**SACHS J ABRIDGED JUDGMENT**

*S v Lawrence, S v Negal; S v Solberg*

*The difficulties*

[139] In responding to the question in the context of the facts of the present case, I have encountered two major difficulties. The first relates to the scope that should be granted to the operation of the maxim that the law does not concern itself with trifles (de minimis non curat lex) in the area of belief and conscience. The second concerns whether or not it is appropriate or even possible to apply objective criteria when determining the significance law has in respect of something as subjective and personal as religious belief. The problem that faces a court in a multi-faith country is to decide whose viewpoint or frame of reference should be adopted when such an evaluation is made.

[140] To complicate the matter further, the challenge based on section 14 came not from believers whose faith was being threatened, but from grocers whose profits were being limited. The applicants were, of course, quite entitled to raise the issue of the constitutionality, in terms of section 14, of a law which placed restrictions on their commercial activities. Yet, the result was an air of artificiality in relation to this aspect of the case, and a lack of evidence, from the side both of the applicants and of the state, on the question of the purpose and impact of closed days. If ever there was a case which required close contextual rather than purely abstract analysis, it was this one, and if ever a cupboard was bare of concrete contextual information, it was the one in the present matter.

*The text and context of the interim Constitution*

[141] Our solutions to all these problems and difficulties will, of course, be found not in the complex and often contradictory North American jurisprudence on the subject but in the text and context of our own Constitution. In *Prinsloo v Van der Linde and Another* this Court cautioned against simplistic transplantation into our jurisprudence of formulae, modes of classification and legal doctrine developed in other countries where the constitutional texts and socio-historical situations were different from ours. At the same

time, we stated that in developing doctrine we had to take account both of our specific situation and of problems which we shared with all humanity. Furthermore, section 35(1) required us when interpreting the bill of rights to promote the values of an open and democratic society based on freedom and equality. We emphasized that we should be astute not to lay down sweeping interpretations at this stage but should allow doctrine to develop slowly and, hopefully, surely, on a case-by-case basis with special emphasis on the actual context in which each problem arose. Although our observations in that case were specially directed towards the interpretation of section 8 equality rights in our country, they can, in my view, be applied with profit to the interpretation of section 14 as well. It is with these considerations in mind that my analysis proceeds. If I draw on statements by certain United States Supreme Court justices, I do so not because I treat their decisions as precedents to be applied in our courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/state relations. Thus, though drawn from another legal culture they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.

[142] The principal provision in our Constitution we have to consider is section 14. Headed "Religion, belief and opinion", its first subsection reads as follows:

> "14(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

This is the central provision as far as our enquiry is concerned, but it by no means exhausts the text with regard to questions of religion, belief and opinion. In the first place, the drafters of the interim Constitution emphasized the importance of section 14 rights by providing that they could not be derogated from during a state of emergency (section 34(5)(c)), and furthermore, that they should be amongst the relatively small number of rights which could only be limited (in terms of section 33(1)(b)(aa)) on the condition that such limitation was not only reasonable but also "necessary". Secondly, section 8 complements section 14 by identifying discrimination on the grounds of religion, conscience and belief as presumptively constituting unfair discrimination.

Thirdly, section 17 guarantees that everyone shall have the right to freedom of association, which clearly includes the right of religious bodies to function freely as part of civil society.

[143] Fourthly, section 14(2) provides that:

> "Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."

This subsection has been referred to as "a prime example of a provision attesting to the negotiators' unwillingness to erect walls of separation between church and state", allowing for the conduct of religious observances at state or state-aided institutions, which, subject to certain conditions to be strictly adhered to, would include educational institutions, prisons, and state hospitals.

Fifthly, section 14(3) opens the way to the possible recognition of religiously based family law by providing:

> "(3) Nothing in this Chapter shall preclude legislation recognising –
> (a) a system of personal and family law adhered to by persons professing a particular religion; and
> (b) the validity of marriages concluded under a system of religious law subject to specified procedures."

[144] Sixthly, the language provisions also testify to the importance which the interim Constitution attributes to religion as part of national life and culture. Section 3(10)(c) provides that:

> "The Pan South African Language Board shall be responsible for promoting respect for and the development of German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu and other languages used by communities in South Africa, *as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes*." (My emphasis)

Seventhly, section 32(c) provides that every person shall have the right:

"to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

And, eighthly, persons taking official oaths are offered the choice either of swearing the oath and adding the words "So help me God", or else of making a solemn affirmation without reference to God.

[145] There are other provisions which, although not directly concerned with religion and belief, have an important bearing on how section 14 should be interpreted. It is noteworthy, for example, that section 15(1) provides inter alia that every person shall have the right to freedom of expression and freedom of artistic creativity and scientific research, while section 15(2) requires that all media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion. Freedom of opinion and freedom of expression go hand in hand, and this section testifies to a strong constitutional concern for openness and diversity.

[146] The same theme is adverted to in the limitations clause and the interpretation clause, both of which establish the notions of an *open* and democratic society as a primary point of reference for evaluating the bill of rights. The concept of an open society must indeed be regarded as one of the central features of the bill of rights and a key element in the interpretation of section 14. Such a society is a pluralistic one in which there is no official orthodoxy or faith. In the ringing words of the US Supreme Court:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

[147] Further evidence of the importance attributed by our Constitution to the respect for diversity is contained in the postscript, where the emphasis on reconciliation so as to overcome the strife and division of the past, underlines the importance of tolerance and mutual accommodation as one of the underpinnings of our new constitutional order.

Openness coupled with diversity presupposes that persons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.

[148] To my mind, read in the context of all of the above provisions and of the Constitution as a whole, section 14 was intended at least to uphold the following principles and values: South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

*State bias in the pre-constitutional period*

[149] In the pre-constitutional era there were a number of statutory provisions with a religious foundation that in no way purported to maintain neutrality in relation to "different confessional alignments". According to Professor J D van der Vyver, writing in 1986, "[i]n cases where the legislature . . . expressed a particular religious preference it . . . clearly sided with Christianity." He points out that the Publications Act 42 of 1974 "seemingly subject[ed] the entire censorship system to the dictates of Christian morality." Furthermore, primary, and secondary education in public schools for white children was based on the principle of Christian national education, while education in black schools had to have a Christian character. A further indication of Christian bias in the law was that the crime of blasphemy "applied to the slandering of the God confessed by Christianity only". His survey goes on to point out that "[t]he Christian bias of certain

branches of statutory law [was] also evidenced by a series of Sunday observance laws covering a wide range of regulative and prescriptive measures." In broad outline, the legislation fell into two main categories, namely, commercial and labour law, and public entertainment and recreation. The former included restraints on retail trade on Sundays and a number of detailed Sabbatarian prescriptions relating to bills of exchange, pegging of claims to mineral rights, and conducting the business of butchers and fishmongers. The latter cluster of penal statutes declared it an offence on Sundays to show films or permit public entertainment at a place where an admission fee was charged, while in Natal horse-racing on this day was unlawful even if gratuitous, as was dancing at a place of amusement or recreation in the Orange Free State.

[150] It should be noted that in almost all of the above cases the restrictions extended not only to Sundays, but to what Professor Van der Vyver referred to as all public holidays "with a religious base", namely, Good Friday, Ascension Day, the Day of the Vow and Christmas Day. Ascension Day is no longer a public holiday, and the Day of the Vow is now the Day of Reconciliation, so that the only holidays with a religious base that survive are Good Friday and Christmas Day.

[151] Not only did the state require observance of certain aspects of the Christian religion, it also refused to recognise the validity of marriages that did not conform to the Christian prototype. The identification of Christianity with what a judge called "civilized peoples" emphasized the role of the Christian religion as a specific source of values for the interpretation and development of the law. The hurt caused by the non-recognition of Hindu and Muslim marriages by the courts has been well documented. Comparing the old situation to the new, Farlam J recently indicated his agreement with the proposition that:

> ". . . it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account."

The contract to which he referred related to property arrangements pursuant to a Muslim marriage. In a later case, Mahomed DP speaking for this Court had this to say on the lack of recognition accorded to Muslim marriages:

> "Unions which have been solemnised in terms of the tenets of the Islamic faith, for example, are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is 'potentially polygamous' and for that reason, said to be against public policy. The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant to s 18 of the Act. The child would not have the status of 'legitimacy' and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable." (Footnotes omitted)

[152] The marginalisation of communities of Hindu and Muslim persuasion flowed from and reinforced a tendency for the norms of "Christian civilisation" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other". Any echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected. Indeed, the concern expressed by O'Connor J about the message sent by state endorsement of religion to non-adherents to the effect that they are outsiders and not full members of the political community, has special resonance in South Africa. Religious marginalisation in the past coincided strongly in our country with racial discrimination, social exclusion and political disempowerment. Similar although not identical observations may be made about anti-semitism, which targeted members of the Jewish community for disadvantageous treatment in the public as well as the private sphere. Thus, any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.

[153] Professor Laurence H Tribe points out further, correctly in my view, that any actual or perceived alliance between government and religion can undermine free political discourse. "The more political leaders wrap themselves in the mantle of religion," he writes "the more readily those who oppose them may be accused of opposing God. That, in turn, may polarize citizens and leaders around a religious axis, creating the sort of divisiveness that the first amendment was partly intended to minimize." Finally, we should remember that the movement for freedom of belief has preceded every other in the history of the struggle for human rights and fundamental freedoms, while conversely, religious persecution, sectarian strife, and ideological totalitarianism have undermined democracy and respect for fundamental rights in many parts of the world. State enforcement of a particular belief or ideology can in an extreme case do more than marginalise citizens and block free debate, it can threaten the whole system of constitutional democracy. The present case, of course, comes nowhere near raising these distressing spectres, but it does highlight how sensitive these matters are, and how potentially deep the implications of apparently harmless provisions may be. Painful history in our country and abroad reminds us that the values underlying section 14 can never be taken for granted and must always be jealously nurtured. At the same time the wide range of matters covered also indicates how broad and varied the spectrum of potential violations is, starting with the most minor infraction which barely impinges upon the values protected by the section, and extending to the most egregious invasion which threatens the whole constitutional order. The appropriate location of the challenged law in this spectrum will accordingly have a significant influence on the way in which it will to be evaluated.

*Competitive disadvantage because of Religion*

[154] As I have said, although the section 14 issue of principle is real, the way it came to us was artificial. The objective was to abolish a commercial restraint, not to secure a religious freedom. Thus, the matter before us arises out of a prosecution of an employee of a grocery chain store whose actual complaint was that she was compelled by the state not to sell liquor on a Sunday. She did not allege that she was obliged by her religion not to sell liquor on a day other than Sunday as well, and, as a result of her belief, subjected by the state to an invidious choice between following her religion or pursuing her trade. Nevertheless, it was not a precondition for her bringing of the case that she establish that her own rights of religion, belief or opinion were trespassed upon. It was sufficient for

her to complain that her rights were infringed as a result of her being prosecuted in terms of a statutory provision which, objectively speaking, was invalid because it violated section 14.

[155] As a result, however, of what appears to have been the tacking on of a complaint of Sabbatarian disadvantage to a more general charge of unconstitutional commercial regulation, no evidence was placed before us to indicate whether in practice there actually was such competitive disadvantage. Furthermore, we have no clear factual foundation for deciding whether, if it did exist, it was substantial or trivial. General knowledge does not provide much help. Because the tenets of Islam, as I understand them, prohibit the use or distribution of liquor at any time on any day, Muslim shopkeepers could hardly be expected to complain. Orthodox Jews might feel that by closing their stores on Saturday and not selling liquor on Sunday as well, they were at some commercial disadvantage because Sunday was chosen as the closed day and not Saturday. Whether or not Sabbatarian exemptions should be provided for in the case of complete cessation of trading by grocers on Sundays is not the issue before us. One could hardly require the state to do a survey of Sabbatarian practice and then choose as a closed day the one that caused the least inconvenience to believers. It could be argued that exemptions would involve the state in invidious determinations of religious persuasion and subject the affected persons to the embarrassment of being forced to make special applications which would emphasise rather than diminish their non-majority status. Yet in the present case we are not required to enter this difficult terrain. We are dealing only with one item on the sale racks that is locked away while the customers push their trolleys through massed ranks of foodstuffs inviting purchase, so that any competitive disadvantage suffered, say, by a Jewish storekeeper, who because of religious observance, closed his or her shop on a Saturday, would indeed be trivial.

*Compulsory observance*

[156] The mere fact that the closed day coincides with a day that has its origins in Christian practice cannot automatically mean that it continues to serve the sectarian purpose of compelling observance of that day as a Christian day of rest. Even if Sunday continues to have special religious significance for many South Africans, it has also become secularised as a common pause day for believers of all persuasions and believers of none. Its special position has been recognised in labour law. Its origins in Christianity have no

more intrinsically sectarian consequences than does the use of terms AD and BC to establish dates in our calendar. Accordingly, I find it difficult to accept that state-imposed temperance on a common pause day is in itself enough to implicate section 14 simply on the grounds that that day of rest originated from and continues to coincide with the Christian sabbath.

[157] It is not always easy to distinguish between observances and practices that are purely sectarian, those that are completely secular and those that combine elements of both. In this respect, I would associate myself with the broad sweep of the remarks of Brennan J in the context of the case which arose out of the public display by a municipality of a nativity scene at Christmastime.

"Intuition tells us that some official 'acknowledgement' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people . . . It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs.

. . . .

[A]t least three principles – tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause – may be identified. First, although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practise their religion. . . . [T]hat principle would justify government's decision to declare December 25th a public holiday.

. . . .

Second . . . while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons. . . . [T]he mere fact that a governmental practice coincides to some extent with certain religious beliefs does not render it unconstitutional. Thanksgiving Day, in my view, fits easily within this principle,

for despite its religious antecedents, the current practice of celebrating Thanksgiving is unquestionably secular and patriotic.

. . . .

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. . . . While I remain uncertain about these questions, I would suggest that such practices as the designation of 'In God we Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . as a form of 'ceremonial deism,'[] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." (Footnotes omitted)

[158] I am not persuaded, therefore, that the selection of Sunday as a closed day either imposes unacceptable commercial disadvantage on non-Christians in a constitutionally meaningful sense, or that it results in state-imposed observance of the Christian sabbath in any significant way.

*Symbolic effect*

[159] The main problem, as I see it, lies elsewhere, and arises from other considerations. The crucial aspects are, firstly, that all of the closed days, namely, Sundays, Good Friday and Christmas Day, are what Professor van der Vyver in pre-constitutional times called "religiously based holidays", and secondly, that the prohibition relates simply to the sale of liquor. Putting those two factors together, there appears to be no getting away from the inference that although part of the objective might have been purely secular, the means used, namely the selection of religiously based days as closed days, was intended to acknowledge and comply with the sentiments of those Christians who regarded these days as days requiring special observance. The identification of these days suggests that the manifest object was not simply to serve as a means of economic regulation or as a way of achieving a measure of temperance at selected times. The sectarian message might not be powerful, but it is inescapable. Had Sundays and all public holidays been included, the situation would have been different, and the choice of days could have been considered neutral; had only Sundays been referred to, the signal would have been mixed. The fact is that Sundays have been coupled with Good Friday and Christmas Day.

[160] My view then is that the identification of Sundays, Good Friday, and Christmas Day as closed days for purposes of selling liquor, does involve an endorsement by the state of the Christian religion in a manner that is problematic in terms of section 14. The functional impact of the law may be marginal, and its symbolic effect muted, yet the communication it makes cannot be disregarded. Even if there is clear scope for the application of the de minimis rule to the question of some ancillary economic costs resulting from being true to one's faith, it should be used with extreme caution when it comes to deciding such sensitive and not easily measurable questions as freedom of conscience, religion and belief. One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion by the state is. The objective of section 14 is to keep the state away from favouring or disfavouring any particular worldview, so that even if politicians as politicians need not be neutral on these questions, legislators as legislative drafters must.

[161] The strength of the O'Connor J's approach, namely its all-encompassing character which lifts it out of formulaic reasoning and combines the relationship between purpose and effect, also appears to be its weakness. It indicates the broad question to be asked, but not the specific criteria to be used for the answer. More especially, it does little to establish from whose standpoint the message by the state should be considered. What comes through as an innocuous part of daily living to one person who happens to inhabit a particular intellectual and spiritual universe, might be communicated as oppressive and exclusionary to another who lives in a different realm of belief. What may be so trifling in the eyes of members of the majority or dominant section of the population as to be invisible, may assume quite large proportions and be eminently real, hurtful, and oppressive to those upon whom it impacts. This will especially be the case when what is apparently harmless is experienced by members of the affected group as symptomatic of a wide and pervasive pattern of marginalisation and disadvantage.

[162] In testing whether in the present case the state endorsed a particular set of beliefs in a manner which violated section 14, I shall attempt to apply the sensibilities and perspectives neither of what has been called the "reasonable Christian", nor, for example,

of the reasonable Jew, Muslim, or Hindu, nor of the reasonable atheist, but of the reasonable South African (of any faith or of none) who is neither hyper-sensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution. In my opinion, such a reasonable South African is a person of common sense immersed in the cultural realities of our country and aware of the amplitude and nuanced nature of our Constitution. He or she neither attempts relentlessly to purge public life of even the faintest association with religion for fear of otherwise descending the slippery slope to theocracy, nor, at the other extreme, regards the religiously based practices of the past to be as natural and non-sectarian as the air one breathes simply because of their widespread acceptance.

[163] I accordingly endorse the compactly expressed approach of Farlam J when he holds that:

> ". . . it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared *by the community at large, by all right-thinking people in the community and not only by one section of it.*" (My emphasis)

Such right-thinking persons, in my view, would have little difficulty in accepting that whatever may be their deep and continuing special significance for Christians, the survival of Sunday, Good Friday and Christmas Day as secularised public holidays integrated into the programmes of rest, travel and, in the case of Christmas Day, festivity, of all South Africans, no longer represents state endorsement of religion. At the same time, however, they would have equally few doubts that the choice of these days as closed days for the purposes of the sale of liquor, and not to establish a common day of rest, does indicate a maintenance of the pre-constitutional sectarian bias referred to by Professor Van der Vyver. Accordingly, adopting the approach of the reasonable non-sectarian South African conscious of the values of openness and tolerance enshrined in the Constitution, aware of the importance in this area of not regarding a majoritarian view as a national one and sensitive to the need to show special regard for the sensibilities of those who may feel excluded or offended by the measure, I come to the following conclusion: the inescapable message sent out by the particular choice of these closed days is that despite the enactment of section 14, the state still shows special solicitude to Christian

opinion or, to put it more accurately, to the views of certain Christians, and thereby infringes section 14.

*Severance and the limitations clause*

[164] As I have stated above, it is the conjunction of Good Friday and Christmas Day with Sunday that manifests a state endorsement of Christianity as a religion requiring special observance and meriting more respect than other religions. Implicit in this is the assumption that Christians occupy central positions in the political kingdom, while non-Christians live on the periphery. If these two public holidays were severed from the rest of the definition of closed days, then, in my view, the identification of Sunday as a closed day would not implicate section 14. Its legitimate secular purpose would then be shorn of its illegitimate sectarian one. In the present case, however, severance was not urged upon us, and we have not heard argument about it. Furthermore, the prosecution related to selling liquor on a Sunday and not to selling it on Christmas Day and Good Friday. Counsel brought these two days into the picture basically to serve as colourative proof that Sunday was chosen not as a mutual day of rest but because of its Christian associations. For the reasons which follow, however, I do not find it necessary to decide whether severance would be either appropriate or competent in the present case.

[165] In my view, the application of section 33 resolves the matter. I have stated that the de minimis rule may have little application in deciding whether or not there has been an infringement of section 14 by virtue of state endorsement of a particular religious creed. I nevertheless believe that the degree of infringement is highly relevant in the balancing process involved in the second phase of the enquiry, namely, the test of proportionality required when considering whether the intrusion against the right qualifies in terms of section 33 as a reasonable, justifiable, and necessary one. This Court has on a number of occasions emphasized that the test established by section 33 relies on proportionality, a process of weighing up the individual’s right which the state wishes to limit against the objective which the state seeks to achieve by such limitation. As Langa J put it in *S v Williams and Others*:

“This evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution and in other legislation, in

the decisions of our Courts and, generally, against our own experiences as a people".

[166] The requirement that limitations on section 14 rights must be not only reasonable and justifiable, but also necessary, clearly identifies section 14 as one of the core provisions of the bill of rights requiring special solicitude by this Court. It reduces the margin of appreciation which a test of reasonableness on its own would allow the legislature, and places special emphasis on the selection of options which are clearly not unduly burdensome, overbroad, or excessive, considering all the reasonable alternatives. In *S v Makwanyane and Another* Chaskalson P emphasised that there was no absolute standard which could be laid down for determining reasonableness and necessity; principles could be established, but the application of those principles to particular circumstances could only be done on a case-by-case basis. The importance of looking at the actual context in which an alleged infringement is to be evaluated was further underlined in *President of the Republic of South Africa and Another v Hugo* where Goldstone J referred to the need for ". . . a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned. . . . A classification which was unfair in one context may not necessarily be unfair in a different context."

[167] The reason why context is so important in constitutional matters is well explained by Wilson J in *Edmonton Journal v Alberta AG*:

". . . a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values . . . ."

In deciding what is reasonable and necessary in the present case we should accordingly look to the actual dilemma triggered by its particular facts, and not deal with it in a formulaic way simply because section 14 has been infringed.

[168] Although the section 14 right is in general a weighty one, not each and every breach of the right carries the same weight. A trivial breach of a specially protected right might be easier to justify in terms of section 33 than a grievous infringement of an "ordinary" right. The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification. Conversely, the lighter the transgression, the less stringent the requirements of justification. Thus, I have no doubt that any state action which interfered directly with or compelled a particular form of religious observance would rarely pass the tests of reasonableness and necessity, if at all, and then only if the most compelling justificatory circumstances were established. Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state. At the other extreme, there are transgressions of section 14 so marginal in themselves, or so slight in relation to manifestly legitimate objectives with which they are inextricably interlinked, that the burden of persuasion on the facts imposed by section 33 would be far easier to discharge.

[169] With these considerations in mind I turn to the concrete act of balancing that we are required to do in the present case. I start with an attempt to characterise the severity of the invasion of the right. We may assume, even though it has not been proved, that there is some, but not very significant competitive disadvantage suffered by persons whose sabbath happens to be on days other than Sunday, Good Friday and Christmas Day. Such persons, as well as Christians who feel that their religious observances are matters of private confession that have nothing to do with the state, are obliged by the state not to sell liquor on these days because of deference to a particular form of Christian sensibility. Yet, the activities involved are so limited that I cannot regard any economic disadvantage flowing from belief as being substantial at all, and I doubt whether they even enter the scales of proportionality.

[170] Of greater significance is the signal given to the public at large that the state regards the Christian religion as worthy of special respect above other religions. In the words of Professor Tribe, government's gratuitous use of a religious means is likely to convey a message of exclusion to all those who do not adhere to the favoured religion; when such people learn that government has gone out of its way to adopt the religion's tools, they

may believe that government must have adopted its tenets as well, and quite reasonably feel, in O'Connor J's words, as if they are not full members of the political community.

[171] This is where the problem of weighing things of a completely different order arises. The difficulty which we must overcome is how to assess the intrinsically intangible, but very real (even if rather reduced) symbolic effect of religious favouritism, as against the very palpable and quite terrible consequences of alcohol abuse which the state wishes to diminish. I have already indicated the factors which led me to the conclusion that the selection of days chosen by the state amounted to endorsement of religion in a manner that breached section 14. I will now consider in its context how grave that breach is, or to put it another way, how powerful or weak the exclusionary message is which the state is sending by such endorsement.

[172] To begin with, the negative symbolic effect of such state favouring of Christianity must be seen in its legislative and historical context. The closed days are a small part of a statute designed to control the sale of liquor and not, as in the *Big M* case, a central aspect of a statute primarily intended to compel religious observance. Secondly, the challenged provisions do not impose beliefs or interfere in a direct way with observance. They relate to a situation of favouritism coupled with indifference, rather than one of orthodoxy combined with persecution, and represent a relatively insignificant relic of a vanishing era, rather than a pungent symbol of continuing hegemony. Even the objectionable pre-constitutional period referred to in my historical survey was not remotely as egregious in respect of religion as it was, for example, in relation to race. The result is that section 14 must be construed in a context of a legacy of institutionalised religious favouritism that is far less pronounced and pervasive than, say, the systematic racism and sexism which must influence the meaning we must give to the equality provisions in section 8. Then, just as the economic effects on non-Christians are at most of a marginal character, since grocers are not obliged to close their stores on certain days, but merely required not to sell liquor on them, so the symbolic effect of compulsory observance is correspondingly reduced.

[173] In the fourth place, the signal was further muted by the fact that prohibition of the sale of liquor on closed days was far from complete, since the legislation in question made provision for sales on a Sunday by persons in possession of hotel, wine house or club house licences, or persons specially granted licences to sell liquor on Sundays. The more modulated the prohibition, the less manifestly Sabbatarian the message. Fifthly, as has

already been pointed out, the days in question have become highly secularised. Shops, cinemas, sportsgrounds and jazz clubs do thriving business on Sundays. Significant though Good Friday is to a great many practising Christians, the Easter weekend has become for the South African population as a whole a time for enjoying late summer holidays. To the regret of many Christians, Christmas Day has become a holiday when, as it has been said, more homage is paid to Mammon than to God. The result is that choosing these days as closed days now sends out a far less powerful signal than it once would have done. Finally, there is relatively little sectarian significance to the prohibition of the sale of liquor as such.

[174] The overall consequence is a law that, while indeed offending against section 14, does so in an indirect and marginal way, imposing relatively little obligatory observance, in respect of a matter of slight sectarian import, in relation to days that have become highly secularised. The message of inclusion coupled with exclusion is accordingly a notably subdued and insubstantial one.

[175] Balanced against these relatively minor infractions of section 14 are strong factors which operate to justify the singling out of Sunday, Good Friday, and Christmas Day as days when the state makes special legislative attempts to encourage temperance. O'Regan J correctly points out in her lucid analysis that no evidence in support of section 33 justification was led. Yet, there are facts of common knowledge to which we cannot blind ourselves. Sunday comes at the end of the weekend, consisting of two pause days, the first of which, with Friday night, is a time of relatively heavy drinking. Good Friday represents the first day of the Easter weekend which is a period when there is exceptionally high traffic on the roads and when drunken driving constitutes a specially serious menace. Christmas Day is the first of two public holidays widely dedicated to festivity. In my view, the state's interest on behalf of society in encouraging temperance on these particular days is a powerful and legitimate one.

[176] Although contested evidence was placed before us to the effect that regulation of the sale of liquor in general has failed to reduce the damage caused by alcohol abuse, I am unaware of anything on record, or any information of common knowledge, which suggests that once such regulation is regarded as legitimate governmental activity, and once the purpose of reducing alcohol intake on these particularly high-risk days is treated as an appropriate and compelling governmental objective, then such objectives could

reasonably have been achieved by less intrusive means. In this respect it is highly relevant that it is only the purchase of liquor in transportable form that is made difficult, not the purchase of liquor as such.

[177] My conclusion, then, is as follows: on the one hand, the scope and intensity of the invasion of section 14 rights is relatively slight. On the other hand, the dangers of excessive drinking, particularly on weekends, at the beginning of the Easter weekend and at Christmas-time, are grave. Pay packets are reduced, domestic violence is intensified and exceptionally high slaughter on the roads resulting from drunken driving becomes a matter of national concern. There are accordingly strong reasons for adopting suitably focused measures which are designed to and hopefully will restrict the consumption of alcohol on these particular days and not on others. I accordingly feel that in the particular circumstances of this case the legislative restrictions in question are both reasonable and necessary.

[178] The result is that I agree with O'Regan J that the provisions relating to closed days involve a breach of section 14. Since, however, I am of the opinion that such infringement is sanctioned by section 33, I concur with Chaskalson P in his conclusion that the provisions in question are not unconstitutional.