Freedom to agreed-upon religious upbringing of the child on dissolution of a marriage: A critique of *Kotze v Kotze*

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SUMMARY

The South African High Court in *Kotze v Kotze* declined a clause in a settlement agreement related to the granting of a divorce order in which the plaintiff and the defendant agreed to educate their minor child in the teachings of the Apostolic Church and to have their minor child participate fully in all the religious activities of the Apostolic Church. The Court was of the view that this clause did not afford the minor child with the necessary freedom that he was entitled to, also to be understood against the background of the Court having to act in the best interests of the child. In this regard, this article critiques the Court's finding in that it substantively violates the right to freedom of religion of the parents and results in a hindrance towards the furtherance of diversity.

1 Introduction

The South African High Court in *Kotze v Kotze*[1] (*Kotze*) declined a clause in a settlement agreement related to the granting of a divorce order. Justice Fabricius' (in *Kotze*) declining of the granting of a clause in a divorce order pertaining to an agreement between the plaintiff and the defendant that they undertake to educate their three-year-old son in the teachings of the Apostolic Church, was based on the view that such a clause deprived the child of the required freedom to which he was entitled. According to Justice Fabricius, the idea that a child belongs to a church or adheres to a religion so that he or she can, at a more mature or developed age, exercise a free choice, contains a fallacy in that it "fails to appreciate fully the nature of the human being within the framework of the imposition of religious dogma upon it".[2] Justice Fabricius added that,

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1 *Kotze v Kotze* 2003 3 SA 628 (T). This judgment, made nearly two decades ago, has not been challenged in proceeding judgments specifically related to religious upbringing and clauses in deed settlements that include a clause that the minor child be raised in accordance with the teachings of a specified religion.

2 *Kotze v Kotze* 632.

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> "Indoctrination (in the neutral sense) and the slavish adherence to certain oft-repeated canons that seem to be generally accepted by one's peers as the only truth often not only negates, but essentially destroys a person's freedom of choice … If a child is forced … to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution …"[3]

The rationale described in the above is cause for critical analysis of *Kotze* against the background of the protection of freedom of religion within the context of parenthood. This overlaps with the argument that there should be limits to the law in the sense that shared views related to meaning and purpose regarding existence, such as that which is signified by parenthood, should be awarded the freedom to have and practise their own views on how life should be lived. It should therefore not be for the law to prescribe ways of living regarding the relationship between parents and their minor child pertaining to raising their minor child in accordance with the teachings and observances regarding a specific religion. This further implies that the determination of the best interests of the minor child is inextricably connected to parental determinations pertaining to religious upbringing, which requires the protection of religious forms of meaning. It is therefore argued that where a dissolution of marriage of the parents of a minor child takes place, and where such parents agree that their child be brought up in a specific religious faith, that it is not for the judiciary (or any other governing or other authority) to decide otherwise, unless there are serious concerns that require consideration, for example, where the threat of substantive harm of the child as a result of such an agreement is clear.

2 The legal context on religious upbringing and parental freedom

The South African Constitution includes no explicit reference to the right of parents to guide the religious choices of children. The Constitution makes provision for the right to freedom of "conscience, religion, thought, belief and opinion" of everyone,[4] which therefore includes both parents and children. The Constitution also provides the child with the right to parental care[5] and confirms the paramount importance of the child's best interests in every matter concerning the child.[6] Bonthuys and

3 *Kotze v Kotze* 632.
4 s 15(1) of the Constitution.
5 s 28(1)(b) of the Constitution.
6 s 28(2) of the Constitution. This section establishes a right independent of the rights listed in s 28(1) of the Constitution, see Boezaart in Heaton (ed) The position of minor and dependent children of divorcing and divorced spouses or civil union partners, *The law of divorce and dissolution of life partnerships in South Africa* (2014) 172-173. The best interests of the child, says Malherbe, has developed as a common-law principle in terms of which the best interests of the child prevail in family law disputes. Having said this, the best interests of the child, now being part of the Bill of Rights, should be applied in all matters affecting the child and not only to matters

Pieterse refer to the South African High Court case of *Allsop v McCann*[7] (*Allsop*) as confirmation that a decision regarding the religious education of a child cannot be taken without taking the best interests of the child and the relevant constitutional rights into consideration.[8] Regarding parental rights pertaining to religious instruction upon the dissolution of the marriage, Bonthuys and Pieterse refer to the view taken in the *Allsop* judgment that the judiciary must only intervene when there is conflict between the parents concerning the religious instruction to be meted out to the child.[9] The Court in *Allsop* further commented that in such instances the judiciary is traditionally hesitant to disturb the "living and educational arrangements of children".[10] Bonthuys and Pieterse comment that the parent's constitutional right to freedom of religion should be understood as the parent's right to influence the religious choices of their children, whereas the extent of the children's right to freedom of religion is in turn determined by the child's degree of maturity and the religious direction provided by their parents.[11] These views calling for the freedom to be awarded to parents to raise their child in the religion of their choice, especially where the child is a minor, are in contrast to the views postulated by *Kotze*.

Mildred Bekink comments that section 28(2) of the Constitution confirms the importance of the child's interests in every matter concerning the child. However, says Bekink, this should not mean that this serves as trump to automatically override other rights.[12] The best interests of the child principle should be applied in a meaningful manner without unnecessarily excluding other constitutionally protected rights or

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related to family law and the rights in s 28 of the Constitution. The best interests of the child is also an internationally accepted measure that guides authorities in decisions affecting children. Also, the Convention on the Rights of the Child has given the best interest measure a broad scope, Malherbe in Boezaart (ed) The impact of Constitutional rights on education, in *Child law in South Africa* (2009) 439-440; also see 172-173. The best interests of the child as forming part of the rights of the child, are not immune to limitations, Malherbe 440, and therefore may be limited when such limitation is reasonable and justifiable. Such a determination should be made taking due cognisance of all the relevant circumstances and in accordance with s 36 of the Constitution, which sets out the criteria to determine whether a right may be limited. Also, s 28(2) does not only refer to the rights included in s 28(1), but also that s 28(2) is viewed as a right, and not just a guiding principle, Skelton in Boezaart (ed) Constitutional protection of children's rights, in *Child law in South Africa*, (2009) 280-281.

7 2000 (3) All SA 475 (C).

8 Bonthuys and Pieterse, "Divorced parents and the religious instruction of their children: *Allsop v McCann*", *SAL J*, (2001) 222.

9 Bonthuys and Pieterse 217.

10 Bonthuys and Pieterse 219.

11 Bonthuys and Pieterse 223. The authors also refer to "The importance of the need for emotional and spiritual stability, whilst simultaneously striking a balance between the religious rights of custodian and non-custodian parents, and those of their children" 224.

12 Bekink "'Child divorce': A break from parental responsibilities and rights due to the traditional sociocultural practices and beliefs of the parents" (2012) 15 191.

interests and, in the words of Bekink, "sometimes the best interests of the child may even limit a child's best interests".[13] This should also be understood in the sense that what should serve the interests of the child does not necessarily imply that such a determination should exclusively be made by the child himself or herself and that the parents should also play an important role in this determination. Bekink adds that the sociocultural beliefs of the parents should only be taken cognisance of where practices resulting from such beliefs prove to impact adversely on the development and happiness of the child.[14]

The law related to parents and family autonomy has traditionally been respected and international human rights instruments recognise the centrality of the family and of parenting by both parents.[15] Parenting and family autonomy should also be understood against the view supported by the European Court of Human Rights, namely that the family relationship between natural parents and their child "is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents".[16] Inextricably related to this is the emphasis placed by the *United Nations Convention on the Rights of the Child* (UNCRC) on both parents as being considered as the best persons to raise their children.[17] The UNCRC also states that States party to the UNCRC should provide "appropriate assistance to parents to facilitate the performance of their child-rearing responsibilities",[18] which implies that the authorities (including the

13 Here, Bekink refers to Skelton's "Constitutional protection of children's rights" and Friedman, Pantazis and Skeltons' "Children's rights".

14 Bekink 192-193. In confirmation of this is s 7(1) of the *Children's Act,* which lists a number of factors that should be considered when making an evaluation as to the furtherance of the interests of the child and s 12(1) of the said Act which states that, "Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being." Also, s 1(1) of the *Children's Act*, against the background of the custodian parent, which refers to "care" in relation to the child, as including "guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of developments". This can also be interpreted as supporting the central role of parents in general within the context of an agreement between the parents that their minor child be raised in accordance with a specific religion.

15 Ahdar and Leigh, *Religious freedom in the liberal state* (2013) 201-203.

16 Nicholson, "The right to family life and family unity of refugees and others in need of international protection and the family definition applied", *Legal and Protection Policy Research Series*, United Nations High Commissioner for Refugees (UNHCR) 2018 26.

17 Art 18(1) of the UNCRC reads as follows: "States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

18 Art 18(2) of the UNCRC reads as follows, "For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the

courts) should assist parents in the facilitation of their child-rearing responsibilities, which includes bringing a child up in accordance with the religious convictions of the parents. Then there is also the right provided to parents pertaining to the religious upbringing and education of their children.[19] This should be understood also by taking due cognisance that parental authority is far from being unconditional, due to the vulnerability of particularly children at a young age.[20] This pertains to matters related to, for example, the emotional or physical health as well as the life of the child and also depriving the child from being educated.[21]

Ahdar and Leigh comment that "there is currently no independent legal right of religious liberty in the intact and united family."[22] Having said this, the authors add that the superior courts in several common law jurisdictions have "tentatively signalled the potential acceptance of an

performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children." South Africa is a party to the said Convention.

19 Art 14(2) of the UNCRC; Art 18(4) of the *International Covenant on Civil and Political Rights* (1976)(ICCPR) and Art 5(1) and 5(2) of the UN *Declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief* (1981) (Religion Declaration). Regarding Art 14(2) of the UNCRC, Anat Scolnicov comments as follows, "Parental rights are mentioned in regard to freedom of religion. They are not mentioned in articles regarding other rights of the child, such as rights of expression, assembly and privacy. Why this difference? If the reason is the relative immaturity of the child to make his or her own decisions and exercise autonomous choice, this reason applies to many other rights. However, regarding religion, the parents are seen as having a right to shape their child's identity. In this, this right is different from other rights such as freedom of speech or freedom of assembly of the child", Scolnicov "The child's right to religious freedom and formation of identity" *International Journal of Children's Rights* (2007) 15 2. Although Justice Fabricius' views in *Kotze* are dealt with below it is worth mentioning here that he refers to the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* in his support of the child's right to his or her full development 631, but omits to mention that the said *Declaration* expressly provides protection to parents pertaining to the religious upbringing and education of their children, Art 5(1) and 5(2) of the said Declaration, Art 14(2) of the UNCRC and Art 18(4) of the *International Covenant on Civil and Political Rights* (1976)(ICCPR). Regarding Art 14(2) of the UNCRC see Anat Scolnicov's comments as referred to earlier on in this footnote.

20 Ahdar and Leigh *Religious freedom in the liberal state* 205.

21 Ahdar and Leigh 205-207.

22 Ahdar and Leigh 213. Ahdar and Leigh explain that by "independent" is meant "separate from the parents' religious liberty" – the law rests on the supposition that religious convictions of the child is the same as that of the child's parents and that "traditionally, there has never been the slightest suggestion that in a parent-child disagreement over the child's religion, a court would override the parents' wishes and uphold the child's", *ibid*. This is with special reference to the law in the UK (specifically England and Wales) and other "Western jurisdictions and international bodies", Ahdar and Leigh 19.

independent right of religious freedom for the child."[23] Children need to be provided with a freedom to grow into their faith, wherever this may take them. However, this should be exercised under the loving authority of their parents,[24] and requires a fine balance between the parents' teaching of religious belief to the child whilst developing the autonomy of the child's sense of what to believe in. In this regard, McLaughlin comments that the long-term aim for parents is to "place their children in a position where they can autonomously choose to accept or reject their religious faith" and their short-term goal

> "is the development of faith; albeit a faith which is not closed off from future revision or rejection. So a coherent way of characterising the intention of the parents is that they are aiming at *autonomy via faith*."[25]

Ahdar and Leigh come to the conclusion that the law consistently presumes that in general, parents and not the state (in the guise of the judiciary), know what is best for their own children,[26] and add that "the unwitting possibility of judicial bias, especially in such a delicate and controversial subject as religion, cannot be discounted too".[27]

Leigh and Ahdar point out that, for example in England, parents have an equal right to determine a child's religious upbringing and that this parental obligation is maintained following on divorce or separation.[28] However, this should be understood against the background that the courts, in the context of fractured families, should focus primarily on the best interests of the child,[29] and that there should be no substantial threat of harm, whether physical, emotional or psychological, from the relevant religious practice.[30] Complexities arise regarding the position to be taken regarding fractured families, more specifically relating to divorce or separation where parents do not reach consensus on the child's religious upbringing.[31] However, regarding *Kotze*, such complexities are irrelevant, as there was consensus between the parents that their child be raised and educated in the teachings of the Apostolic Church.

From the above it is evident that there is overwhelming legal authority in support of the centrality and autonomy of the family as well as the

23 Ahdar and Leigh 213-215. Ahdar and Leigh also point to the contentiousness lying in especially Art 18(2) of the UNCRC and comment that "a potential constriction upon traditional religious upbringing and a concomitant bolstering of a child's religious rights is certainly one increasingly plausible reading" 216.
24 Ahdar and Leigh 217-218.
25 Ahdar and Leigh 218 (emphasis not added).
26 Ahdar and Leigh 219.
27 Ahdar and Leigh 219.
28 Ahdar and Leigh 221; Art 16(3) of the Universal Declaration of Human Rights 1948; the preamble of the UNCRC 1989.
29 See for example *Re N (A child: religion: Jehovah's Witness)* 2011 EWHC B26 (Fam) 85, Ahdar and Leigh 221.
30 Ahdar and Leigh 233.
31 For more on this see Ahdar and Leigh 221-233.

right of parents to determine and participate in the religious upbringing of their child, even in instances where there has been dissolution of the marriage. It has also been confirmed that the parents' wishes regarding the child's religion enjoys priority regarding the parent-child relationship and that the law consistently supports the view that the parents, and not the state, know what is best for their child. This is similar to views proffered regarding the South African context. The South African judiciary supports the view that it only needs to get involved when there is conflict amongst the parents concerning religious instruction, or where such instruction would seriously harm the interests of the minor child. There is also support for the understanding that the parents' right to freedom of religion includes the right to influence the religious choices of the minor child until such an age has been reached in which a fair amount of maturity has been developed in the child, which should allow for the child to make his/her own choices regarding adherence to whatever belief. Also, if the minor child is substantially affected by the religious upbringing he/she receives, the law is in support that this should merit the protection of the minor child against such adverse consequences. In conclusion, it is therefore confirmed that *Kotze* did not pay heed to the insights presented in the above regarding the law, for example, the rights of parents to agree amongst one another on the raising of their minor child with reference to a specific religion and the autonomy of the family.

3 Religious upbringing and the limits of the law

Views on the parameters of parental authority regarding the upbringing of the child in accordance with the tenets of a certain religion bring into play differing opinions based on points of departure that in themselves are founded upon underlying beliefs. Consequently, what the parameters of the 'best interests of the child' measure should be is connoted to the dictates of some or other underlying belief-generated perspective. An example of this is the emphasis on the exclusive autonomy of the child when it comes to the question whether a child should essentially be educated in accordance with the doctrine of a certain religion (religion as understood in the traditional sense).[32] This is similar to what Ahdar and Leigh refer to as a liberal approach that places the emphasis on individualism that does not prioritise an understanding of the family as an entity in itself.[33] Rather, the family is viewed as being comprised of individuals that form the component parts of the family. These individuals are "united temporarily for their mutual convenience and armed with rights against one another".[34] Ahdar refers to the "liberal,

32 For example, Christianity, Judaeism, Islam and Hinduism.
33 Ahdar and Leigh 207-208.
34 Schneider in Ahdar and Leigh "Moral discourse and the transformation of American Family Law" 208.

secular baseline which maximizes individual choice"[35] (which is inextricably related to the idea of autonomy). This is the understanding that is implied in *Kotze*, namely that the minor child,[36] due to his individual autonomy, should be excluded from a specified religious upbringing that his parents may want to exercise over him after dissolution of the marriage. This differs from the view, for example, in support of preserving the child's right to a godly future and to caution against governmental intrusion that may threaten the attainment of salvation.[37] Accompanying this is the understanding that parents carry the conviction that they are responsible for providing their children with an intellectual and moral framework that accords with the religion that parents ascribe to. Included here is the belief by parents that they will be held accountable for any diversion from this path,[38] and this should also be understood in the context of the seriousness of this to the consciences of such parents.

How convincing is this idea related to the autonomy of the child that is inextricably connected to the idea that the child should have freedom of choice? According to Ingber, "the image of an individual unimpeded by any preconditioning, however, is a fiction. People acquire their values because of innumerable influences upon their lives …"[39] Therefore, reverting to *Kotze*, Justice Fabricius' implied support of the autonomy and free choice of the child misses the fact that ridding the child from religious influences creates a space only to be filled by other influences and this brings into question the true autonomy and free choice that are awarded by excluding the child from religious influences. The

35 Ahdar "The child's right to a godly future" 2002 *International Journal of Children's Rights* (Review Essay) 10 105.

36 It is important to note here the reference to the "minor child" in that the position may differ regarding the religious upbringing of the child who is no longer a minor due to the understanding that, as the child grows older, the child's freedom of choice (autonomy) should broaden pertaining to the child's adherence to a specific belief.

37 Ahdar "The child's right to a godly future" 105. According to Ahdar and Leigh, families are not merely collections of persons; rather, they are institutions created by God and are distinct and valuable in their own right. Therefore, family autonomy should be respected and the office of parenthood encouraged, Ahdar and Leigh 219. Also, the family and the importance of its autonomy are related to the inherent and naturally existing need by parents to preserve their sense of community, which is, in part, engendered by their particular foundational system of belief. The fear of indoctrination is also real from the side of religious parents who are concerned that their child will be indoctrinated in teachings that run contrary to the religious convictions of such parents, Carter *The culture of disbelief. How American law and politics trivialize religious devotion* (1993) 179.

38 Proverbs 22:6 and Ephesians 6:4 in Ahdar and Leigh 212.

39 "Socialization, indoctrination, or the 'pall of orthodoxy': value training in the public schools" 1987 *University of Illinois Law Review* 16. Ingber adds that the awarding of a complete sense of autonomy to the child is inconceivable and that many adults view the child as incapable of determining a proper educational approach, as they lack experience, perspective, and judgment, Ingber 32.

indoctrination that Justice Fabricius warns against in *Kotze* therefore also applies to the concerns by religious believers that their children will be indoctrinated by that which is non-religious. The argument in support of the free choice of the child to the exclusion of any form of religious influence is in itself connoted to a certain conviction on what should be the moral or correct position to take, a position that comes into opposition to other views regarding what the moral or correct position is to be taken from, for example, a Christian point of view.[40]

Here it will be useful to refer to the insights presented by Ingber against the background of 'value neutrality'. Ingber explains that value neutrality is a value bias in support of the liberal philosophy embodied by the scientific method of inquiry.[41] Such inquiry expects from public schools to "foster habits of open-mindedness and critical inquiry" where children need to be exposed to a multitude of various points of view to "develop their full potential or exercise their sovereign right to govern themselves". Value neutrality is therefore partisan to those value systems that are orientated towards the self and therefore in support of self-centeredness.[42] Inger adds that value neutrality advances individual criticism and moral choice as values unto themselves. Consequently, a so-called "value-neutral" education (or upbringing) would clash with perspectives that advocate the necessitating or obliging of specified values such as can be found in many of the traditional and mainstream religions.[43] In other words, Ingber's illustration of the convictions on which so-called 'value neutrality' rests indicates how partisan and enforcing a view that seemingly opposes any form of specified values and the imposition thereof can in fact be. Ingber's critique of a so-called 'value-neutrality' therefore also relates to *Kotze*, where Justice Fabricius proclaims the importance of the inculcation of open-mindedness where children need to be exposed to many other influences beyond that of religion to develop their full potential or exercise their sovereign right to govern themselves. Value neutrality's loyalties to those value systems that are orientated towards the self and therefore in support of self-centeredness are hereby confirmed where the advancement of moral choice is viewed as a value unto itself. Consequently, a so-called value-neutral education (or upbringing) would clash with perspectives that advocate the necessitating or obliging of specified values such as can be found in many of the traditional and mainstream religions.[44] Also, Justice Fabricius states that,

> a The paragraph of the settlement agreement that I refused to make an order of court does not afford the child the freedom that he is entitled to. It is not in his best interests. It, in the context of religious activity, predetermines his future and places him in constraints from which he may never be freed.[45]

40 Carter 179.
41 Ingber 779.
42 Ingber 779.
43 Ingber 779.
44 Ingber 779.

In this regard, Justice Fabricius assumes that activity or influences beyond the religious are absolutely freed from any constraints and future predeterminations. However, this approach is everything but neutral and does not prevent the minor child in becoming constrained by value-laden influences that stem from, for example, non-religious sources that may take the place of the religious teachings and influences that were planned for the minor child.

To support freedom of choice lends itself to various interpretations, and it is not for the judiciary to decide on how this freedom of choice should be understood when addressing the religion in which the minor child should be raised in instances where both parents are in agreement on this. To have the judiciary determine how freedom of choice should be viewed and inextricably connoted to this; how the best interests of the child should be interpreted is to prioritise a foundational belief that limits the freedom of the parents to choose that which according to them is right, moral and in harmony with their consciences. It is not about pitting a specific interpretation by the judiciary of the bounds within which freedom of choice and consequently the best interests of the child[46] should be understood on the one hand, against that which the Court in *Kotze* refers to as "dogma", on the other hand.[47] Rather, it is about making space or including an understanding of the bounds of freedom of choice and of the best interests of the child according to a specific religious belief. Not everyone views individual choice as having primacy over a religious obligation and therefore freedom of religion should be given the freedom to subscribe to and exercise the obligation inextricably connected to many religions that the parents are obligated to raise their child in the faith of their choice. In the words of Hill, "Focusing simply on choice fails to sufficiently recognize what religion means to believers."[48]

Schoeman refers to the relationship between parent and infant as involving an awareness of a union between parent and infant. In this regard, the emphasis is placed on that which is 'intimate' in the sense of 'to bring within' and that the primary meanings of 'intimate' focus on

45 *Kotze v Kotze* 632.

46 The view that accentuates the exclusive autonomy and free choice of the child in the sense of avoiding any form of religious influence constitutes a foundational view that provides a specific interpretation to accompany meanings related to the 'best interests' of the child.

47 *Kotze v Kotze* 629.

48 Hill "Open options education and children's religious upbringing: a critical review of current discussions taking place in the UK parliament" 2019 *Oxford Journal of Law and Religion* 584.

this attribute of being innermost for a person.[49] This serves as a primary reason for adults wanting and having children[50] and from this arises the view that we share ourselves with those with whom we are intimate and that this sharing takes place by all within the relationship.[51] It is through intimate relationships, such as the parent-child relationship, explains Schoeman, that meaning is gained that is central to defining who one is.[52] This intimate relationship and shared union consequently necessitate the required sensitivity pertaining to state intervention.[53] Schoeman connects the autonomy that should be enjoyed by the intimate relationship and union between parent and infant child to a moral claim that is as important as any other that can be envisioned. Such a relationship can only be intervened upon by society or the civil authorities, where a special cause has been established.[54] Schoeman comments that,

A religion lives and grows by projecting itself over time, by working in the present to connect the future with the past. For most religions, an important tool of that projection is the family itself. If I am unable, as a parent, to protect my children from official interference in the process of that dynamic projection – the process of the formation of their faith – then the state is, in a real and frightening way, taking upon itself the authority to decide which religions should be allowed to survive and in what forms.[55]

Also, Ahdar and Leigh comment, with the focus on Christianity as an example, that the family is viewed as "prior to any recognition by public authority,[56] and this public authority has an obligation to recognize it".[57] It is important to take due cognisance of Bonhoeffer's warning against the state aiming at standardising its citizens in a sense of "directing and shaping the coming generation". To do so, says Bonhoeffer, "constitutes a disastrous interference in the natural order of the world".[58] For the

49 Schoeman "Rights of children, rights of parents, and the moral basis of the family" 1980 *Ethics* 91 1 8.
50 Schoeman 8, citing Hoffman's "The value of children to parents – a national sample survey".
51 Schoeman 8.
52 Schoeman 14.
53 Schoeman 14, 17.
54 Schoeman 17.
55 Schoeman 12.
56 Garnett, "Taking *Pierce* seriously: the family, religious education, and harm to children" 2000 *Notre Dame Law Review* 76 145. Patrick Brennan refers to the family "as the primary society in which humans find both themselves and the possibility of their fulfillment", Brennan "The 'right' of religious liberty of the child: its meaning, measure, and justification" 2006 *Emory International Law Review* 20 152. In this regard, says Brennan, 'society' constitutes a distinct "group person" with its own "identity, integrity, and function" 152.
57 Catechism of the Catholic Church and Carter "Religious Freedom" in Ahdar and Leigh 211. Ahdar and Leigh note that a referral to 'a Christian view' should not necessarily mean 'the Christian conception of the family', as the 'Christian' label is as broad as the liberal one 210.

judiciary to determine that parents, upon dissolution of the marriage, may not stipulate in a deed settlement upon dissolution of the marriage, that they choose to raise their child in accordance with a specific religion, constitutes indoctrination over society regarding the parameters of parental authority. Garnett comments that,

> "What reason is there for thinking that, in contested matters of education, values, and faith, a child's dignity is more respected, and her autonomy better served, when her 'best interests' in those matters are determined by the State, rather than by her family?"[59]

Therefore, even though the High Court, as was emphasised in *Kotze*, serves "as upper guardian in matters involving the best interests of the child" and that such a Court "has extremely wide powers in establishing what such best interests are"[60] this should not mean that the judiciary should have the final say in matters deeply related to underlying beliefs that may be accompanied by different forms of meaning.

Regarding the European Court of Human Rights' (ECHR) jurisprudence on Protocol 1 Article 2[61] of the European Convention on Human Rights, Hill observes that to understand the rationale of the Court when determining the boundaries of the parental right and what the State may permissibly do where the parental right is engaged, is recognition of the underlying principle of pluralism. In this regard, pluralism is viewed as inseparable from the right to freedom of religion, and that the said Court has consistently maintained that pluralism prohibits indoctrination by the State through education.[62] Linking up to the argument earlier that the State can also be seen as indoctrinating society regarding views on the autonomy and free choice of the individual, it is argued that disallowing parents on dissolution of marriage to include a stipulation in a deed settlement that the minor child be raised in a particular religion, should be understood as countering this idea related to pluralism. According to Galston, what is required is a version of liberalism that gives diversity its due[63] – the liberal state must allow the fullest possible scope for diversity.[64] Against this background, the promotion of personal

58 Bonhoeffer's *Ethics* in Carter 2000 *University of Detroit Mercy Law Review* 78 8.

59 Garnett "Taking *Pierce* seriously: the family, religious education, and harm to children" 133.

60 *Kotze v Kotze* 630.

61 "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

62 Hill "Open options education and children's religious upbringing: A critical review of current discussions taking place in the UK parliament" 585-586.

63 Galston "Two concepts of liberalism" 1995 *Ethics* 105 3 524.

64 Galston 525. Hill comments that: "Respect for pluralism requires protection of the transgenerational transfer of religious belief from parent to child and those beliefs do not exclude conservative variants. Nor does it assume such variants as necessarily reflecting a closed mind that might limit access to a sufficient number of choice options, whatever those might be", Hill "Open

autonomy, says Galston, is not among the shared liberal purposes – "autonomy is one possible mode of existence in liberal societies – one among many others".[65] Therefore, those who subscribe to autonomy need to recognise the need for respectful coexistence with those who do not prioritise autonomy.[66] This implies therefore that support for the free choice that a minor child should have, and therefore that any form of religious upbringing should be avoided on dissolution of the marriage where the parents choose to have the minor child raised in accordance with the tenets of a specified religion, should not be applied across the board. Not everyone in a plural society agrees on choice and autonomy of the minor child as the ultimate measure.

What should be understood specifically regarding the parameters of the best interest of the child; the meaning of family and the parameters of freedom of choice, is inextricably fused with foundational beliefs, whether religious or non-religious. To prioritise, for example, the choice or autonomy of the minor child, an understanding that rests on some or other foundational belief comes into opposition to the prioritisation by parents of their conviction that they are responsible for the moral upbringing of their minor child in accordance with a specific religion. It is a popular view held in liberal democracies that the autonomy of the person (and therefore of the child) as well as a so-called neutral approach by the judiciary to religion be upheld. However, the irony is that where the judiciary prohibits parents from explicitly stating in a settlement agreement on dissolution of their marriage that they raise their child in accordance with a specific religion, some other foundational belief (or beliefs) forms the foundation of the child's upbringing, which in turn constitutes everything but a neutral approach. The so-called child's autonomy now finds itself compromised by, for example, non-religious influences, which in turn is far from being neutral in the sense of one belief being prioritised by another.[67] Those who support parental authority regarding the religious upbringing of the minor child also find support in the insight that the family constitutes a closely knitted entity that shares with those who are intimately involved within such an entity, this being a convincing reason for adults wanting children in the first place. That the family constitutes a tightly knitted unit that shares with those who are intimately involved within such a unit applies not only to

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options education and children's religious upbringing: a critical review of current discussions taking place in the UK parliament" *OJLR* 570.

65 Galston 525. Galston explains autonomy in this regard as that which prefers "self-direction over external determination" and which views "the examined life as superior to reliance on tradition or faith" 525.

66 Galston 525.

67 Ingber, "Socialization, indoctrination, or the 'pall of orthodoxy': value training in the public schools" 15-95, for an interesting take on the dilemma for liberalism in staying true to (i) its support of the autonomy of the child when viewed as capable of choosing among values without contraint from others or from the state; (ii) its accounting for the influences necessary for choosing values while simultaneously observing the limitation that the requirement of neutrality places on attempts to educate children.

parents who wish to raise their minor child in accordance with the tenets of a specific religion, but also to parents who ascribe to a non-religious upbringing for their minor child, an example being an atheist couple. In addition, views on the family precede the law. For the parents to be denied raising their minor child in accordance with the precepts of a specific religion opens a space for the introduction of other foundational views on the family, the best interests of the child and the degree of choice to be allowed. For the judiciary (or any other entity that exercises some or other form of public authority) to dictate to families how to live their lives in the context of the raising of children within the family structure in accordance with foundational beliefs related to purpose in life and matters of moral importance constitutes a gross violation of inherent foundational freedoms, such as the right to freedom of religion, conscience and human dignity. Such violation would in turn be an impediment to the furtherance of diversity in democratic societies.

4 Conclusion

In *Kotze*, Justice Fabricius' declining of the granting of a clause in a divorce order pertaining to an agreement between the parents of a minor child that they undertake to educate their child in the teachings of the Apostolic Church is supportive towards the importance of the autonomy of the minor child. The importance of such autonomy is accompanied by the view that the minor child should be protected from being indoctrinated in the ways of a specific religion. This comes down to a specific understanding expressed by the Court regarding the best interests of the minor child, the parameters of choice and the meaning of family. In *Kotze* is the negation of the parents' freedom of choice as to what religion their child is to be raised in when it comes to a formal agreement between both parents upon divorce that they commit towards the raising of their minor child in the teachings of a specified religion.

It has been argued in this article that *Kotze* counters the protection of the right to freedom of religion, conscience and human dignity in that it neglects to take due cognisance of the reality that meaning, of which religious beliefs are also a source, should enjoy the necessary protection in a society that encourages the flourishing of diversity. It is not for the judiciary (or any other authority beyond that of parenthood) to dictate to society as to which foundational meanings should be attached to the inherent parental responsibility of raising a child. Similarly, upon divorce, parents should be allowed to agree by means of a deed settlement that they undertake to educate their minor child in the teachings of, for example, atheism, and it is not for the judiciary to, as a general rule, prescribe to the parents what the better route should be for such upbringing. What if parents upon divorce agree by means of a clause in a deed settlement that their minor child be raised in specified tenets that prohibit any form of religious influence? Should the judiciary not then be obliged to, in following the rationale in *Kotze*, deny the

inclusion of such a clause due to the partisan indoctrination that will consequently arise? If the answer to this is not in the affirmative, then what makes non-religious convictions more important than religious convictions?

To prohibit parents upon divorce to freely solidify a formal agreement between one another that their minor child be raised in accordance with the tenets of a specific religion, comes into stark contrast to what Justice Chaskalson states, in *S v Lawrence*,[68] quoted from *R. v Big M Drug Mart Ltd.*,[69] as being the essence of the concept of freedom of religion, namely

> "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."[70]

George comments that religion pertains to ultimate matters; religion representing our efforts to bring ourselves into a "relationship of friendship with transcendent sources of meaning and value". Religion assists us to view our lives as a whole and forms an essential component of our flourishing as human beings.[71] The Constitution of South Africa confirms the importance of the right to freedom of all beliefs, whether religious or non-religious,[72] and the Constitutional Court of South Africa has confirmed the importance of religious beliefs.[73] It is foundational belief, whether religious or non-religious, that determines and nurtures

68 1997 (4) SA 1176 (CC).
69 *R. v Big M Drug Mart Ltd.* para 92.
70 *S v Lawrence*, para 92.
71 George *Conscience and its enemies. Confronting the dogmas of liberal secularism* (2013) 118, 123. In this regard, George refers to Finnis *Natural law and natural rights*. Also see George 91.
72 See s 15(1).
73 See for example, *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36. Further confirmation of the importance of religious freedoms for the South African context is the *South African Charter of Religious Rights and Freedoms* that was drafted and subsequently unveiled in 2008 (which is the first charter of its kind in the world). In 2012, official recognition was petitioned to the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities, a Chapter 9 Institution, and this document was drafted by representative religious organisations and individuals with the purpose of defining the freedoms, rights and responsibilities of the citizens of South Africa and their relationship with the State regarding their various religious beliefs. In this regard, see Benson, "Religious interfaith work in Canada and South Africa with particular focus on the drafting of a South African Charter of Religious Rights and Freedoms" 2013 *HTS Teologiese Studies/Theological Studies* 69 1 1-13. Included in this Charter is the wording that: "Article 7: Right to Educate Children in Accord with the Religion and Philosophy of the Parents: This article deals with education and states that every person has the right to be educated or to educate their children, or have them educated in accordance with their religious or philosophical convictions …", *South African Charter of Religious Rights and Freedoms*, SA Council for Religious Rights and Freedoms (signed 21 October 2010). The *Charter* enjoys the support of a number of religions, denominations as well as organisations

meanings connoted to freedom, harm, human dignity, the best interests of the child, choice and family. It is for the parents of the minor child and not the judiciary (or any other public or other authority) to instil in the minor child foundational beliefs that may come into contrast to those meanings reflected in other underlying beliefs.

This right to freedom of religion related to the parents of a minor child is further bolstered by the inherent nature of the family as an entity where intimacy and sharing take place and where the purpose behind parenthood is the actualisation of such intimacy and sharing. This intimacy and sharing as the actualising of parenthood naturally include bringing children up in accordance with foundational views on the meaning and purpose of life and, closely related to this, the measure according to which existence should be play out. Inextricably connected to this is the importance of the protection of freedom of religion, conscience and human dignity. As is the case with many freedoms, there are limitations, such as where a practice substantively violates the rights of others, or where the avoidance of serious harm should be prioritised. To view the religious upbringing of a minor child as a form of indoctrination as was expressed by Justice Fabricius in *Kotze*,[74] is reflective of a biased approach towards religion; one that lacks informed and convincing grounding and that fails to grasp that indoctrination of beliefs also applies to non-religious beliefs (and their accompanying take on what is moral and immoral, right and wrong). The view taken by *Kotze* also counters the furtherance of diversity.

representing specified faiths or religions in South Africa. The *Charter* is also relied upon in much scholarship related to the right to freedom of religion in South Africa.

74 Of interest is that in the approximately eighteen years since *Kotze*, the position taken by *Kotze* has not been challenged regarding the negation of a formal agreement as part of a court order related to parents who, upon divorce, agree to have their child raised in the teachings of a specific religion. Upon divorce parents may find it more convenient to, without making it part of a deed settlement that the Court should convert into a court order, simply have their minor child raised in accordance with the teachings of a religion. Although a court order may seem to be a more effective remedy for the parent who wants the original agreement maintained it is, however, not the purpose of this article to delve into questions related to what the most effective remedy would be in instances where one of the parents deviates from such an agreement. There may also be differing views on what matters should be included in court orders regarding deed settlements – in other words, should it only be limited to matters of, for example, custody, maintenance and specified proprietary rights or should the scope of matters be broader? Also, even though Justice Fabricius refused to make the stipulation of the deed settlement related to the religious upbringing of the minor child part of the court order, the parents could still continue to raise their minor child in the teachings of a specific religion. Having said all of this, this article rather focuses on a critique of *Kotze* in the context of the parents' right to freedom of religion.