Vaccination in 2022,” 8 December 2021. Available at: <https://careerwise.co.za/university-proof-of-vaccination-2022/>.

65 It has been argued that such dismissals may have been unjust in view of section 187(1)(f) of the Labour Relations Act 66 of 1995.

66 The claim was based on the incompatibility between their religious beliefs and vaccination policies. See Cliffe Dekker Hofmeyr, “An Employer’s Guide to Mandatory Workplace Vaccination Policies,” 30 May 2022, 7. Available at: <https://bit.ly/3SkaI4K>.

67 Section 7(2), read with section 8 of the Bill of Rights.

ment, the specific preconditions will be briefly outlined, followed by an evaluation of the inadequacies in their formulation.

#### **4.1.1. MVP preconditions necessitating proof of religious belief**

In all instances, the onus rested on the applicants to provide written supporting evidence of their conscientious objection, with variations in the required extent of proof.

The strictest policy limited conscientious objections to a “seriously held religious belief that materially conflicts with vaccination.” This required substantiating evidence, including (1) “an affidavit from a *senior* religious leader *setting forth the key tenets of the religion relied upon* and supporting the contention that these ground an objection to receiving the vaccination” (emphasis added), (2) a recommendation for accommodating the employee, and (3) a written motivation, explaining, *inter alia*, that the applicant’s beliefs relate to a “particular religion” and clarifying how vaccination “presents an unavoidable and serious conflict with the applicant’s religious beliefs.”

Another policy granted the exemptions committee sole discretion, when reviewing a religious exemption application, to determine the presence of “a true verifiable religious ground,” which determination could be made either “by the Applicant’s universally recognised umbrella faith institution or body” or by considering “the doctrines of any religion or faith, including existing cultural faith-based religions.”

Furthermore, certain policies required “documentary evidence of previous vaccine exemptions,” demonstrating instances where the applicant’s “adherence to their religious beliefs caused them to adjust their behaviour, particularly in relation to medical interventions.” As vaccinations had not been mandated in recent history, presenting evidence of a prior religious exemption was practically impossible.

#### **4.1.2. Notable inadequacies of this formulation**

The specified preconditions illustrate that policymakers approached religious exemption applications with suspicion and a shrug of resignation, revealing two significant concerns.

First, as noted above, exemptions committees were granted sole discretion to perfunctorily assess the verifiability and doctrinal significance of a conscientious objection; this evaluation, concerning inner religious conscience, is a matter that not even the Constitutional Court is willing to undertake (under its non-entanglement doctrine). The reason is that secular polity is existentially incapable to assess the significance that a “deeply held conviction has for the identity of those

holding it.”<sup>68</sup> Though religious freedom is “a precious asset” for everyone,<sup>69</sup> including secular (non-religious) beliefs and sectarian views,<sup>70</sup> these beliefs are existentially different from each other.<sup>71</sup> For some secular believers, the significance lies in freedom from coercion,<sup>72</sup> often termed ‘freedom from religion,’<sup>73</sup> while for some sectarian believers, “Religion is not just a question of belief or doctrine. ... It is part of a way of life.”<sup>74</sup> Accordingly, respecting and accommodating diametrically and phenomenological opposed beliefs demands “serious engagement with the notion of diversity.”<sup>75</sup>

Inevitably, secular polity is bound to fall short in appreciating the personal significance of a deeply held conviction through empirical observation. In a pluralist society, it is incongruous to grant secular polity the discretion to determine the doctrinal acceptability, scientific logic, rationality, or centrality of others’ existential views. Allowing the secular polity to make such discretionary findings signifies “the primacy of the polity and its worldly preoccupations over the transcendent ... [without] a hint of equality between the two realms.”<sup>76</sup> Without a genuine understanding of the profound significance of a belief conviction, the individual religious freedom of conscientious objectors was conveniently subjugated to collective interests.

Second, focusing exclusively on established or widely accepted religious doctrines as verifiable grounds left no room for unique, individual conscientious positions. Effectively, an applicant’s subjective beliefs must have been corroborated by a “senior religious leader” as a position that is “*aligned with, or have some relation to, the accepted doctrines, widely adopted practices and known philosophical or theological underpinnings of a particular religion*” (emphasis added).

Understandably, most religious institutions and leaders were hesitant to adopt a definitive doctrinal stance for or against vaccination.<sup>77</sup> Instead, they delegated this decision to individual consciences, which stance, it is argued, aligns with accepted principles of religious freedom. According to the Constitutional Court

68 Bielefeldt et al., *Freedom of Religion and Belief*, 10.

69 *Kokkinakis v. Greece*, App No 14307/88 (ECtHR, 25 May 1993), par 31.

70 Section 15(1) read with section 9 of the Bill of Rights.

71 *Lawrence* (1997), paragraph 148. See also *Christian Education* (2000), paragraph 19; *Prince* (2002), paragraph 38.

72 *Lawrence* (1997), paragraph 148. See also *Christian Education* (2000), paragraph 19; *Prince* (2002), paragraph 38.

73 Protected by article 18 of the ICCPR. See *General Comment No. 22*, paragraph 2; Bielefeldt, “Misperceptions,” 47; Bielefeldt et al., *Freedom of Religion and Belief*, 22; A. N. Guiora, *Freedom from Religion*, Oxford University Press (2009).

74 *Christian Education* (2000), paragraph 33.

75 De Vos and Freedman, *South African Constitutional Law*, 483.

76 Rudevskis, “Why Freedom of Religion Matters,” 27.

77 This included administrative and economic consequences and possible criminal sanctions, as exemplified in several Canadian cases, notably involving Pastors Artur Pawlowski, Tim Stephens, and James Coates.

in *Pillay*, the centrality of a belief “must be judged with reference only to how important the belief or practice is to the *claimant’s religious ... identity*.”<sup>78</sup> In other words, “the *subjective view* of the religion taken by the adherent is a *vital factor*,”<sup>79</sup> whereas evidence of “the objective importance or centrality of a belief to a particular religion” or the community at large is of *subsidiary value*.<sup>80</sup>

Practically, individual religious self-determination implies constitutional protection of the freedom to *interpret* one’s belief convictions,<sup>81</sup> to formulate “deviant ideas”<sup>82</sup> or evolve one’s opinions about belief convictions without undue influences,<sup>83</sup> and to express these religious positions.<sup>84</sup> In essence, individual religious self-determination allows for a margin of aberration from accepted or known religious doctrine.<sup>85</sup> Accordingly, a person’s views and adherence to a particular religious doctrine may, to some extent, diverge from the accepted doctrinal position without negatively impacting membership in a related religious community.

As a result, the sanctity of individual religious autonomy renders the compulsory validation of acceptability of a unique conscience-based position by a particular identifiable religious group profoundly objectionable. The Constitutional Court confirmed this view in the *Prince* case, stating:

The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that ... does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith.<sup>86</sup>

It is unavoidable – though not statistically verifiable<sup>87</sup> – that the overly restrictive preconditions effectively limited the scope of protection and thus excluded claimants with genuine and deeply held religious objections to vaccination. Sub-

78 *Pillay* (2008), paragraphs 63-66 (emphasis added).

79 Currie and De Waal, *Bill of Rights Handbook*, 321 (emphasis added).

80 *Pillay* (2008), paragraphs 86-88.

81 A. Shaheed, *Freedom of Thought*, A/76/380, Report to General Assembly – 76th Session, published 5 October 2021, paragraph 24.

82 C. Calvert, “Freedom of Thought, Offensive Fantasies and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got it Wrong in *Doe v. City of Lafayette, Indiana*,” 3 *Pierce L. Rev.* 125 (2005).

83 Bielefeldt, “Misperceptions,” 44. See also N. Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (2005), 412.

84 Section 15 read with section 16 of the Bill of Rights.

85 *Prince* (2002), paragraph 42. See also *Minister of Police and Others v Kunjana* 2016 (9) BCLR 1237 (CC), paragraph 18; *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC), paragraph 64.

86 *Prince* (2002), paragraph 42.

87 In this regard, see the effect of the *Protection of Personal Information Act*, No. 4 of 2014.

sequently, such claimants would have faced ‘Hobson’s choice,’<sup>88</sup> or an unreasonable and coercive choice between adhering to their religious conscience or maintaining their employment. In the *Christian Education* case, the court held that the polity should, “wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”<sup>89</sup>

#### 4.2. Exemptions limited to known and accepted religions or beliefs

The preconditions for exemption from vaccination on religious grounds were strictly interpreted; only a narrow set of religions or beliefs qualified. While there is no unanimous consensus on the definition of religion,<sup>90</sup> the constitutional jurisprudence resolutely emphasized the importance of a pluralistic framework for interpreting religious freedom.<sup>91</sup> Currie and De Waal opine that the formulation of section 15(1) “makes the debate about the meaning of the term ‘religion’ unnecessary.”<sup>92</sup> The deliberate intertwining of ‘conscience,’ ‘religion,’ ‘thought,’ ‘belief’ and ‘opinion’ is significant as it “imports a decidedly overt secular element into the clause.”<sup>93</sup> This ensures the protection of diverse views, encompassing not only traditional religious beliefs or those with an institutional character but also secular or non-religious beliefs, along with the right not to profess any religion or belief.<sup>94</sup> Commenting on the significance of this clustering, Farlam notes that section 15(1) embraces

comprehensive views of the good life that are derived from political, socio-logical or philosophical ideologies as well as purely personal moral codes ... even if they stem from ‘personal morality that is not founded in religion’ or from ‘conscientious beliefs that are not religiously motivated.’<sup>95</sup>

88 In relation to the COVID-19 vaccination mandate, see for example *Selina Keene et al. v. City and County of San Francisco et al.*, No. 22-16567 (9th Cir. 2023), paragraph 2.

89 *Christian Education* (2000), paragraph 35. This coercive choice may potentially have been considered a basis for constructive dismissal in the employment law context. See A. Van Niekerk and N. Smit (eds.), *Law@Work*, 5th ed. (2019), 244-247.

90 Guiora, *Freedom from Religion*, 10. Religion is “a set of systematic beliefs in relation to a transcendent being, thing, or principle”, A. Deagon, “Towards a Constitutional Definition of Religion: Challenges and Prospects,” in P. T. Babie, N. G. Rochow and B. G. Scharffs (eds.), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (2020), 108. Durham and Scharffs endorses Tillich’s concept of a person’s “ultimate concern” as a possible orientation. W. C. Durham Jr. and B. G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*. Aspen (2010), 46. See also Pillay (2008), paragraph 47.

91 *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355(CC); 2006 (1) SA 524 (CC) (1 December 2005), paragraph 89 (hereinafter *Fourie*); *Prince* (2002), paragraph 25.

92 Currie and De Waal, *Bill of Rights Handbook*, 316. See also De Vos and Freedman, *South African Constitutional Law*, 485-486.

93 Farlam, “Freedom of Religion,” chapter 41, 13-14.

94 *General Comment No. 22*, paragraph 2. See also De Vos and Freedman, *South African Constitutional Law*, 483-484.

95 Farlam, “Freedom of Religion,” chapter 41, 13-14.

Accordingly, when considered in conjunction with the principle of equality and non-discrimination, the preferred shorthand terms ‘religion’ or ‘religious freedom’ must be understood to include “an extremely wide range of world-views.”<sup>96</sup> Undoubtedly, this expansive interpretation of religion applies to MVPs.

Without exception, every public university MVP allowed for religious exemptions. However, in contrast with the pluralist interpretation of religious freedom, the preconditions did not adequately account for a spectrum of sincerely held non-religious objections.<sup>97</sup> Regardless of the potential merit of conscience-based concerns, the formulation of MVPs explicitly limited conscientious objections to traditional notions of religious belief.<sup>98</sup> Individuals with non-religious objections lacked the means to establish a verifiable religious ground rooted in the doctrines of a recognised religion or faith. Consequently, this exclusive formulation of the preconditions undermined the principle of equality and religious pluralism.

#### **4.3. Justifiability of limitations of fundamental rights by juristic entities**

MVPs do “not enjoy inherent legitimacy and [are] open to challenges as to reasonableness and fairness.”<sup>99</sup> Given that the pandemic has passed without Constitutional Court adjudication on the justifiability of MVPs,<sup>100</sup> a detailed analysis seems futile and is thus beyond the scope of this contribution. However, there are notable concerns about the ease with which public universities justified the restriction of fundamental human rights in the name of serving the perceived public interest. In this section, two related questions will be probed. First, to what extent were public universities authorised to limit rights of employees *in the public interest*? Second, was the limitation of religious freedom through MVPs proportionate to the intended purpose of safeguarding broader public interests?

##### **4.3.1. Authority to limit rights in the public interest**

Considering that public universities perform specific public functions; they may legitimately limit certain rights in some instances. But while public institutions

96 Currie and De Waal, *Bill of Rights Handbook*, 316. See also Farlam, “Freedom of Religion,” chapter 41, 13.

97 Illustrative examples include conscientious objections “pertaining to the consumption of animal products or the manner in which vaccines are tested” (Hofmeyr, “An Employer’s Guide,” 4) and concerns that “COVID-19 vaccines are, albeit remotely, ‘derived’ from aborted fetal cell lines,” creating legitimate differences of opinion (Keene [2023], 5).

98 As referenced above, one policy specified that exemption on “a true verifiable religious ground” is determined based on either a “universally recognised umbrella faith institution or body”, or “the doctrines of any religion or faith, including existing cultural faith-based religions.” A different policy limited conscientious objections to “a seriously held religious belief” and supported by the key tenets of “a particular religion” (emphases added).

99 Based on the decision in *Tshatshu* (2022). See C. Loubser and T. Laubscher, “South Africa: CCMA Decides That an Employer’s Vaccination Policy Is Unreasonable and Unconstitutional—Should Employers Be Concerned?” 7 July 2022. Available at: <https://bit.ly/3SiuZYl>.

100 For a detailed analysis of the two-stage approach, see Currie and De Waal, *Bill of Rights Handbook*, chapter 7, and De Vos and Freedman, *South African Constitutional Law*, chapter 10.

are generally expected to operate in the public interest, the limitation of rights “in the interest of broader society and the common good” requires a normative framework for objective decision-making. To this end, the justifiability of rights limitations is typically evaluated in a public hearing before an independent and impartial court.<sup>101</sup>

It was inevitable that public universities would, consciously or unconsciously, consider their self-interests when exercising their discretion in implementing and enforcing MVPs.<sup>102</sup> In a market-based economy like South Africa, reasonable accommodation is generally not cost-effective and does not necessarily fit into the agenda of the secular polity. As an unfortunate consequence, some public universities seem to have regressed into becoming self-appointed, self-governing, and partisan decision-makers without external or objective oversight. In the case of public university MVPs, the limitation of rights ‘in the public interest’ eclipsed the actual interests at stake, thereby concealing a worrying conflict of interest. Under these circumstances, limiting religious freedom in favour of societal interests effectively constituted a pseudo-moralistic stance. Therefore, limiting rights *in the public interest* is the prerogative of government;<sup>103</sup> this discretion cannot and should not be delegated to secular polity.<sup>104</sup>

At its core, workplace MVPs resulted in the unequal enjoyment of rights and freedoms between employees and those individuals not currently in the workforce. If the government wanted to enact legislation mandating vaccination, a more effective and equitable approach would have been to implement it nationally.

### **4.3.2. Proportionality and necessity enquiry**

The second notable concern with public university MVPs pertains to the proportionality between the limitation of individual religious freedom and the purported necessity to protect broader public health interests. Human dignity must have been at the forefront of all intervention measures and in accordance with the principles of necessity and proportionality.<sup>105</sup> The central issue revolves around the constitutional legitimacy of the impact of an MVP on individual religious freedom. More precisely, the proportionality assessment under the general limitation

<sup>101</sup> Section 34 of the Bill of Rights.

<sup>102</sup> With minimal consultation, employers had to subjectively assess whether (1) implementing an MVP was necessary in their workplaces, (2) limiting employees’ rights was justifiable in relation to perceived societal and self-interests, (3) a conscientious objector had a valid ground for exemption, and (4) reasonable accommodation measures were operationally and financially feasible.

<sup>103</sup> This does not rule out the possibility that government itself may not ascribe to a pseudo-moralistic stance.

<sup>104</sup> *Tshatshu* (2022), quoted in Mqoboli and Nondima, “Mandatory Vaccination Unlawful” (emphasis added).

<sup>105</sup> R. Bottoni, “Implications of the COVID-19 Pandemic for Religious Minorities from the UN Perspective,” *IJRF* 16(1) (2023), 5.

clause must consider whether refusing to accommodate a claimant's sincerely held conscientious objection is reasonable and justifiable.<sup>106</sup>

As mentioned, public university MVPs justified the limitation of individual religious freedom by prioritizing collective interests.<sup>107</sup> Although this *ubuntu* approach underlines South Africa's contextual approach to transformative constitutionalism and the limitation of rights,<sup>108</sup> Currie and De Waal warn that if "rights can be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights."<sup>109</sup> Evidently, the limitation of rights is not a mindless exercise in favour of majoritarian interests. Therefore, Calitz questions whether it is reasonable to expect those who refuse vaccination to forfeit fundamental human rights to accommodate another group's preference for vaccination.<sup>110</sup>

While a communitarian approach may have merit, there is no value or purpose in an MVP where only a handful of employers implement such policies. The COVID-19 vaccinations may have mitigated the severity of the virus for individuals; they did not prevent future infection.<sup>111</sup> As a result, the scattered implementation of public university MVPs, as opposed to national MVPs, would not have effectively advanced public health interests. A particularly persuasive ruling in this regard was made by the New Zealand High Court in *Yardley*,<sup>112</sup> where the court held as follows:

The evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the [policy] materially addresses. COVID-19 clearly involves a threat to the continuity of ... services. But that threat exists for both vaccinated and unvaccinated staff. I am not satisfied that the [policy] makes a material difference.

Similarly, in *Tshatshu*, the Commissioner asserted that the implementation of MVPs was irrational as the employees "do not live in a cocoon" and would inevitably come into daily contact with other members of society, vaccinated or

<sup>106</sup> *Christian Education* (2000), paragraph 32.

<sup>107</sup> T. Calitz, "Constitutional Rights in South Africa Protect Against Mandatory COVID-19 Vaccination," 21 April 2021. Available at: <https://bit.ly/3SEhCD1>.

<sup>108</sup> See P. Langa, "Transformative Constitutionalism," 17 *Stellenbosch L. Rev.* 351 (2006).

<sup>109</sup> Currie and De Waal, *Bill of Rights Handbook*, 151.

<sup>110</sup> Calitz, "Constitutional Rights."

<sup>111</sup> L. Maragakis and G. D. Kelen, "Breakthrough Infections: Coronavirus after Vaccination," Johns Hopkins Medical Center, <https://bit.ly/4byVVMr>.

<sup>112</sup> *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 (25 February 2022), paragraphs 104-108.



not; therefore, mandated employees were still at risk of contracting COVID-19 and infecting others.<sup>113</sup> In other words, while protecting public health interests is undoubtedly important, the restrictive means of workplace MVPs did not effectively advance this purpose, at least not in proportion to the inequitable limitation of rights.<sup>114</sup> Alleviating the overwhelmed healthcare system through vaccination necessitated large-scale enforcement,<sup>115</sup> an objective that would not have been attained through the scattered implementation of public university MVPs.

Realistically, this situation contradicts public universities' assertion that their MVPs were in the interest of the broader society. Arguably, the only conceivable remaining purpose of workplace MVPs was to promote personal health, an argument that is self-defeating.<sup>116</sup> Consequently, the "public health imperative for vaccination" appears incongruous, given that the national state of disaster was lifted on 5 April 2022, still significantly short of the threshold for 'herd immunity' in South Africa.<sup>117</sup>

In summary, the limitation of rights must always be assessed in relation to their legitimate purpose. It is concerning that contrary to limitation jurisprudence, some MVPs not only required proof of the mandate's limitation on known or accepted religious beliefs but also "reasons" for considering it an unjustifiable limitation of that right. In other words, these policies were formulated based on the legal and moral presumption that an "applicant's rights are justifiably limited by mandatory vaccination," placing an undue evidential burden on the applicant to prove otherwise. Effectively, this approach lacked appreciation for the importance of individual religious freedom, as well as a disregard for pluralism. The limitation of fundamental rights in the public interest – of which religious interests form a part – should never be treated as a foregone conclusion.

## 5. Conclusion

In the context of the COVID-19 pandemic, a wide range of public responses and opinions emerged. The overwhelming socio-political narrative, especially from

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113 Cliffe Dekker Hofmeyr, Employment Law Alert, "Vaccination: Not Necessarily an Operational Requirement?" 1 July 2022. Available at: <https://bit.ly/47YFRjV>.

114 Effective, less restrictive measures that didn't severely infringe on human rights included frequent hand sanitation, remote work, and wearing personal protective equipment.

115 By July 2020, signs of the healthcare system's collapse, in both the public and private sectors, were already evident. BusinessTech, "Signs That South Africa's Health Care System Is Collapsing: Union Official," 10 July 2020. Available at: <https://bit.ly/3SFVPel>.

116 Russo asks, "Why does this freedom of choice over what one does with one's body not work both ways, such as when dealing with vaccine mandates grounded in religious objections?" C. J. Russo, "My Body, My Choice," Vaccination Mandates, and Religious Freedom," *Catholic World Report*, 20 May 2023.

117 Only 46% of the required 67% required for 'population immunity' was achieved by 10 April 2022. In this regard, see B. Steenberg, "Vaccine Hesitancy in South Africa: COVID experience Highlights Conspiracies, Mistrust and the Role of the Media," *The Conversation*, 26 January 2023. Available at: <https://bit.ly/3w6lPqg>.

secular polity, expressed fervent support for the scientific bureaucracy, which favoured vaccination. In hindsight, it appears that this narrative was flawed.<sup>118</sup> A minority expressed scepticism, citing safety concerns and conscientious objections regarding the vaccine and its impact on personal rights. Unfortunately, the characterization of sceptical views as “anti-vaccine ideology” and misinformation failed to duly consider the varied reasons underlying the cynicism and opposition to vaccination.<sup>119</sup>

Whether artificially engineered or naturally derived, COVID-19 was not the first or the final pandemic humanity will confront. Learning from the missteps taken during this most recent global pandemic is crucial to achieve a more respectful and considerate approach to the limitation of individual rights during a time of human adversity. The actions of secular public universities in South Africa, and especially the preconditions for conscientious objections, shed light on secular polity’s sometimes limited appreciation of the significance of individual religious freedom.<sup>120</sup>

Fundamentally, the prevailing view was that collective interests take precedence over individual rights. MVPs made restrictive provision for conscientious objections to vaccination, exposing an ostensibly benevolent but apathetic attitude towards individual religious autonomy. Henceforth, to ensure that the indiscriminate restriction of individual religious freedom does not become a mindless exercise of preconceived inevitability in favour of collective interests, the following recommendations and observations should be considered:

- 1) When framed in the context of human rights, the clustering of “religion” with other interrelated freedoms protects a diverse range of profound existential views equally. Although opposing beliefs may appear irrational or scientifically unverifiable,<sup>121</sup> they hold intense personal significance for human dignity. By implication, principled public discourse should reflect this inclusive understanding and should reasonably accommodate sincerely held religious and conscientious objections.
- 2) Despite a degree of constitutional secularity reflected in substantive human rights law, secular society is still grappling with the realisation that in a truly pluralistic liberal democracy, the public sphere must remain

118 R. L. Blaylock, “COVID Update: What Is the Truth?” *Surgical Neurology International* 13(167) (2022). See also Jordan B. Peterson, “COVID-19 Mandates, Silencing the Opposition” (podcast with Dr. Jayanta Bhat-tacharya), available at: <https://www.youtube.com/watch?v=proLKPMZ-qc>; Peterson, “The Origin of Covid 19” (podcast with Matt Ridley), available at: <https://www.youtube.com/watch?v=Feh5jyZCz18>.

119 M. Debus and J. Tosun, “Political Ideology and Vaccination Willingness: Implications for Policy Design,” *Policy Sciences* 54(3) (2021), 477-491.

120 It’s unclear whether this interpretive lens reflects the majority societal view or if the identified shortcomings represent the failings of all secular politics in South Africa.

121 I. T. Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion*, PhD thesis, University of the Witwatersrand (2013), 108.

inclusive of both secular (non-religious) and religious beliefs. Relegating unpopular or intrusive religious views and practices to the private sphere renders freedom of (religious) thought, opinion, and expression obsolete, affording hierarchical and exclusive recognition to secular (non-religious) beliefs, which is neither pluralistic nor fair.<sup>122</sup>

- 3) Similar to the judicial non-entanglement doctrine, policies and decision-makers should require disclosure of a person's belief only when necessary and reasonable. As a matter of principle, believers should not be unduly burdened to prove (i) the sincerity of their beliefs, (ii) the centrality of practices related to such a belief, or (iii) a concrete correlation between their subjective beliefs and accepted tenets of a particular belief.
- 4) Whenever feasible, policies and decision-makers should avoid forcing a believer into the excruciating choice between being true to his or her profound convictions or respectful of the law, policy, or other conflicting interest.
- 5) Grounded in constitutional primacy, no law, policy, or official act enjoys inherent legitimacy, and they remain subject to challenges regarding reasonableness and fairness. This becomes more intricate when the limitation of rights is justified institutionally rather than through law of general application. Government has the prerogative to enact necessary measures that limit rights to protect public interests, which should not be delegated. Allowing different secular polities to determine the reasonableness and justifiability of the limitation of rights is not only discriminatory, but also obscures the inevitable conflict of interest.
- 6) In principled discourse, the secular public sphere should inclusively embrace all beliefs and opinions,<sup>123</sup> fostering a mutually respectful coexistence between scientific theories and both secular (non-religious) and sectarian perspectives,<sup>124</sup> even if those views are opposing, irrational, or incapable of scientific proof.<sup>125</sup>
- 7) Constitutional protection for individual religious self-determination allows for a margin of aberration from accepted doctrinal positions. The obligation is not to endorse every conceivable religious position, but to examine, on a case-by-case basis, the significance of the conscientious objection to the claimant.

<sup>122</sup> I. T. Benson, "Taking Pluralism and Liberalism Seriously: The Need to Re-Understand Faith, Beliefs, Religion, and Diversity in the Public Sphere," *JSR* 23(1/2) (2010), 21.

<sup>123</sup> J. Vorster, *Gender Trouble in the Church: Promoting Associational Autonomy Through Ontological Difference*, Master of Laws dissertation, University of the Free State (2023), 21.

<sup>124</sup> *Fourie* (2005), paragraph 94.

<sup>125</sup> *Prince* (2002), paragraph 42.

Despite doctrinal and pragmatic differences, religious freedom remains a precious asset in both private and public life for individuals and communities in all spheres of society, whether secular or sectarian. Therefore, for South Africa to embody true pluralism and equality, every person should be free to embrace and profess that belief which – guided by the light of knowledge, reason, morality, will, and conscience – they consider true, and in line therewith assume a measure of religious autonomy that informs normative values. Simultaneously, every person is responsible for respecting the inherent human dignity, equality, and freedom of others to enjoy this same right.<sup>126</sup>

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<sup>126</sup> Paraphrasing Pius IX, *The Syllabus of Errors* (1864), paragraph 15. See also Rudevskis, “Why Freedom of Religion Matters,” 18-23.

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