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Focus: The foundations and future of law, religion and human rights in Africa

Guest-edited by
Professor Dr Johan D van der Vyver
and
Dr M Christian Green

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Editorial

The main feature of this issue of the *African Human Rights Law Journal* is the focus on a subject of great global controversy and debate: law, religion and human rights in Africa. Although the *Journal* generally contains contributions of a general nature, it has in the past devoted parts of its contents to specific issues: commemorating the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2006 Vol 6 No 1) and the entry into force of the African Charter on Human and Peoples' Rights (2006 Vol 6 No 2).

However, the focus in this issue differs in that it presents the first example of collaboration between the *Journal* and outside experts acting as guest editors. These guest editors are Professor Johan van der Vyver and Christian Green from the Center for the Study of Law and Religion (CSLR) at Emory University School of Law, in the United States. Earlier this year, CSLR organised a conference on 'Law, religion and human rights in Africa', which took place in Durban, South Africa, with financial support of the Henry Luce Foundation. The 'focus' feature contains papers delivered during the conference. Reflecting both the debates during the conference and providing an overview of the papers, the guest editors of the 'focus' section prepared a comprehensive Introduction.

We are thankful to the guest editors for the quality and variety of the papers and for their professionalism in ensuring peer review and follow-up with authors. Without a doubt, these papers make a significant contribution to important and ongoing debates. Thus far, the issues under discussion have not been explored sufficiently from an African perspective. The 'focus' section in this issue of the *Journal* succeeds in filling this gap.

This issue of the *Journal* contains a few other contributions, aimed at issues of importance in specific African countries. As in many previous issues, recent developments pertaining to the African Committee of Experts on the Rights of the Child are also reviewed. It is encouraging that the Committee is now starting to examine state reports. Hopefully the consideration of long-pending communications will follow soon. In line with our aim to include more book reviews, this issue sees three reviews of recently published books.

One of the most significant developments in the African human rights landscape since the publication of the last issue of the *Journal* is the

adoption of the Protocol and Statute of the African Court of Justice and Human Rights, in July 2008. Once this Protocol has been ratified by 15 AU member states, the African Court of Justice and Human Rights will replace the African Court on Human and Peoples' Rights. The African Human Rights Court has also now adopted 'Interim Rules of Procedure', and is ready to entertain cases. So far, no cases are pending before the Court. This state of affairs seems to be as much due to the inertia of the African Human Rights Court, as to that of African civil society and lawyers. As the institution best placed to approach the African Human Rights Court with a first case, the African Commission on Human and Peoples' Rights should develop a clear strategy in this regard.

The editors convey their thanks to the following independent reviewers, who so generously assisted in ensuring the quality of the *Journal*: Danie Brand, Takele Bulto, Christian Green, Sabelo Gumedze, Magnus Killander, Fikremarkos Merso, Ann Skelton and Johan van der Vyver.

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The *African Human Rights Law Journal* publishes contributions dealing with human rights, with a special focus on topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in May and November.

The *Journal* is included in the International Bibliography of the Social Sciences (IBSS) and is accredited by the South African Department of Education.

A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy

*Johann van der Westhuizen**

Judge of the Constitutional Court of South Africa; Board member, Centre for Human Rights and Extraordinary Professor, Faculty of Law, University of Pretoria, South Africa

Summary

This contribution is a reworked version of a lecture presented at the Faculty of Law, University of Pretoria, commemorating the University's centenary celebrations. Contrasting the pre- and post-constitutional legal landscapes, Justice Van der Westhuizen emphasises that political meddling in judicial affairs, previously left in a legal void, is now very clearly circumscribed by the constitutionally-entrenched principles of separation of powers and independence of the judiciary. Justice Van der Westhuizen proceeds to analyse aspects of the relationship between the courts, on the one hand, and the government, the legal profession, universities, the media and civil society, on the other hand. The relationship between courts and the government is fraught with tension, but so far the executive has readily complied with almost all court decisions, and the court has steered a cautious course when it comes to interference in the legislature. The importance of the legal profession, both inside and outside courtrooms, is underlined, and the crucial role of universities in fostering free speech is emphasised in the contribution. Turning to the media, Justice Van der Westhuizen acknowledges the importance of an informed public, and

* BA, LLB, LLD (Pretoria); vanderwesthuizen@concourt.org.za. This is a reworked version of a lecture presented as part of the Prestige Lecture Series of the Faculty of law, University of Pretoria, on 17 September 2008.

responsible reporting. He takes the media to task for some irresponsible and factually incorrect reporting. In conclusion, the author emphasises the important role of civil society and of continuous debate, analysis and criticism in the attainment of 'our constitutional project'.

1 Introduction

In the early 1970s, when I studied law at the University of Pretoria, maverick law professor Barend van Niekerk, who during his relatively short lifetime actively campaigned against apartheid, against capital punishment, against the treatment of Red Army Faction members by the West German government, for the retention of the historic Durban station building and for or against a range of other causes, addressed a public meeting in Durban. The apartheid regime was at the height of its power, supported by its draconian system of so-called security laws. Section 6 of the Terrorism Act of 1967 empowered the police to detain, without trial for virtually indefinite periods, persons suspected of being in possession of information about so-called terrorism or terrorists. The purported purpose was to gather information about terrorists. Detainees were held in solitary confinement until they provided information to the satisfaction of their interrogators and could testify against accused in terrorism trials.

In his address, Professor Van Niekerk criticised section 6 and urged courts not to admit evidence given by witnesses detained in terms of the provision, because they were likely to have been tortured or otherwise coerced and their testimony would therefore be highly suspect. He offered an activist academic opinion, nothing more; he made no threats to die, kill or crush. A terrorism trial was underway in Pietermaritzburg, not far from there. The professor was charged with contempt of court. Under the *sub judice* rule, it was a criminal offence to attempt to influence a court. Soon afterwards, the Minister of Justice and Police spoke at a police passing-out parade in Pretoria. He referred to allegations that section 6 detainees were tortured and that their evidence would be suspect, but emphatically assured the public that this was not the case. Again a terrorism trial was underway. It was apartheid South Africa. The Minister was not charged. In a delightful piece in the *South African Law Journal*,¹ Van Niekerk and Tony Mathews questioned the objectivity and independence of the prosecuting authority — the Attorney-General at the time — and complained that Van Niekerk was selectively targeted for prosecution, for political reasons. Why was the

¹ AS Mathews & B van Niekerk 'Eulogising the Attorney-General: A qualified dissent' (1972) 89 *South African Law Journal* 292. See also J Dugard 'Prosecuting a minister for contempt of court' (1972) 89 *South African Law Journal* 364. Ellison Kahn writes movingly of Van Niekerk's life in his 1981 tribute 'In memoriam: Barend van Niekerk' (1981) 98 *South African Law Journal* 402.

Minister not also charged with contempt of court under the *sub judice* rule? After all, they reasoned, the Minister should know far better than a mere professor whether detainees are tortured or not and presumably has a much more persuasive influence on courts!

At that time, most law teachers and students at my university probably thought, however, that not only Professor Van Niekerk, but also section 6 detainees, got what they deserved.

From this glimpse into history, two things are noticeable. In pre-constitutional South Africa, attempts to influence courts in their judgments were met with the force of the criminal law – well, at least sometimes, perhaps depending on the position of the perpetrator. Hence, allegations of politically motivated selective prosecution did occur. Enough of the professor's history, though.² Many more people were subjected to prosecution for political reasons, with much more serious consequences.

We are now living in a constitutional democracy, under a written Constitution which guarantees the independence of courts, requires the prosecuting authority to act without fear, favour or prejudice and protects free expression as a basic right. And, of course, the Faculty of Law of the University of Pretoria is probably the leading human rights champion on the African continent.

This contribution contains a number of fairly loosely-linked reflections or notes on the role of various components of society in our democratic order. I shall briefly touch on aspects of the concept of constitutional democracy and the position and role of the courts in our Constitution, against the background of our history, whereafter I shall refer to the role of government, the legal profession, universities, the media and civil society, including the right and duty to report, analyse, debate, comment and criticise.

I do not claim to represent the Constitutional Court, or the opinion of any of my colleagues on the Court. Naturally, I am unable to express views on matters pending or expected to be brought before any court or other tribunal, including the court of which I am a member. My remarks are intended to be taken on the level of principle.

2 Historical dimension

A reminder of the role of law and the courts in apartheid South Africa may provide a useful perspective on the present situation.

In the absence of a constitution as supreme law, a sovereign but undemocratically elected parliament enacted laws that could not be tested by courts. Little needs to be said about the massive violation

² The background and relevant portions of the address are reproduced in the judgment in that case, reported as *S v Van Niekerk* 1972 3 SA 711 (A). Also see J Dugard 'Judges, academics and unjust laws: The Van Niekerk contempt case' (1972) 89 *South African Law Journal* 271.

of almost all recognised human rights that apartheid was. The policy and practice of apartheid was embodied in laws. Apartheid was lawful and the legal order became an apartheid order. Apartheid laws were enforced by the courts and practices and circumstances directly or indirectly created by apartheid were accepted by the courts as normal, right and the *boni mores* of our society.

Law was a tool in the hands of the apartheid regime. Judges and other lawyers applied and practised apartheid laws because they agreed with them, because they were so much part of the system that they never thought of questioning them, because they benefited from them, or because they overcame their discomfort with them by arguing that the law was the law, which their task was to accept and apply. The legal system's lack of legitimacy in the eyes of very many people reached crisis proportions. Anti-apartheid lawyers and accused persons used the courts as strategic sites of struggle and utilised the space created by court procedures to fight political battles, because no other forum or arena was available for lawful political activity.

Thus, a cynical instrumentalist attitude to law and the courts prevailed amongst the legislature, the executive, the judiciary, lawyers and litigants, at least in areas with political implications. In fact, it became increasingly difficult to isolate non-political areas of law from the politics of apartheid. Even those accused of common crimes came to be seen as victims of an apartheid or class-based criminal justice system and many an undefended accused suffered as a result of poverty and lack of understanding of the system. As a result of the apartheid system, most black people simply did not feature in areas of commercial law which facially appeared to be free of politics.

The role of judges under the apartheid order became the focus of much debate and views expressed by human rights lawyers ranged from statements that an appointment to the bench should be refused, that judges should resign, to arguments that judges should as activists refuse to apply blatantly unfair laws, or at least utilise spaces for discretion to rule in favour of human rights. There was also the view that judges were simply obliged to apply laws on the statute book and were not to blame for their unfair nature.³ In the absence of a constitution as supreme law, the dilemma was of course where to find any concrete or more or less objective higher law or guiding principle to override unfair laws — in natural law, international law, the principles of common law, the principles of natural justice, or simply one's own subjective views of fairness and justice.

³ See eg J Dugard 'Judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181; C Forsythe 'Recent cases: Recent judicial attitudes to free speech' (1977) 94 *South African Law Journal* 19; R Wacks 'Judge and injustice' (1984) 101 (1984) 226; J Dugard 'Should judges resign? A reply to Professor Wacks' (1984) 101 *South African Law Journal* 286; J Wacks 'Judging judges: A brief rejoinder to Professor Dugard' (1984) 101 *South African Law Journal* 295; H Corder *Judges at work* (1984); A van Blerk 'The irony of labels' (1982) 99 *South African Law Journal* 365.

The respect for the law and courts that did exist was power-based, rather than value-based, as far as the majority of the population was concerned.

3 The present constitutional order

Our present situation is very different. The Constitution of 1996 resulted from the struggle for democracy and was democratically agreed to by the representatives of the vast majority of people.

Section 2 of the Constitution states unequivocally that the Constitution is the supreme law of our land, that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. But we have more than just a set of supreme legal rules. In section 1 we find the founding values of our sovereign democratic state: human dignity, equality, non-racialism and non-sexism, the advancement of human rights and freedoms, a multi-party system of democratic government to ensure accountability, responsiveness and openness, and again supremacy of the Constitution and the rule of law.

Chapter 2 contains a detailed Bill of Rights as the cornerstone of our democracy.⁴ In it the democratic values of human dignity, equality and freedom are affirmed more than once⁵ and courts, tribunals and fora are instructed to promote the spirit, purport and objects of the Bill of Rights.⁶ The Bill of Rights includes so-called socio-economic rights (for example to housing, healthcare, food, water, social security and education)⁷ next to what has been called first generation rights like human dignity, life, equality, freedom of expression and, of course, the right to vote,⁸ as well as environmental rights.⁹

The structure and wording of the Constitution embody a separation of powers. The legislative authority is vested in parliament (in the national sphere of government), provincial legislatures (in the provincial sphere) and in municipal councils (in the local sphere).¹⁰ In the national sphere, the executive authority is vested in the President as head of the national executive and exercised together with other members of the cabinet.¹¹ In the provincial sphere, the same applies to the Premier and executive committee.¹²

⁴ Sec 7(1). Also see the Preamble.

⁵ See secs 7(1), 36(1) & 39(1).

⁶ Secs 39(1)(a) & (2).

⁷ Secs 26, 27 & 29.

⁸ See secs 9, 10, 11, 12, 16 & 19.

⁹ Sec 24.

¹⁰ Secs 43, 44, 104 & 156.

¹¹ Secs 83 & 85.

¹² Sec 125. As to local government, see sec 151(2).

Section 165 of the Constitution deals with the judicial authority. In a recent address,¹³ former Chief Justice Arthur Chaskalson emphasised the explicit nature of this provision. Section 165(1) states that the judicial authority of the Republic is vested in the courts — and only in the courts; not in the government, any organ of civil society, or any disgruntled litigant.

The philosophical and historical foundations of the concept of a constitutional democracy cannot be adequately explored in this paper. To some extent, the constitutional project of our and other societies represents the latest in a series of answers to questions emanating from Hobbes, Locke and Montesquieu and ran through the creation of the Constitution of the United States of America and the jurisprudence of the US Supreme Court in *Marbury v Madison* and later cases.

During the run-up to our constitutional negotiations, human rights activists and intellectuals referred to a constitution as the autobiography of a nation, or the mirror in which a nation views itself, or a window to a nation's soul. Our Constitution has been characterised as egalitarian, post-liberal, social-democratic and a transformative document. Over the past decade, Karl Klare's concept of transformative constitutionalism has found considerable resonance in our academic literature, in jurisprudence and in civil society campaigns. The Chief Justice has referred to it as a 'permanent ideal'.¹⁴

By transformative constitutionalism, Klare meant:

a long-term project constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'evolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multi-cultural community, governed thorough participatory, democratic processes in both the polity and large portions of what we now call the 'private' sphere.

¹³ 'Comments made at the Gordon Institute for Business Science Forum on the independence of the judiciary' 20 August 2008.

¹⁴ See KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 and a recent paper by S Liebenberg on 'The future of "transformative constitutionalism" in South Africa'. As to the ongoing debate on the Constitution and decisions of the Constitutional Court, see eg I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138; S Woolman 'The amazing, vanishing bill of rights' (2008) *South African Journal on Human Rights* 762. Also see W Waluchow 'Constitutions as living trees: An idiot defends' (2005) XVIII *Canadian Journal of Law and Jurisprudence* 207. I was also privileged to be able to look at the following soon to be published highly instructive pieces: F Michaelman 'On the uses of interpretive "charity"' (a response to Woolman); T Roux 'Principle and pragmatism on the Constitution of South Africa'; T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (to be published).

Sunstein has referred to our Constitution as ‘the world’s leading example of a transformative constitution’ and even ‘the most admirable constitution in the history of the world’ and to ‘the astonishing success of constitutional design in South Africa’.¹⁵

The Constitution also embodies protection against the abuse of power, which I believe to be perhaps the most central pathology of our society at this stage. An attitude of ‘I do it because I can’ underlies the conduct of the school ground bully, the aggressively reckless driver, rapists and other criminals, the boss who fires employees at will and some others higher up in our economic, social and political hierarchy.

Therefore the Constitution is more than just the highest law in a technical sense. The rule of law has also been said to be an idea or attitude, rather than a rule. Our constitutional project requires a massive joint effort from institutions, leaders, civil society and individuals; hence my very wide topic. The role of the courts in it is limited, but central and crucially important.

4 Courts

The functions of the courts are clearly set out in the Constitution. Those of the Constitutional Court, for example, include to take decisions on disputes between organs of state and decisions on the constitutionality of legislation and, under certain circumstances, bills, the constitutionality of any amendment to the Constitution and the question whether parliament or the President has failed to fulfill a constitutional obligation.¹⁶ The Constitutional Court is the highest court in all constitutional matters and thus decides appeals from other courts in disputes involving natural and juristic persons and the state, including criminal matters, provided that the matter is a constitutional matter or an issue connected with a decision on a constitutional matter.¹⁷

The Constitution makes it clear that courts are independent and subject only to the Constitution and the law.¹⁸ All persons to whom and organs of state to which a court order or decision applies are bound by it.¹⁹

Courts must apply the Constitution and the law impartially and without fear, favour or prejudice.²⁰ When taking office, judges swear or solemnly affirm to uphold and protect the Constitution and the human rights entrenched in it and to administer justice to all persons alike,

¹⁵ See CR Sunstein *Designing democracy: What constitutions do* (2002), eg 50 68 224 261.

¹⁶ Sec 167.

¹⁷ Sec 167(3).

¹⁸ Sec 165(2).

¹⁹ Sec 165(5).

²⁰ Sec 165(2).

without fear, favour or prejudice, in accordance with the Constitution and the law.²¹

On the independence of the courts, the Constitution is emphatic. Section 165(3) states that no person or organ of state may interfere with the functioning of the courts.

No other branch of government or institution is afforded the same level of independence by the Constitution. The state institutions supporting constitutional democracy provided for in chapter 9 of the Constitution are stated to be 'independent', 'subject only to the Constitution and the law' and they must 'perform their function without fear, favour or prejudice'. Non-interference is also required. However, they are accountable to the National Assembly, to which they must report annually on their activities and the performance of their functions.²² The Constitution requires national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice, but states that the cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.²³ The legislature and executive are obviously accountable to the electorate.

The independence of courts is internationally required for any democracy. The international standards, endorsed by the resolutions of the General Assembly of the United Nations (UN) in 1985, include two principles:

- (1) The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution of the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
- (2) The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

On the requirement of non-interference, the Constitutional Court on two occasions²⁴ cited with approval the words of Chief Justice Dickson, former Chief Justice of Canada:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure groups, individuals or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or

²¹ See the oath or solemn affirmation of judicial officers in Item 6 of Schedule 2 of the Constitution.

²² Sec 181.

²³ Secs 179(4) & (6).

²⁴ *De Lange NO v Smuts & Others* 1998 3 SA 785 (CC); 1998 7 BCLR 779 (CC) para 70; *Van Rooyen & Others v S & Others (General Council of the Bar of South African Intervening)* 2002 5 SA 246 (CC); 2002 8 BCLR 810 (CC) para 19, citing *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) 491.

her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

The procedure for the appointment and removal of judges embodied in the Constitution provides security of tenure and safeguards independence. Judges are not elected. They can be removed from office only by way of a fairly cumbersome procedure in the case of incapacity, gross incompetence or gross misconduct. They should not have to worry about income or future job offers.

Independence does not first have to be 'earned' by a court, as I once with astonishment heard a senior lawyer say at a conference. The Constitution demands it. If a court does not have it, it cannot function as a court. After all, no one has to earn the right to life, human dignity and equality. The Constitution guarantees it as a given.

The independence of courts carries with it a huge responsibility on the judiciary, though.

The first aspect of this responsibility for courts is to value, assert and protect their own independence. The judiciary must resist all attempts at interference, whether in the direct and corrupt form of bribes, or instructions or requests from the politically powerful, or favours from or for the financially powerful, or the much more difficult to detect, even in oneself, fear for rejection, or desire for popularity. Taken seriously, the constitutional imperative to act without fear, favour or prejudice may sometimes be more difficult to adhere to than at first glance appears. Judges are human, with human emotions, including fear and the need for acceptance.

Undue influence on a court does not always have to be exercised by way of concrete interference. Judges may in some situations be so much part of a political, social or cultural system that there is no need for anyone to make a telephone call to tell them how to decide; they know what is expected in the circumstances; their moral and perhaps even intellectual dependence on the system demands them to act in a certain way. They may not realise that their independence is compromised and believe that they act fairly and even fearlessly. This might have been the case with many judges during the apartheid era.

Whereas independence does not have to be earned by a court, legitimacy — or at least some forms of legitimacy — may have to be earned by a court's treatment of litigants and the public and of course its judgments, which have to be well-reasoned and properly grounded in the Constitution and the law.²⁵ The saying that justice must not only be done, but must be seen to be done, is important for legitimacy. The

²⁵ On the meanings of legitimacy, and the legitimacy of the Constitutional Court, see eg RH Fallon 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787; JL Gibson 'The evolving legitimacy of the South African Constitutional Court' in F du Bois & A du Bois-Pedain (eds) *Justice and reconciliation in post-apartheid South Africa* (2008) 229.

public must also know and see that courts are independent and will not be interfered with.

Another responsibility is to act with restraint, or constitutionally appropriate judicial modesty. The issue of restraint is not uncomplicated and has been the subject of intense and extremely instructive academic debate.²⁶ In addition to simply resolving disputes between litigants, courts — and the Constitutional Court in particular — have to pronounce on the validity of legislation and executive conduct and to guard over our Constitution, its democratic structures, and the values and rights in it, build a constitutional jurisprudence and human rights culture, protect the weak against abuse of power, facilitate access to justice for those who most need it and often cannot afford it and generally strive to further our constitutional project. And it is often said that constitutional law is necessarily ‘political’, or even that ‘law is politics’.

However, the first aspect of restraint that comes to mind is to respect the constitutionally entrenched principle of the separation of powers. For a court to unduly interfere in the functions of the legislature or executive is not only constitutionally wrong, but could put a young democracy in grave danger. This has been recognised in judgments of the Constitutional Court.²⁷

More controversial than restraint out of respect for the separation of powers is how possible ideological, political and social inclinations of judges should be handled. In the previous century, the realists pointed out the undeniable significance of these factors; the critical legal studies movement developed it, and apartheid jurisprudence proved it. Judges have to be representative of and not out of touch with the community in which they operate, because the Constitution and law is there for people. Yet, they must be independent and act without fear, favour or prejudice.

Academic views that have been expressed range from requiring judges to up front deal with and even disclose their political and other inclinations, to arguing that they must put aside and not mention these, because the very difference between the judicial and other branches lies in the distance that a court should keep from politics. Perhaps one needs a finer distinction here. Acknowledging that constitutional jurisprudence is ‘political’, or even that ‘law is politics’ in the critical legal studies sense of the term is not to say that courts must play or interfere in politics. There may be a difference between ‘the political’ or ‘community’ or ‘pluralism’, and simply practising ‘politics’ — if I understand Hannah Arendt correctly.²⁸ The first implies an appreciation of the diversity of human beings and the need for space to live and think and debate. This is what the Constitution recognises and protects

²⁶ See eg some of the sources referred to in n 14 above.

²⁷ Eg *S v Dodo* 2001 3 SA 382 (CC) para 7; *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) paras 36 & 244.

²⁸ H Arendt *The human condition* (1958); H Arendt *The origins of totalitarianism* (1966).

and courts have to be aware of it.²⁹ Politics is a much narrower concept with instrumentalist connotations.

A practical approach may simply be to recognise that all law deals with people and therefore has 'political' dimensions, and to further recognise that judges are human beings and the products of their class, education and ideological and other preferences. Judges must then try to the best of their intellectual, moral and emotional ability to take decisions according to the Constitution and its values, and the law, as their oath of office demands from them. The values and detailed contents of our Constitution could go a long way to guide us. We do not have to seek for evasive guiding principles in natural law or elsewhere, or argue whether to interpret a centuries-old constitution in the light of the original intent behind it or prevailing circumstances. We will always have differences of opinion even on the interpretation of the wording of the Constitution; that is why there are 11 judges on the Constitutional Court and why diversity on the bench is important.

It is clear that in a constitutional democracy entrenching the separation of powers, courts should not become sites for struggle in the area of politics.³⁰ This is important because, with a government enjoying a very large majority in the legislature, it is to be expected that opposition parties and perhaps factions within the majority party would try to utilise constitutional litigation to achieve their aims.

Constitutional Court judgments have been subjected to academic criticism for being too minimalist as far as the active protection and promotion of rights are concerned, for avoiding issues on which judicial guidance would be welcomed, and for being outcome-based. It has been suggested that the Court's strict direct access jurisprudence has failed the poor and even that not enough cases are taken, compared to, for example, the US Supreme Court. Much of the criticism may certainly have merit and must be taken into account.

The world of the judge is, however, not always the world of the scholar, philosopher or artist, no matter how much some of us — including myself — would like it to be a little more open than it is. Philosophers (to use a broad term) have to ask questions. Judges have to provide answers to questions brought before them by litigants. No matter how much I as a judge may hope that, for example, certain socio-economic issues be brought to court, we cannot go and look for them.

In deciding whether to set applications down for hearing, it is asked whether a constitutional issue is involved, whether there are prospects of success and whether it would be in the interests of justice to hear

²⁹ See J Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *South African Journal on Human Rights* 500 on Constitutional Court decisions to this effect.

³⁰ See eg the judgment of Skweiyia J in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC) para 306.

a matter. Sometimes the objective importance of the issues raised demands that the matter be heard. However, it may not be right to use an applicant whose specific application bears no prospects of success as a vehicle for the Court to make *obiter* statements on important issues or write a homily at the cost of the financial means and emotions of applicants and their families.

Whereas it is tempting and sometimes justified to grant direct access in many more cases, it is not necessarily fair or productive to hear cases that have not gone through the other courts, for a number of reasons, including the following two: Our judicial system is an integrated one. For other courts to hear a matter before it comes to the Constitutional Court is necessary not only because the Constitutional Court can benefit from their views, but because we cannot afford a perpetuation of the discredited perception that constitutional issues are for politicians in the Constitutional Court while other courts busy themselves with hard law. Furthermore, it is not in the interest of justice for the Constitutional Court to hear a case on papers which do not reasonably define the issues at stake, or which may contain serious factual disputes. The Court does not hear live evidence or make credibility findings. In such cases the constitutionally important issues are often drowned by the muddy mess around it. The Court has on occasion requested law clinics or professional bodies to assist litigants in cases of this nature.

On the issue of avoidance or minimalism, the temptation is often there to answer not only the question concretely calling for an answer, but the next question, as well as others that would follow. But the (perhaps unintended) consequences are not irrelevant. Processes of investigation by the Law Commission, or debates in parliament may, for example, be pre-empted and complex nuanced questions may be finally determined without the benefit of having proper thoughtful argument. Counsel often focus quite narrowly on aspects that serve the immediate interests of their clients.

Other aspects of the responsibility of judges that follow from the independence of courts would include the need to communicate as clearly as possible and not to use legal language as a shield against criticism or a tool of professional self-preservation and to try to make courts accessible.

Judges have to act legally and morally above reproach, bearing in mind that they cannot easily be removed from office.

And, last but not least, as was once said, it would be good if judges also know a little law.

5 Government

The legislature and the executive shape public policy and control public resources. No other body therefore has a greater contribution to make to the legal system. Section 165(4) of the Constitution provides

that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts. This provision reflects the fact that no one else can provide the primary support to the courts necessary to make their procedures and orders operate. Without personnel and infrastructure, the courts cannot work.

This is nowhere clearer than in the criminal justice system, where the ability of courts to enforce criminal justice depends critically on the police, prosecution and legal aid systems. This was recognised by the Constitutional Court in *S v Jaipal*, which also noted the duty of the officials conducting trials — judges, magistrates and prosecutors — to take ‘responsible and creative’ measures to make the best of available resources.³¹ *Jaipal* arose because a shortage of office space meant that in a murder trial, assessors shared an office with the prosecutor, who from time to time had discussions with state witnesses and the investigating officer. While it did not render the trial unfair in the particular case, this state of affairs understandably looks suspicious to members of the public, and thereby weakens the integrity of the courts.

Our constitutional structure, which obliges the state to act in accordance with a range of obligations which are enforceable in the courts, means that organs of state are frequently before the courts. It has resulted in a number of important matters being decided against the state. In *Grootboom* and *TAC*, the courts invalidated conduct based on aspects of the existing government policy on the vital issues of housing and the treatment of HIV/AIDS.³² The Court has twice ruled against the government on the charged issue of prisoners’ voting rights.³³

The Court has also ruled that the government failed to comply with other provisions of the Constitution. In *Modderklip Boerdery* it was held that, when the government had not taken the necessary steps to enforce an order of court and remove occupiers from the land of a farmer who had followed all the correct legal procedures, this represented a violation of its duty to take reasonable steps to uphold the rule of law.³⁴ In *Doctors for Life, Matetiele* and *Merafong*, the Court considered the obligation of legislatures to facilitate public participation in the democratic process, ruling in favour of the provincial legislatures of

³¹ *S v Jaipal* 2005 4 SA 581 (CC) paras 54-57.

³² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC).

³³ *August & Another v Electoral Commission & Others* 1999 3 SA 1 (CC) paras 3-5 22-23. In *August*, the court held that if the government wished to take away the right of prisoners to vote, it had to do so explicitly in a law of general application because of the importance of the right. This was followed six years later by another ruling that the state had not properly justified the breadth of the law it had then passed. See *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 3 SA 280 (CC) paras 66-67.

³⁴ *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amicus Curiae)* 2005 5 SA 3 (CC) paras 42-43.

the Eastern Cape and Gauteng and ruling against the provincial legislature of KwaZulu-Natal and the national parliament.³⁵

In the overwhelming majority of cases, the government has accepted the findings. It is extremely important that state institutions comply with court orders and directions. Generally this happens, as far as the Constitutional Court is concerned. There have been a few exceptions. During the TAC litigation, the Minister of Health made comments interpreted as stating that she would not comply with the Constitutional Court's order, but this impression was swiftly corrected following intervention by the Minister of Justice.³⁶ Government non-compliance was also at issue in several cases arising out of the blanket cancellation of welfare grants in the Eastern Cape.³⁷ Similar failures were the subject of the recent *Nyathi* case.³⁸ The government failed to comply with a court order to pay damages to a man in a critical state of health, who died during the course of the litigation. An affidavit the state was ordered to file following the *Nyathi* litigation states that hundreds of judgments stood unsatisfied and indicates the urgent steps that would be taken to expedite payment of these amounts.

However, as the Court has noted, some of these problems can be traced to incompetence or inadequate training or procedures.³⁹ The effect is damaging or unacceptable, and one would not know whether disrespect for the law or for courts may be underlying, but in general

³⁵ *Doctors for Life International* (n 27 above); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) 2007 6 SA 477 (CC); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10, as yet unreported judgment handed down 13 June 2008.

³⁶ See 'More damage control after Manto says "No"' *Independent on Saturday* 25 March 2002 and Ministry of Health Press Release dated 27 March 2002 <http://www.doh.gov.za/docs/pr-f.html> (accessed 4 September 2008). Compliance with the order followed, with some enforcement efforts by the Treatment Action Campaign, including the launch of contempt of court proceedings in respect of the roll-out in Mpumalanga. See *Treatment Action Campaign v MEC for Health, Mpumalanga* unreported Case 35272/02 and M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278.

³⁷ See *Permanent Secretary, Department of Welfare, Eastern Cape & Another v Ngxuzza & Others* 2001 4 SA 1184 (SCA) para 15; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape & Another* 2004 2 SA 611 (SCA) paras 2 17-18 and *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) paras 16-22; and the High Court cases considered in those judgments.

³⁸ *Dingaan Hendrik Nyathi v Member of the Executive Council for the Department of Health, Gauteng & Others* [2008] ZACC 8, as yet unreported judgment handed down 2 June 2008.

³⁹ *Nyathi* (n 38 above) paras 64-78 (see also para 129 of the judgment of Nkabinde J, dissenting in part); *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 8 BCLR 901 (CC) paras 50-54.

the commitment of government to respect the courts has not been seriously questioned.⁴⁰

6 The legal profession

I wish to put forward a few loose thoughts in regard to the legal profession.⁴¹

Lawyers must act in the best interests of the clients they represent. However, they have also over a long period of time been recognised as officers of the court. Therefore they are responsible to the courts and to the administration of justice, including the Constitution.

In order to represent their clients and assist the court, lawyers need to have a sound knowledge and possess appropriate skills. The argument presented by counsel often has a huge influence on judgments and written heads of argument sometimes feature centrally in a judgment. The contribution of lawyers who participated in litigation before the Constitutional Court in the building of our constitutional jurisprudence has been enormous. Many seas in the constitutional litigation are still uncharted, though, and numerous questions have not been answered, or even asked. A proper understanding of the structure and contents of the Constitution is thus surely needed for lawyers to assist the Court.

Earlier I mentioned the cynical instrumentalist approach to law that was understandable in pre-constitutional South Africa. Working within a legal system with questionable legitimacy, the law was often seen as a mere tool to gain tactical and other advantages. Not only apartheid is responsible for this. Our adversarial system also fosters notions of litigation as a game, or even a battle, and of lawyers as gladiators or soldiers. There are advantages to this approach. However, at the risk of sounding idealistic or naïve, I wish to stress the need for commitment to values of the Constitution and plead that lawyers do not view themselves simply as mercenaries or hired guns, but as a small and privileged group within society with the knowledge and skills to either protect and enhance our democratic legal order, or to undermine and loot it.

One of our biggest problems is access to justice for the poor. *Pro bono* work could go a long way to alleviate the situation.

Outside the confines of litigation, the organised legal profession has a huge role to play in the presentation and promotion of our

⁴⁰ Controversial planned constitutional amendments were withdrawn from parliament before the second reading in 2006. See C Albertyn 'Judicial independence and Constitution Fourteenth Amendment Bill' (2006) 22 *South African Journal on Human Rights* 126.

⁴¹ My colleague, Judge Kate O'Regan, recently presented an excellent keynote address at the launch of the Routledge-Modise Law School in Johannesburg on 'Lawyering in our new constitutional order', on 10 September 2008, with which I not only concur, but which I recommend for reading.

constitutional order, *inter alia* by educating people and by speaking out against threats to that order. Upon leaving the Pretoria High Court bench, Judge Kees van Dijkhorst said to the Pretoria Bar at a function that it had to be admitted that not enough had been done in the past by the profession in this city to speak out against injustice and called upon his audience not to let it happen again. I wish to echo his call, while acknowledging that much good has been done in this regard, especially by the attorneys' profession.

Lastly, realising that gossiping — about everything, including each other and especially courts and judges — may be a valuable stress reliever and a time-honoured tradition for legal practitioners, I plead that it not be done to undermine a system on which we all depend.

7 Academic institutions

Universities and other academic institutions have a unique role to play in a constitutional democracy. Law faculties educate students and must foster a proper understanding of the Constitution, including its structure, contents, values and the significance for law and for democracy, in addition to attempting to produce knowledgeable and skilled lawyers.⁴²

Even before reaching the Constitution and the law, though, the task of academic institutions is — through education and research — to improve the standard of living of our people. By contributing to the eradication of poverty and the improvement of nutrition, health and literacy, they could actively help to achieve the realisation of not only socio-economic rights, but the rights to dignity and equality and in the process create an environment in which the Constitution could be understood, respected and complied with.

Law clinics and similar institutions that support litigation or make submissions to courts as *amici curiae* enhance access to justice and contribute to our jurisprudence.

Universities must in campus life and in their administration promote the values of the Constitution and respect for the rights enshrined in it. This would include to prevent and act against racism, sexism, homophobia, discrimination against the disabled and abusive conduct in general.

A very important aspect of academic and student life is obviously to allow for and cultivate free expression, including freedom to receive or impart information and ideas, academic freedom and freedom of scientific research, as well as freedom of artistic creativity.⁴³ Tension

⁴² Shortly after presenting this paper, I was fortunate to have sight of the inaugural lecture by Prof Drucilla Cornell on 'uBuntu, pluralism and the responsibility of legal academics to the new South Africa', recently delivered at the University of Cape Town, which contains valuable insights.

⁴³ Sec 16.

may arise between respect for the Constitution and the law and a free exchange of ideas. Freedom in this regard must include the freedom to criticise everything, including the Constitution or constitutional order itself, and to advocate change — in my view even radical or revolutionary change. Constitutional democracy is supposed to facilitate change, not stultify or petrify human development. Amongst the many arguments about the limits of free expression in a democracy, I put forward only two simple points. Our democratic constitutional order offers possibilities for change, including legal and constitutional amendments. These could be utilised, but as long as the Constitution and laws are in place, compliance is morally and practically required. And, of course, free expression should not be used to destroy the rights protected by the democratic constitutional order.

Academic scholars from this and other South African universities have a proud tradition of advancing our legal system by teaching and writing. I earlier referred to the work of constitutional scholars. One of the areas that continues to require attention, in my view, is the link between the Constitution and the common law, or Roman Dutch law, or African customary law. The Constitution is the supreme law and our legal order and legal culture were fundamentally changed in 1994. However, there is room for a position between the extremes of regarding the common law as self-standing, proven over time and sufficient for most disputes, and the Constitution as something separate, political and not really law, which is clearly wrong, and regarding old order common law as simply a remnant of the by-gone era and the Constitution as the sole source of answers for all legal issues. It is often tempting to invalidate or develop the common law in accordance with the Constitution, but one can only do so meaningfully if one is very well aware of what the existing common law position and its potential actually is. In my almost five years on the bench of the Constitutional Court, I have been struck by the number of cases that would not at first sight appear to be constitutional in nature that the Court has to deal with: contract; delict, family law, insurance, criminal law, building regulations, tender procedures, gambling. One is sometimes very aware of the possibility that in the process of seeking the answer to a constitutional question, one may act like a bull in a china shop as far as established private or commercial law is concerned — and perhaps some of you would say that that awareness has indeed not prevented damage to those areas of law.⁴⁴

Academic lawyers could therefore make an even bigger contribution than some have already done by developing an integrated approach.

⁴⁴ Also see the unpublished lecture on 'Transformative constitutionalism: Its implication for the law of contract' by Deputy Chief Justice Moseneke, delivered at the University of Stellenbosch on 22 October 2008.

8 The media

Independent courts and free independent media are essential ingredients of a democracy mutually dependent on each other to be able to fulfil their role properly. This is so not only because freedom of the press and other media and the freedom to give and receive information is a constitutionally guaranteed right, which the courts have to protect, but because the legitimacy of courts and the very constitutional order depends on reporting, comments and discussions in the media. The role the free media has played in building our democracy and human rights awareness cannot be underestimated and has to be applauded.

It is often said that the media has a huge educational task and function. I agree. It is also said that reporting on court decisions and other legal matters are often not up to standard. I again agree. I am not so naïve as to think that journalists report only objectively, without any subjective angle or slant to advance a cause, to please their readers, listeners or viewers, or for that matter to out-sensationalise competitors to gain a larger audience. In a democracy that provides for the right to gossip it is a reality. One cannot always expect detailed and comprehensive accounts which all would regard as correct and fair. In my view, the inevitability of sound bites and quotes that are sometimes regarded as 'out of context' has to be accepted.

But I am of the view that our constitutionally-protected right to receive information entitles us to expect at least a basic level of accuracy, understanding of the issues and procedures at stake, and fairness. Not striving to achieve this at all times is negligent, if not malicious, and in fact dangerous. I have often been amazed by news reports soon after hearing a case. The Constitutional Court recently heard argument in the case of *Mamba* on refugee camps. Obviously it is a matter with strong emotional connotations in view of the earlier violence against foreign nationals. It was brought to the Court on the basis of urgency. On a Friday, the judges of the Court met, decided to enrol the matter for hearing on the next Monday and issued directions, in which an undertaking by the government respondents regarding the camps was noted. Argument was heard the next week. However, on the Saturday morning, the front page of a newspaper told its readers in a bold headline that the Constitutional Court had ruled that the camps had to stay open. The Court's 'order' was specifically mentioned in the report. In reality, the only decision taken was to set the matter down. There was no order to keep the camps open. In fact, there was no order at all — the matter had not even been heard!

A report on a front page that the country's top court is 'in disarray', and without any '*esprit de corps*', mainly based on information such as 'whispers' allegedly received from sources that were 'well-placed ... in the legal profession', but nevertheless anonymous, including senior counsel who often appears before the Court, evokes a similar sense of amazement. (I may add that I have not experienced a better spirit in

any previous professional environment, and do not think one would easily be found in South Africa.)

After delivery of a judgment in which the Court ruled that anal penetration of a girl was rape, but refrained from extending the definition of rape to the penetration of male victims,⁴⁵ I was astounded to hear on the radio that the Court had decided that sodomy is not a crime! And I was amused to see myself on television delivering the Court's recent judgment in *Merafong*.⁴⁶ While the reporter tried to summarise the majority judgment, I was shown reading from the minority judgment of a colleague, while the subtitles on the screen indicated to the viewer that I was Judge Albie Sachs!

To lift out of a day-long hearing in the Constitutional Court one question or remark by one of 11 judges under a headline like 'Judges slam Minister' appears slightly mischievous. To report on a suspect in an inter-racial murder case in a small town in Limpopo being released on bail by creating the impression that he was indeed acquitted, is clearly dangerous.

9 Civil society

Whilst being aware of academic debates about the meaning and contents of the concept of civil society,⁴⁷ I use the term to loosely refer to religious groups, trade unions, political parties and other interest groups and social formations.

It speaks for itself that civil society could play a highly relevant role in giving life to our constitutional democracy, by using the Constitution and court decisions on it in the quest they pursue, and by discussing and debating them, subject to what is said about criticism below.

10 Analysis, comment, criticism

From the ideal of having a living Constitution and due to the vital role of courts in a constitutional democracy, the right and indeed the need to study, analyse, understand and comment on the Constitution and on judgments and the functioning of the courts follow by necessity.

⁴⁵ *Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae)* 2007 5 SA 30 (CC); 2007 8 BCLR 827 (CC). It was in fact decided years earlier in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 1 SA 6 (CC); 1998 12 BCLR 1517 (CC) that the common law offence of sodomy was unconstitutional.

⁴⁶ n 30 above.

⁴⁷ See T Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' (2007) 34 *Journal of Law and Society* 77.

In a democracy, views will inevitably differ. Some will be critical. Therefore it could not possibly be said that judgments, the judiciary, courts and even the Constitution are above criticism.

Obvious truths, such as that court rulings must be respected and that criticism must be informed, thoughtful and fair have to be developed, though, to take us further in our attempt to understand and define the line between acceptable and unacceptable criticism. I do not have the answers and merely put forward a few possible guidelines. The essential difference — inelegantly and roughly stated — may well be between comments or criticism which serve to enhance and vitalise the constitutional democratic order, and those that undermine, corrode or threaten it and may cause its collapse.

One's view of what is fair and justifiable is sometimes understandably subjective, and not all of us can be expected to be equally thoughtful and well-informed. Could we expect the emotional litigant who walks out of a divorce court after having lost children and a home because of a judgment, not to harbour suspicions of bias or incompetence on the part of the judge? Could we blame the parents of a convicted child for continuing to believe in her innocence? Is it not understandable for a rape victim to distrust a court with detailed evidence of her ordeal; and do we require Mama Malindi or Oom Piet who hears over the car radio that a court has freed a murder suspect, or ruled that prisoners may vote, or that their church may not discriminate against gay people, to first study a lengthy written judgment before expressing disappointment or outrage to a fellow passenger?

I would suggest that the level of thoroughness, insight, thoughtfulness, fairness and responsibility to be expected from those who criticise depends on the position from which one criticises, the authority with which you claim to do so and the audience the comments are directed at.

A litigant who feels aggrieved by the decision of a court has the right to appeal and to fully state the grounds for doing so in the proper manner. Once a decision is final, it has to be accepted, which does not mean that one has to agree or pretend to agree with it.

Academics and other authoritative commentators do extremely important necessary work, in which they — like the judges who give judgments — have responsibilities, in addition to working hard and being thorough.

One is to be realistic and appropriately modest about the perspective from which one comments or criticises. Following the revelation of Copernicus that one could never understand the movement of the sun, planets and stars as long as you fail to realise that the earth from which you observe not only turns but moves around the sun, Immanuel Kant revolutionised Western philosophy by stressing the importance of subjectivity and the impossibility of ever truly knowing from a limited observation point perspective.

It would be useful if commentators could spare a little thought for what they may not be able to see from their world into the world of a court producing judgments, and perhaps to be frank with their readers in order to help them to distinguish between fact, speculation and creative thinking.

I earlier mentioned some aspects and add only one or two more. Labelling, psychologists tell us, is a necessary human process. It helps us to understand and manage our environment. In order to be continuously confronted by questions requiring decisions, we attach labels to phenomena. The labels have evaluative components, for us to know what is good or bad, what I like and dislike, in advance. But we have to be able to look beyond the labels and accept that they may be wrong or outdated.

The labeling or categorising of judgments or judges, for example as conservative, liberal or progressive, as influential or as swing voters, or even as brilliant, good, or just there, could be useful for the purpose of stimulating interest in the Constitution, the law and the courts, and could help readers and students to understand. However, it must be kept in mind that in a constantly changing society, the categories themselves may overlap, change, evolve or disappear. Furthermore, the complexity of decision making in a collegial court of nine or 11 judges is not simple and one-dimensional. Following the hearing of argument, post-hearing notes are produced, conferences are held, comments and draft judgments are exchanged and joint read-throughs take place over a long period of time. In this process, colleagues criticise each other's views, assist one another and suggest or write contributions to judgments. Who would know who is always conservative or progressive or influential?

Community leaders have to be particularly responsible in their criticism as educators, role models and the shapers of ideas and personalities. Criticism which intimidates may amount to undue pressure on courts and to interference in their functioning to the extent of violating the constitutional imperative of independence. Attacks on the integrity of courts may serve to de-legitimise not only rulings against the attacker, but also rulings in his or her favour, and even the authority of courts as the judicial authority under the Constitution.

Naturally, one may distinguish between our courts as institutions and the judges staffing them as far as criticism is concerned. But the distinction is not always so easy to make. When a judge rules on a legal or procedural aspect, it is the court that acts. When one judge gives a judgment or, for that matter, makes a remark in court in a division with 30 judges, it is the court. Let us not undermine the courts with perhaps valid criticism against specific judges — a complaints mechanism is constitutionally available. This goes both ways, of course. Judges must realise that their professional conduct is viewed as the conduct of our courts.

Standards for criticism of the judiciary are different from criticism of the executive and legislative arms of our state and the politicians staffing those institutions. For this there are several reasons. The most obvious is that we have to evaluate and criticise our political representatives and leaders, because we must decide whether to re-elect them or elect others. If we do not do so, our democracy cannot function. Judges are not elected and serve for fixed non-renewable (and fortunately or unfortunately long) terms. They are not supposed to be pressurised by popularity demands.

Lastly, let us not forget the power of language. Words can be weapons to humiliate, hurt, injure, intimidate and destroy. Section 16(2) of the Constitution recognises this by disqualifying what is often referred to as 'hate speech' from constitutional free speech protection. Mindless and irrational vulgar name-calling and abuse is not criticism, has little to do with free speech and democracy and is slightly reminiscent of Hannah Arendt's use — in the context of Nazi-Germany — of the term 'the banality of evil', or perhaps 'the evil of banality'.

A democracy not only allows but requires free expression and criticism. But democracy is not necessarily the natural state of humankind. It has been hard-won, is precious and has often been easily lost. When it is destroyed, not only will there be no right to criticise the Constitution and the courts; there will be nothing left to criticise.

In order to end on a slightly more optimistic note, I wish to state my pride in our Constitution and the Court of which I am a member, to thank those with an interest in the well-being of our constitutional democracy and to express the hope that we will all work together on our great constitutional project.

The justiciability of human rights in the Federal Democratic Republic of Ethiopia

Sisay Alemahu Yeshanew*

Researcher and Doctoral Candidate, Institute for Human Rights, Åbo Akademi University, Finland

Summary

Making human rights domestically justiciable by clearly defining their content and subjecting them to judicial and quasi-judicial mechanisms of enforcement is important for their effective protection. Although a legal framework for the justiciability of human rights exists in Ethiopia, the judicial practice reveals some problems. Lawyers and courts tend to avoid invoking and applying human rights provisions in the Constitution of the Federal Democratic Republic of Ethiopia and ratified international human rights treaties which form part of the law of the land. There is confusion regarding the mandate of the House of Federation to 'interpret' the Constitution. Procedurally, the basic laws of the country limit 'standing' in human rights litigation to those with a vested interest, failing to make public interest litigation possible and hence limiting the justiciability of rights. The article examines the justiciability of human rights in Ethiopia from a substantive, jurisdictional and procedural perspective. It juxtaposes law and practice in an attempt to show the extent to which rights are justiciable in the Ethiopian legal system.

1 Introduction

Domestic legal systems take precedence over international human rights systems in terms of their effectiveness in the protection of human rights. This is because domestic systems offer a more accessible forum for victims of violations and because they have more effective enforcement mechanisms. The effective protection of human rights requires, among others,

* LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria); sisis2002et@gmail.com

that they be justiciable. Justiciability refers to the capability of rights to be enforced by a judicial or quasi-judicial organ and the existence of procedures to contest and redress violations. The extent to which rights are justiciable at any level depends on the content or definition of rights and the existence of procedures for their judicial and/or quasi-judicial enforcement. This is not, however, to forget the role progressive judges play in ensuring the practical justiciability of rights. It is also worth noting that making rights justiciable is only one of the ways of protecting them — policy and related measures should also be taken to realise human rights.

In elaborating a framework for the domestic protection of human rights, emphasis is usually placed on their inclusion in a constitutional bill of rights and ordinary legislation and the reviewability of their implementation by judicial and quasi-judicial organs.¹ The effect of international human rights instruments is also recognised.² Less attention is paid to the existence of procedures that allow persons or organisations to institute cases on behalf of victims of violations of human rights (*actio popularis*). These substantive, jurisdictional and procedural elements of the protection of human rights determine the extent to which rights are justiciable in a domestic legal system. This article evaluates the laws and practices in Ethiopia with regard to the above components of human rights protection.

Ethiopia is a federal state with nine regions and two administrative cities. While there is a federal Constitution with nationwide application, the regional states do also have their own constitutions with provisions on human rights and constitutional interpretation modelled after the former. As its title suggests, the article deals with the system established by the Ethiopian Constitution,³ and hence does not deal with regional constitutions. Furthermore, both federal and regional legislative bodies have the power to issue legislation relating to human rights that are compatible with the provisions of the Constitution.⁴ As a result, there is a wide array of ordinary legislation that provide for specific justiciable rights in Ethiopia.⁵ This contribution does not discuss all such legislation in any depth.

¹ See, eg, S Liebenberg 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 55-84.

² F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *ESR Review* 7.

³ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation 1/1995.

⁴ Arts 55 & 9 Ethiopian Constitution.

⁵ Such ordinary legislation to give effect to constitutionally-protected rights and their justiciability are not usually questioned. Legislation regulating aspects of civil and political rights includes the Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting 3/1991, the Mass Media and Freedom of Information Proclamation 590/2008 (amending the Press Law Proclamation 34/92), the Broadcasting Service Proclamation 533/2007, and the Proclamation to Make the Electoral Law of

2 Entrenchment of human rights in the Bill of Rights of the Ethiopian Constitution

Human rights are most securely protected where they are entrenched as fundamental norms of a supreme constitution through a comprehensive bill of rights with strict amendment requirements and where they are enforceable by courts of law. According to article 9 of the Ethiopian Constitution, the Constitution is the supreme law of the land and any law, customary practice or decision of an organ of state or a public official which contravenes it shall be of no effect. Chapter 3 provides for a long list of ‘fundamental rights and freedoms’ grouped as ‘human rights’ and ‘democratic rights’.⁶ Aside from this seemingly artificial distinction between rights,⁷ the Bill of Rights of the Constitution enshrines classic civil and political rights, economic, social and cultural rights and collective rights. Article 105 of the Constitution ends with an

Ethiopia Conform with the Constitution of the Federal Democratic Republic of Ethiopia 111/1995 (amended by Proclamation 438/2005). The Revised Family Code (Proclamation 213/2000) was adopted to replace the family law provisions in the 1960 Civil Code of Ethiopia (Proclamation 165/ 1960), which were found inconsistent with the constitutional right to equality of women, and to give effect to arts 34 and 35 of the Constitution, which provide for marital, personal and family rights, and the rights of women respectively. While the newly adopted Criminal Code (Proclamation 414/2004) protects various aspects of the rights of individuals (including the right to life, bodily integrity, the right to property, etc) by making certain conduct punishable, the 1961 Criminal Procedure Code of Ethiopia, which is also under revision, provides for the rights of accused and detainees. Among economic, social and cultural rights there is legislation governing such rights as the right to work (Labour Proclamation 377/2003), the right to housing and land (Proclamation Providing for the Expropriation of Urban Lands and Extra Houses 47/1975; Condominium Proclamation 370/2003; Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005; and Urban Land Lease Holding Proclamation 272/2002), and the right to health (Public Health Proclamation 200/2002; HIV/AIDS Prevention and Control Council and the HIV/AIDS Prevention and Control Office Establishment Proclamation 276/2002; and Drug Administration and Control Authority Proclamation 176/99). There are also proclamations adopted to regulate environmental rights (Environmental Protection Proclamation 295/2002; Environmental Pollution Control Proclamation 300/2002; and Environmental Impact Assessment Proclamation 299/2002). The Civil Code of Ethiopia also enshrines provisions relating to all categories of rights.

⁶ Arts 14-44 Ethiopian Constitution.

⁷ The basis for the distinction between human and democratic rights is not clear from the Constitution, neither is one able to draw a conclusive basis of distinction from the nature of rights and freedoms listed under these categories. However, art 10 of the Constitution and some commentators indicate that human rights and freedoms emanate from the nature of mankind and democratic rights and are those which are ‘conferred’ upon their beneficiaries or holders in a democratic system. A close look at the rights listed under the latter heading shows that the distinction is artificial in that they include rights classically defined as human rights. This fictitious categorisation also does not affect the justiciability debate as the relevant provisions of the Constitution refer to them by the general name ‘fundamental rights and freedoms’.

extremely stringent requirement for the amendment of its chapter on fundamental rights and freedoms.⁸

2.1 Rights protected

The Ethiopian Constitution enshrines robust provisions on civil and political rights, including the right to life, security of the person and liberty, the right to protection against cruel, inhuman or degrading treatment or punishment, the rights of arrested, accused and convicted persons, the right to dignity, the right to equality, the right to privacy; freedom of religion and belief, freedom of thought, opinion and expression, the right to assembly, demonstration and petition, freedom of association; freedom of movement, the right of nationality, marital, personal and family rights, the rights of women and children, the right to vote and to be elected, and the right to property. The contents of the rights protected by these and other provisions are more or less in line with internationally recognised standards of protection of similar rights.

The Constitution further incorporates economic, social and cultural rights under the crudely-formulated provisions of article 41. Without specifically listing and defining these rights, the article generally requires the creation of equal opportunities to freely chosen means of livelihood and the allocation of ever-increasing resources for health, education and other social services. It is argued that certain economic, social and cultural rights can be read into the broad provisions of article 41.⁹ However, the poor formulation of the article increases the ambivalence regarding the justiciability of this group of rights as it is difficult to clearly delineate the precise scope of the rights.

Collective rights such as trade union rights, the right to development and environmental rights are also included in the Bill of Rights of the Ethiopian Constitution. Under chapter 10, the Ethiopian Constitution provides for 'National Policy Principles and Objectives' that guide any government organ in the implementation of constitutional provisions, other laws and public policies.¹⁰ These objectives, among others, require the government to promote self-rule and equality of the people, to formulate policies that ensure equal economic opportunities and benefits, and to adopt policies that aim at providing all Ethiopians access to public health and education, clean

⁸ As different from the requirement for the amendment of other provisions, art 105 requires the approval of the majority in all state councils, and a two-third majority of the House of Peoples' Representatives as well as that of the House of Federation for the amendment of the provisions of the Constitution on fundamental rights and freedoms.

⁹ S Yeshanew 'The constitutional protection of economic and social rights in the Federal Democratic Republic of Ethiopia' *Journal of Ethiopian Law* (forthcoming).

¹⁰ Arts 85-92 Ethiopian Constitution.

water, housing, food and social security to the extent the country's resources permit. While the provisions of the Bill of Rights provide for individual and group entitlements, the policy objectives extend this protection by imposing the duty to adopt policies that ensure the enjoyment of rights by citizens. Policy Principles and Objectives are akin to what are, in other systems, called 'Directive Principles of State/Social Policies' (DPSP) which are deemed expressly non-justiciable.¹¹ I argue that they are not out of the total reach of courts. They may be used as tools that guide the interpretation of fundamental rights and freedoms. Policies should also be developed and implemented with due respect to fundamental rights. A court may, for instance, find a policy adopted to realise the right to health (as a DPSP) in violation of the right to equality (which is part of the Bill of Rights) if it happens to be discriminatory.

2.2 Judicial enforcement

Article 13(1) of the Ethiopian Constitution establishes the duty of all federal and state legislative, executive and judicial organs to respect and enforce fundamental rights and freedoms. The duty of the judiciary to enforce rights is an expression of the justiciability of the fundamental rights and freedoms provided by the Constitution. Article 37(1) further provides that everyone has the right to bring a justiciable matter to court, and to obtain a decision or judgment by a court of law or any other competent body with judicial power.¹² While article 13 declares the judicial enforceability of fundamental rights and freedoms, article 37 makes bringing justiciable matters before judicial and quasi-judicial organs and get decision thereon a right by itself.

However, according to articles 83 and 84 of the Constitution, all 'constitutional disputes' shall be decided by the House of Federation upon the recommendation of the Council of Constitutional Inquiry that it is necessary to interpret the Constitution. In my view, these provisions

¹¹ See the Constitution of Ireland (1937), art 45, and the Constitution of India (1949/1950), arts 36-51. The Supreme Court of India turned the principles to justiciable guarantees by reading them with the fundamental rights. In two cases (*Mohini Jain v State of Karnataka* (1992) 3 SCC 666, AIR 1992 SC 1858 and *Unni Krishnan JP v State of Andhra Pradesh* (1993) 1 SCR 594, AIR 1993 SC 2178) which concerned the right to education, the court held that fundamental rights and DPSP are complementary because what is fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual. Note that the Ethiopian Constitution does not say that the principles and objectives are non-justiciable.

¹² Art 37 of the Constitution shows that the institutional aspect of justiciability includes institutions with judicial power other than proper courts of law. In one case, the Federal Supreme Court interpreted the article as including organs such as the National Electoral Board of Ethiopia in respect of its jurisdiction to decide on electoral complaints. See *National Electoral Board v Oromo Federalist Democratic Movement*, Appeal File 21387, judgment 27 September 2005.

define the mandate and procedure of 'judicial or constitutional review' — a procedure by which the constitutionality of laws and decisions is controlled — rather than determine whether constitutional provisions may be applied by courts of law.¹³ Articles 83 and 84 have nevertheless served as grounds for the objection of some courts and lawyers in the country against directly applying constitutional provisions, and for considering cases in which constitutional provisions are invoked as 'constitutional disputes'.¹⁴

A close look at the relevant laws shows that the mandate of the Council of Constitutional Inquiry and the House of Federation 'to interpret' the Constitution, as the title of article 83 shows, does not exclude courts from enforcing constitutional provisions on fundamental rights and freedoms. The provisions of article 84 of the Constitution and articles 6, 17 and 21 of the Council of Constitutional Inquiry Proclamation show clearly that 'constitutional disputes' are those in which the constitutionality of laws or decisions is contested and those which make the interpretation of some constitutional provisions necessary.¹⁵

It may be that the precise meaning and scope of a constitutional provision is disputed or that legislation invoked by parties or relied on by the court, or a decision given by a government organ or official is

¹³ For a detailed discussion on the Ethiopian approach to constitutional review, see YT Fessha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 53-82; A Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' (2005) 52 *Netherlands International Law Review* 1-30.

¹⁴ In a workshop (Training of Judges, organised by the Federal Supreme Court in co-operation with USAID, Summer 2001, Adama, Ethiopia) in which this author took part, most judges of the Oromiya Regional State took the position that arts 83 and 84 of the Constitution in effect debar them from directly applying constitutional provisions, especially when the constitutionality of a law or decision is in issue. See also Fessha (n 13 above) 79-80 (observing that there is a practice of shying away from considering the provisions of the Constitution, including those in the bill of rights even when parties invoke them); and T Regassa 'State constitutions in Federal Ethiopia: A preliminary observation' (2004) 3 <http://www.camlaw.rutgers.edu/statecon/subpapers/regassa.pdf> (accessed 27 April 2007).

¹⁵ Council of Constitutional Inquiry Proclamation, Proclamation 250/2001, Federal Negarit Gazeta 7th Year 40, 6 July 2001. See also Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, Proclamation 251/2001, Federal Negarit Gazeta, 7th Year 41, 6 July 2001. According to arts 6 and 17 of Proclamation 250/2001, the power of the Council is to investigate constitutional disputes (including disputes relating to the constitutionality of laws) and submit recommendations to the House of Federation if it finds that it is necessary to interpret the Constitution. These articles as well as art 21 indicate in essence that for the mandate of the Council to be invoked, there should be an issue that necessitates constitutional interpretation in the first place. For an argument that both courts and the House of Federation should have the power to decide on the constitutionality of laws and decisions, see Fiseha (n 13 above) 19-22. (This author fails to address the issue of whether there should be a need to 'interpret' specific constitutional provisions (for lack of clarity or some other reason) for the jurisdiction of the House of Federation to come into the picture).

contested as inconsistent with the Constitution. Such instances may give rise to 'constitutional disputes' that make constitutional interpretation necessary. When such disputes arise in a case already before a court of law, the court is not precluded from deciding the case.¹⁶ The court will submit a legal issue to the Council of Constitutional Inquiry only if it believes that there is a need for constitutional interpretation in deciding the case. If the court believes that the constitutional provision in question is clear, it can apply it without referral to the Council.

The article 13(1) duty of the judiciary to enforce the rights enshrined in the Constitution definitely extends to applying the provisions in specific cases. That ordinary courts have jurisdiction over cases arising under the Constitution is further confirmed by article 3(1) of the Federal Courts Proclamation which provides that '[f]ederal courts shall have jurisdiction over cases arising under the Constitution, federal laws and international treaties'.¹⁷

2.3 Judicial practice

In practice, Ethiopian courts generally tend to avoid adjudicating cases based on constitutional provisions (including the ones on human rights) even where such provisions are invoked and are relevant. Such cases are referred to the Council of Constitutional Inquiry, especially when the constitutionality of a law or decision is contested, sometimes in a way that contravenes the relevant constitutional and legislative provisions. One relatively recent case sheds light on the practice in this regard.

The plaintiff, an opposition political party called Coalition for Unity and Democracy (CUD), contested the decision of the Prime Minister of Ethiopia to ban assembly and demonstration in Addis Ababa and its surrounding area for a month after the May 2005 elections.¹⁸ CUD argued that the federal first instance court had jurisdiction over the matter by reciting the constitutional (articles 13(1) and 37) and legislative provisions discussed above in establishing that the human rights provisions of the Constitution are justiciable. It further argued that ordinary legislation have a constitutional basis and, with the express wish to preclude the court from referring the case to the Council of Constitutional Inquiry, stressed that the suit was based on the Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political

¹⁶ See art 21 Proclamation 250/2001 (n 15 above). The court forwards only the legal issue that, it considers, needs to be interpreted and keeps the case pending before it for final decision after receiving the authoritative interpretation of the House of Federation.

¹⁷ Federal Courts Proclamation, Proclamation 25/1996, Federal Negarit Gazeta 2nd Year 13, 15 February 1996.

¹⁸ *Coalition for Unity and Democracy v Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File 54024, decision 3 June 2005.

Meeting.¹⁹ The court framed the issue as follows: Was the directive of the Prime Minister, whose constitutional power as the chief executive it underlined, in contravention with the Constitution? It then referred the matter to the Council by invoking the provisions of articles 17 and 21 of Proclamation 250/2001, according to which courts may refer cases in which the constitutionality of the decision of a government official is disputed and the interpretation of the Constitution is needed.²⁰

The court did not consider the provisions of Proclamation 3/1991 on which the plaintiff claimed to have primarily relied. As has been shown earlier, it is not the case that any case in which it is argued that a law or decision is unconstitutional should always be referred to the Council of Constitutional Inquiry. There must first be a lack of clarity necessitating the interpretation of the Constitution.²¹ In the instant case, however, the court did not consider the clarity or otherwise of the relevant constitutional provisions. In further elaborating its order,²² the court said that it referred the matter for the Council to decide whether there was a need for constitutional interpretation. Considering that Proclamation 3/1991 provides for the right to demonstration and public political meeting and declares any directive which is in violation of this right null and void, the court could have evaluated the contested directive of the Prime Minister against these provisions and decided the case without referring the matter to the Council of Constitutional Inquiry. Even if the decision had to be based on the Constitution,²³ the court should have first investigated the clarity or otherwise of the relevant provisions.

In the instant case, the Council of Constitutional Inquiry never considered the issue of whether there was a 'constitutional dispute' giving

¹⁹ Proclamation 3/1991, *Negarit Gazeta* 50th Year 4, 12 August 1991. The plaintiff based its case on art 3(1) of the Proclamation that provides for the right of any individual to organise and participate in peaceful demonstration and public political meeting and art 11 of the same which declares any law, regulation, directive or decision that violates the Proclamation null and void.

²⁰ The Federal High Court dismissed an appeal against the decision to refer the case to the Council of Constitutional Inquiry as an interlocutory order.

²¹ See n 15 above. The Supreme Court of the Amhara Regional State has demonstrated in one exceptional case that an issue of constitutionality of a law should not necessarily be referred to the Council of Constitutional Inquiry. In *State v Haile Meles & Another* (Supreme Court of Amhara Regional State, File 21/90, decision 1998 (1990 EC)), the defence argued that the Criminal Procedure Code of Ethiopia is unconstitutional in as far as it denies bail for suspects accused of crimes that entail imprisonment for 15 years or more. The Court decided that the contested provision (art 63) of the Code was not unconstitutional because the right to bail under art 19(6) of the Ethiopian Constitution has clear exceptions.

²² In justifying the punishment of a lawyer accused of criticising the court's decision (in a newspaper opinion piece) in the same file.

²³ Of course, CUD has alternatively argued that the decree of the Prime Minister is in violation of art 30(1) of the Ethiopian Constitution, which provides that 'everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition', and hence shall be of no effect based on art 9(1) of same.

rise to its jurisdiction.²⁴ It rather took it upon itself to decide the case as presented to the court. While the matter took a different version at the level of its examination by the Council, it effectively decided the case by concluding that the directive issued by the Prime Minister was not unconstitutional.²⁵ This decision was sent to the court, but the case was not reopened on the same matter as the contested ban of assembly and demonstration had expired. Surprisingly, a perusal of the records of the court and the Council does not reveal that the matter was referred to the House of Federation. Though symptomatic of the Council's erroneous understanding of its mandate, this is not the general practice in the exercise by the Council of its power in relation to constitutional disputes as there is evidence that the House of Federation gives final decisions.²⁶

²⁴ Council of Constitutional Inquiry, decision taken on a regular meeting of 14 June 2005 — the date when the contested ban expired (on file with author).

²⁵ The Council framed two issues for its consideration: (1) whether the decree issued by the Prime Minister was in violation of the Constitution; and (2) who decides as to whether there are sufficient circumstances to issue such a decree. It picked up the argument of CUD that the decree shall be of no effect as it is in contravention of art 30(1) of the Ethiopian Constitution. It reproduced the article and attempted to interpret its provisions in an effort to settle the matter rather than indicate the way they should be interpreted by the court that referred the matter to it. The Council criticised the submission of CUD as relying on only part of art 30(1) — the statement of rights — leaving out the possible limitations that may be imposed in the interest of public convenience or for the protection of democratic rights, public morality and peace during a meeting or demonstration. But the Council itself left out the specific and explicit circumstances in relation to which regulations may be made, namely, the location of open-air meetings and the route of movement of demonstrators. Surprisingly, the decree which was finally found by the Council to be constitutional is a total ban without any reference to location and direction of demonstrations and meetings. In dealing with the issue, the Council referred to the constitutional provisions which define the powers of the Prime Minister, the status of Addis Ababa and the Charter of the City and then came to the decision that the responsibilities of the Prime Minister to respect the Constitution and follow-up and ensure the implementation of laws and policies adopted by the House of Peoples' Representatives make the decree constitutional. It also found that it was up to the Prime Minister to decide whether there were sufficient circumstances to justify issuing the decree.

²⁶ House of Federation of the Federal Democratic Republic of Ethiopia, 1st term 5th year, Minutes of Extraordinary Meeting, Addis Ababa, 7 July 2000 (on file with author). The representative of the Council of Constitutional Inquiry submitted recommendations on two issues of constitutionality which were referred to it by the House of Federation itself (which received them from the sources first) and the latter took a final decision. One of the cases concerned the compatibility of the electoral law (art 38(1)(b) of Proclamation 111/87) that requires candidates to know the language of the region in which they compete for election, with art 38 of the Ethiopian Constitution which provides that every Ethiopian national has the right to vote and to be elected without any discrimination based among others on language. While the majority in the Council decided that the electoral law is unconstitutional as it discriminates based on language, the House upheld the dissenting opinion of two members of the Council that the language issue should be seen in the context of the general principles on which the Constitution is based and in light of the provisions of the whole Constitution, and came to the conclusion that the electoral law is not unconstitutional.

Considering the misunderstanding around the meaning of 'constitutional dispute' and the position of some courts that issues that require applying or interpreting the Constitution should be referred to the Council, some lawyers in Ethiopia have adopted a litigation strategy by which reference to specific constitutional provisions is avoided or claims are as much as possible based primarily on ordinary legislation. This strategy proved fruitful in a couple of cases brought against the National Electoral Board by non-governmental organisations (NGOs) which claimed to have been excluded from observing the May 2005 elections. In two landmark cases, local NGOs contested the decision (or failure to make a decision) of the Board based on electoral legislation specifically while referring to the Constitution (and international law) only generally lest the court may refer the case to the Council of Constitutional Inquiry and the time the process takes would effectively bar them from observing the elections which were fast approaching.²⁷ Both the cases were decided in favour of the NGOs three days ahead of Election Day. The same approach was followed in a case in which an opposition party contested the announcement of provisional poll results by the National Electoral Board.²⁸

Ethiopian courts also generally avoid referring to or applying the Constitution even in relation to issues the disposition of which the provisions on fundamental rights and freedoms are directly relevant. In recent years, some members of the judiciary have taken steps to invoke and directly apply constitutional provisions. Still, such decisions remain exceptions to the general trend of evasion.

In one case, the plaintiff, a former President of Ethiopia, contested the legality of the decision of the speakers of the House of Peoples' Representatives and the House of Federation to terminate his benefits under Proclamation 255/2001 on the ground that he had violated his obligation to avoid partisan political activities by running for parlia-

²⁷ *Organisation for Social Justice in Ethiopia & 13 Others v National Electoral Board of Ethiopia* Federal High Court, File 38472, Addis Ababa, judgment 3 May 2005. (The author has taken part in the preparation of the application submitted to the court that followed the above-mentioned litigation strategy); *National Electoral Board of Ethiopia v Organisation for Social Justice in Ethiopia & 13 Others*, Federal Supreme Court, Appeal, File 19699, judgment of 11 May 2005; and *Ethiopian Human Rights Council v National Electoral Board of Ethiopia*, Federal High Court, File 38890, Addis Ababa, judgment 12 May 2005.

²⁸ *Coalition for Unity and Democracy v National Electoral Board*, Federal High Court, Addis Ababa, judgment 10 June 2005. The court in effect upheld the submission of the Coalition that the Board had violated the Constitution (referred to in general terms) in announcing provisional results for polling stations in relation to which the former has complaints pending before it.

mentary elections as an independent candidate.²⁹ The federal first instance court decided against the former President, arguing that his functions, should he eventually be elected, make him partisan.³⁰ In reversing this decision, the Federal High Court underlined first that, under articles 29 and 38 of the Ethiopian Constitution, the plaintiff has the right to hold an opinion and has freedom of expression without interference, as well as the right to vote and to be elected without any form of discrimination.³¹ Coherently interpreted, the court observed, the obligation to avoid partisan political movements is a prohibition against being a member or supporter of a certain political party and not a duty to avoid all forms of political movement which would be in violation of the President's democratic rights. The Federal Supreme Court finally reversed this decision in a judgment that relied heavily on the Proclamation.³² It held that the respondent had exercised his constitutional right in winning a seat in the highest political organ and, by taking part in political activities making use of his rights, he forfeits the benefits granted by Proclamation 255/2001.

Finally, some legal professionals in the country argue that constitutional provisions are too broad to apply in specific cases and hence

²⁹ Proclamation Governing the Administration of the Office of Both the Former and Current Presidents, Proclamation 255/2001. Art 7 obliges the President to avoid partisan political movement during or after presidency; art 13 provides for benefits; and art 14 empowers the Speakers of the two Houses to jointly decide on termination of benefits of former President if he fails to respect obligations imposed by the Proclamation.

³⁰ *Dr Negaso Gidada v the House of Peoples' Representatives and the House of Federation (Former President's case)*, Federal First Instance Court, File 54654, Addis Ababa, judgment 5 August 2005. The court argued: 'Even if the former President ran as an independent candidate, if eventually elected, his role would make him partisan as he votes on either side of the issues that arise and hence the termination of his benefits under the Proclamation was not illegal.' The court failed to appreciate that members of parliament voting on one side may belong to political parties with diverse agenda in which case the independent member's vote may not be associated with that of members of any single political party.

³¹ *Dr Negaso Gidada v the House of Peoples' Representatives and the House of Federation*, Federal High Court, Appeal, Addis Ababa, judgment 4 January 2006. The court said that it had the mandate to interpret the provisions of Proclamation 255/2001 in light of the Constitution and international treaties ratified by Ethiopia. After mentioning that the vote of a member of parliament is an expression of his opinion rather than support for those who vote in the same side and that the appellant was not elected by people who organised themselves as political party, the court held that the former President had not violated his obligation to avoid partisanship and hence the decision of the Speakers of the respondents was illegal and of no effect.

³² *House of Peoples' Representatives and House of Federation v Dr Negaso Gidada*, Federal Supreme Court, Appeal, Files 22980 & 22948, judgment 25 October 2006. The court startlingly argued that those who take seat in the House of Peoples' Representatives, which is the highest political organ of the state, are politicians with certain partisan political positions and that the announcement of their political agenda (and their difference with that of others) during their campaign makes the movement partisan even if one is an independent candidate.

disputes are better settled by the application of ordinary legislation.³³ In my view, such an argument fails on two grounds. Firstly, it is not true that the generality of constitutional provisions precludes their application by courts of law. The Ethiopian Constitution enshrines provisions specific enough to be applied by courts (examples are rights of persons under arrest and rights of the accused under articles 19 and 20 respectively). Moreover, the small number of cases in which the Constitution has been referred to by the courts of Ethiopia and the judicial practice of other states disprove this argument.³⁴ Secondly, there are constitutional rights which do not have a perfect substitute in ordinary legislation. An example is the right of accused persons to 'full access to any evidence presented against them' under article 21(4) of the Constitution. Courts cannot totally avoid referring to constitutional rights, especially in the latter cases.

3 The status and application of international human rights instruments in the Ethiopian legal system

3.1 Status

Ethiopia has acceded to almost all the major international human rights treaties.³⁵ Under its supremacy clause, the Ethiopian Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land (article 9(4)). This formulation implies that the provisions of these international instruments are part of the law of Ethiopia.³⁶ The domestication of international human rights instruments is further fortified by article 13(2) of the Constitution, which provides

³³ R Messele *Enforcement of human rights in Ethiopia* (2002), Action Professionals' Association for the People (APAP) 39 [http://www.apapeth.org/ Docs/ENFORCEMENT OF HR.pdf](http://www.apapeth.org/Docs/ENFORCEMENT_OF_HR.pdf) (accessed 24 April 2007) (observation of some judges and advocates).

³⁴ In *State v Dr Taye Wolde Semayat & Others* (Federal High Court, File 4780/88, 5 August 1996), eg, the court observed that it is against the Constitution to deny a detainee his right to communicate with counsel. In many states (eg South Africa) constitutional rights have been applied by courts in specific cases.

³⁵ Ethiopia has acceded to: the Convention on the Prevention and Punishment of the Crime of Genocide (1 July 1949); the International Convention on the Elimination of All Forms of Racial Discrimination (23 June 1976); the International Covenant on Economic, Social and Cultural Rights (CESCR) (11 September 1993); the International Covenant on Civil and Political Rights (CCPR) (11 June 1993); the Convention on the Elimination of All Forms of Discrimination against Women (10 October 1981); the Convention on the Rights of the Child (13 June 1991); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (14 March 1994); the African Charter on Human and Peoples' Rights (15 June 1998); and the African Charter on the Rights and Welfare of the Child (27 December 2002). See <http://www2.ohchr.org/english/bodies/ratification/index.htm> and http://www.achpr.org/english/_info/index_ratifications_en.html (accessed 18 April 2007).

³⁶ Ethiopia follows the monist tradition where international treaties become an integral part of national law upon ratification. For a discussion on the monist/dualist distinction and the fallacies involved therein, see F Viljoen *International human rights law in Africa* (2007) 530-538.

that the fundamental rights and freedoms shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (Universal Declaration), international covenants on human rights and international instruments adopted by Ethiopia.³⁷ To the extent that the rights protected by these instruments are guaranteed in the Ethiopian Constitution, the provisions of these treaties would supplement them. In relation to rights which are not expressly guaranteed in the Bill of Rights, the provisions of the treaties shall be taken as Ethiopian law. Detailed provisions of the international instruments would also be used to define the content and scope of rights which are protected in very general terms in the Constitution. Article 41 of the Constitution may, for instance, be juxtaposed with the International Covenant on Economic, Social and Cultural Rights (CESCR) to read classic economic, social and cultural rights into the Constitution.

While it is clear that treaties ratified by Ethiopia are part of the law of the land, their status in the hierarchy of laws is not clear. Going by the requirement of interpretation of fundamental rights and freedoms in conformity with international instruments, one may say that these instruments are hierarchically parallel to (or even above) the Constitution. However, considering that international instruments get ratified by the organ that adopts legislation, the House of Peoples' Representatives,³⁸ and that the Constitution is the supreme law of the land (article 9(1)), one would reach the conclusion that international human rights treaties are hierarchically below the Constitution and have a status equal to legislation. Accordingly, if, for instance, a provision of a human rights treaty ratified by Ethiopia is inconsistent with the Bill of Rights, the latter prevails.

3.2 Judicial application and practice

As explained earlier, articles 13(1) and 37 make the fundamental rights and freedoms guaranteed by the Ethiopian Constitution justiciable. By making international human rights treaties ratified by Ethiopia part of Ethiopian law, article 9(4) of the Constitution extends the jurisdiction of Ethiopian courts to apply their provisions. Article 3(1) of the Federal Courts Proclamation specifically provides that federal courts shall have jurisdiction over international treaties and article 6(1) of the same proclamation states that federal courts shall settle cases or dis-

³⁷ It is worth noting also that where a constitutional dispute relating to the fundamental rights and freedoms enshrined in the Constitution is submitted to the Council of Constitutional Inquiry, it shall interpret the provision in question in a manner conforming to the principles of the Universal Declaration, international covenants on human rights and international instruments adopted by Ethiopia. See art 20(2) Proclamation 250/2001 (n 15 above).

³⁸ Art 55(12) Ethiopian Constitution.

putes submitted to them on the basis of, among others, international treaties.³⁹

In practice, however, litigants as well as courts avoid referring to international human rights instruments ratified by Ethiopia even in cases where they are directly relevant. There is very limited number of cases in which provisions of such instruments are applied. An example is the judgment of the Federal High Court in the former President's case, discussed above.⁴⁰ In affirming the right of the appellant to freedom of opinion and expression and his right to vote and be elected, the court referred to articles 18 and 19 of the Universal Declaration and the International Covenant on Civil and Political Rights (CCPR), which it said are part of the law of the land by virtue of article 9(4) of the Constitution and that, in accordance with article 13(2), fundamental rights and freedoms shall be interpreted in conformity with these international instruments.

Otherwise, many members of the judiciary believe that rights included in ratified international treaties but which are not clearly guaranteed in domestic laws are not justiciable.⁴¹ Some lawyers also argue that the judicial practice in which the provisions of international human rights instruments are rarely referred to is a result of the fact that domestic law, especially the Constitution, incorporates the provisions of international instruments.⁴² However, the truth is that the Bill of Rights in the Ethiopian Constitution is not substitutive of the diversified and elaborate provisions of international human rights treaties. As well, courts rarely refer to relevant constitutional provisions.

It has been argued that, even if a ratified treaty is part of domestic law, the direct applicability of its provisions would depend on the 'self-executing' nature of each individual treaty right which is determined, *inter alia*, by the wording of the treaty provision.⁴³ But the characterisation of treaty provisions as 'self-executing' in the context of justiciability

³⁹ n 17 above.

⁴⁰ n 31 above. See also the first decision in the trial of officials of the previous regime for genocide, namely, *Special Prosecutor v Col Mengistu Hailemariam & 173 Others*, Federal High Court, Criminal File 1/87, decision 9 October 1995 (instruments referred to include the Universal Declaration, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment).

⁴¹ S Yeshanew *Protection of the right to housing and the right to health in Ethiopia: The legal and policy framework* (2006) Action Professionals' Association for the People (APAP) 23 (conclusion reached after interviews with judges and advocates of the various levels of courts in Ethiopia).

⁴² See Messele (n 33 above).

⁴³ F Coomans 'Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 7; and Viljoen (n 36 above) 533.

of rights is rejected for want of a strong jurisprudential foundation,⁴⁴ and it is in the power of the courts to decide the exact content of legal rules that are normally expressed in general and abstract terms. In the practice of Ethiopian courts, ratified international human rights treaties are sidelined even where the relevant provisions are unambiguously specific. That they are part of the law of the land and that courts are specifically mandated to apply them should be enough for their direct justiciability.

On 6 November 2007, the Cassation Division of the Federal Supreme Court passed a landmark decision which has set a precedent for the future application of international human rights treaties by courts of law in Ethiopia.⁴⁵ The case concerned a dispute between a father, who had never provided for his son, and a maternal aunt of the same child, who had brought him up from early childhood, over the administration of the minor child's inheritance from his deceased mother. The aunt pleaded for the reversal of the legal guardianship which the father had obtained upon the death of the child's mother, which he used to his own benefit, based on the best interest of the child. All three levels of courts of the southern region dismissed her case upon the basis that the aunt could not have a legitimate claim while the father was alive. The Cassation Division of the Federal Supreme Court, to which the aunt applied on the basis of a fundamental error of law in the decision of the regional courts, upheld her argument that the best interest of the child as a primary consideration trumps the 'stronger blood relationship' test of the lower courts by citing article 3(1) of the UN Convention on the Rights of the Child (CRC) and article 36(2) of the Ethiopian Constitution. On this basis it reversed the decision of the regional courts and appointed the aunt as legal guardian. By virtue of article 4 of Proclamation 454/2005, federal as well as regional courts on all levels are bound by the Cassation Division's interpretation of law.⁴⁶

The general trend of avoiding reference to ratified international human rights treaties by both litigants and courts is partly attributable to the fact that the full texts of the treaties have not been published in the official gazette of the state. A specific proclamation with the title of the treaty is usually issued upon the ratification of a certain international treaty by the House of People's Representatives.⁴⁷ Such proclamations incorporate an article with a succinct statement that a treaty (in its full

⁴⁴ See M Scheinin 'Direct applicability of economic, social and cultural rights: A critique of the doctrine of self-executing treaties' in K Drzewicki *et al* (eds) *Social rights as human rights: A European challenge* (1994) 73.

⁴⁵ *Miss Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, File 23632, judgment 6 November, 2007.

⁴⁶ Federal Court Proclamation Amendment Proclamation 454/2005, Federal Negarit Gazette, Year 11, 42.

⁴⁷ See, eg, Convention on the Rights of the Child Ratification Proclamation 10/1992 and Proclamation to Provide for Accession to the African Charter on Human and Peoples' Rights, Proclamation 114/1998.

name) is ratified or acceded to. They never reproduce the full text of the treaty in question and translate the treaty provisions into the official languages of the country.⁴⁸ More strikingly, such proclamations (providing that a treaty is ratified or acceded to) in the official gazette do not exist in relation to some international human rights treaties, including CESC and CCPR.⁴⁹

According to article 2(2) of the Federal Negarit Gazette Establishment Proclamation, all laws of the federal government shall be published in the Federal Negarit Gazette.⁵⁰ Article 2(3) of the same Proclamation provides that all federal or regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of laws published in the Gazette. It has been argued, based on these provisions, that ratified international treaties should be published in the official gazette for their provisions to be enforced at the domestic level.⁵¹ However, the above provisions apply to federal laws, while the provisions of the Federal Courts Proclamation, defining the jurisdiction of federal courts and the substantive laws they apply, refer to international treaties as a different set of laws than federal laws.⁵² International instruments may therefore be applied by federal courts irrespective of their publication in the official gazette. There is an additional argument, based still on the provisions of the Proclamation that established the Federal Gazette, that courts take judicial notice *only* of legal texts or provisions published in the official gazette. This is also a skewed argument as the law requires only that judicial notice be taken of laws published in the gazette. It does not necessarily imply that the laws that courts may take judicial notice of and apply are only those of which the texts are published in the Gazette.

In relation to international human rights instruments, the ratification of which is published in the official gazette, one may argue that the statement that the treaty is ratified or acceded to is as good as publishing the full text of such an instrument. Those who insist on the need to

⁴⁸ The Committee on the Rights of the Child has expressed its concern about the failure to publish the full text of the Convention in the official gazette. See Concluding Observations of the Committee on the Rights of the Child: Ethiopia CRC/C/15/Add 144 (31/01/2001) para 14.

⁴⁹ Most international human rights treaties were ratified or acceded to by the transitional government of Ethiopia between 1991 and 1994. While ratification instruments were deposited with the UN and hence the treaties bind Ethiopia, their ratification was not published in the official gazette, let alone their full texts.

⁵⁰ Proclamation to Provide for the Establishment of the Federal Negarit Gazeta, Proclamation 3/1995, 22 August 1995, art 2. Incidentally, regional states have different official gazettes of their own.

⁵¹ Messele (n 33 above). (Several interviewed judges believe that the provisions of the Proclamation establishing the gazette hinder the application by courts of the international human rights treaties.)

⁵² Proclamation 25/1996 (n 17 above) art 3(1). Art 6(1)(a) also states that federal courts shall settle cases or disputes submitted to them on the basis of federal laws and international treaties.

publish the full text maintain that it is only upon publication of the treaty in the official gazette that it can be deemed to have been known by the public — the publicity function of the Gazette. A counter-argument is that publication, which is required for the benefit of the public, should not serve as a reason to bar citizens from enjoying or invoking their rights in the international instruments ratified by the state and that the knowledge of the public, though important, should not matter that much (in relation specifically to the judicial applicability of the treaty provisions), as such instruments impose the state's obligations rather than individual responsibilities. In addition, domestic laws and other obstacles, such as the non-publication of international treaties ratified by a state, cannot justify the failure to apply (including judicially) the treaties domestically.⁵³

Still, it should be underlined that the publication of the full text of these human rights instruments would make a substantial contribution towards the enforcement or justiciability of the rights they protect. It would make it easier for litigants as well as courts to refer to the treaty provisions. It is therefore submitted that the text of treaties, including the ones whose ratification was not promulgated, be published in the official Gazette, including translations in domestic official languages.

4 National human rights institutions

National institutions, such as a Human Rights Commission and an Ombudsman, provide an easily-accessible forum for the implementation and enforcement of human rights that enjoy constitutional or legislative protection. Such institutions ensure the justiciability of human rights through quasi-judicial procedures. The Human Rights Commission and the institution of the Ombudsman were established in Ethiopia in 2002. Article 6 of the Proclamation that established the Human Rights Commission states that it has the powers and duties to ensure that the human rights and freedoms recognised by the Constitution are respected by all citizens, organs of state, political organisations and other associations as well as by their representative officials; and to ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution.⁵⁴ According to article 6(1) of the Proclamation that established the institution of the Ombudsman, it shall have powers and duties to ensure that directives and decisions

⁵³ See Vienna Convention on the Law of Treaties (adopted in 1969 and entered into force in 1980), Treaty Series Vol 1155 331, arts 26 & 27.

⁵⁴ Proclamation to Provide for the Establishment of the Human Rights Commission, Proclamation 210/2000, 4 July 2000. It is also worth noting that art 1(5) of the Proclamation defines 'human right' as including fundamental rights and freedoms recognised under the Constitution and those enshrined in the international treaties ratified by Ethiopia.

given by executive organs do not contravene the constitutional rights of citizens.⁵⁵ The establishment of these institutions with the mandates given to them could potentially contribute to the justiciability of human rights. Through the branch offices that both institutions shall have over the country, they could offer easily-accessible and speedy quasi-judicial remedies to violations of human rights.⁵⁶

While the Proclamations establishing these two institutions entered into force in 2000, they have not been fully operationalised until recently. By 2007, the two institutions had adopted strategic plans and begun investigating complaints. At the time of writing, the two institutions have investigated and decided a fairly large number of complaints on various human rights issues.⁵⁷ Both institutions face problems that relate to the execution of their recommendations or decisions and a shortage or lack of manpower and facilities that are needed for their effective functioning.⁵⁸ They have also failed to apply human rights treaties and the provisions of the Constitution.⁵⁹ With more experience and support, and the opening of branch offices down to local levels, which is underway, these institutions will make a much greater contribution towards the justiciability of human rights.

5 *Locus standi* in human rights litigation in Ethiopia

The issue of standing, that is, capacity to file a suit or petition invoking the human rights provisions in various legal instruments of a state before judicial and quasi-judicial organs, affects the justiciability of the rights. So as to ensure the full justiciability of rights, the law defining standing in human rights cases should allow for the *actio popularis* or public interest litigation, where a person or organisation may institute a case on behalf of a third person or an indiscriminate mass of people with similar grievances without being required to show a vested personal interest in the case. Especially in developing countries, victims of violations of human rights are often unable to bring their cases before

⁵⁵ Proclamation to Provide for the Establishment of the Institution of the Ombudsman, Proclamation 211/2000, 4 July 2000.

⁵⁶ Art 9 of both Proclamation 210/2000 and Proclamation 211/2000.

⁵⁷ In 2007/2008, the Commission received 301 complaints out of which it managed to investigate and dispose of 272 — the remaining 29 are pending. Interview with Mr Paulo's Firdissa, head of Human Rights Education and Research Department, on 31 July 2008. From August 2007 to April 2008, the Ombudsman received 1315 cases (492 house and land possession cases, 316 employment dispute cases, 95 social security cases, 369 'partiality and unlawfulness' cases, and 43 related cases) by 11 549 complainants out of which decisions and appropriate measures have been taken on 1073 of them — the rest are pending. Interview with Tigist Fisseha, legal expert of the Institution, on 30 July 2008.

⁵⁸ As above.

⁵⁹ As above.

judicial or quasi-judicial organs by themselves, partly as a result of their victimisation. NGOs have been in the forefront in fighting against the violation of human rights by, among others, taking cases to national organs with judicial power and international monitoring bodies. In the absence of a procedure for *actio popularis*, NGOs (or some public spirited persons) cannot play this vital role.

In Ethiopia, the Constitution and the Civil Procedure Code⁶⁰ do not really allow the *actio popularis*. To begin with, article 37 of the Ethiopian Constitution gives the right to an individual or group of persons to bring a justiciable matter to a judicial or quasi-judicial body. However, it requires the person to be a member of the affected group or an association representing the interests of its members. Even where the person is interested in the case, she needs to be authorised by the people on whose behalf she takes the case. The Civil Procedure Code of Ethiopia has the same rule regarding representation in civil cases.⁶¹ For a case of a group of people to be taken to court, all those who are interested should give power of representation to one or more of them (class action) or a power of attorney to a lawyer; such power is also required to take a case on behalf of an individual.⁶² This means that, for example, the case of an Ethiopian street child, who is the victim of a violation of human rights, for whom no relative can be called, may not reach a court of law and, even if it does, may be dismissed for lack of standing.

There are, nonetheless, some special laws that allow for public interest litigation. The Federal Courts Advocates Licensing and Registration Proclamation that was issued in 2000 has a section dealing with the *actio popularis*.⁶³ Article 10 of this Proclamation provides that any Ethiopian who defends the general interests and rights of society will be issued with a Federal Court Special Advocacy Licence, provided certain requirements are fulfilled. These requirements include having a degree in law from a legally-recognised educational institution, knowing the basic Ethiopian laws and having work experience of five years, among others.⁶⁴ NGOs that advocate a respect for human rights in the country may also be issued with such a licence. This means that a lawyer or

⁶⁰ The Civil Procedure Code, Decree 52 of 1965. This Code defines the procedure for all types of civil cases in court unless otherwise provided by the specific legislation providing for a particular right.

⁶¹ Art 38 of the Civil Procedure Code governing class actions in civil cases provides: 'Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorised by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented.'

⁶² See Civil Procedure Code (n 60 above) arts 57-64.

⁶³ The Federal Courts Advocates Licensing and Registration Proclamation 199/2000.

⁶⁴ As above, art 10. The other requirements are: not receiving any kind of reward from a section of society; having a suitable character for shouldering such responsibility; not being convicted; and sentenced for an offence showing improper conduct.

human rights NGO may help an individual victim or a group of disadvantaged individuals whose rights are violated by taking their case to court after securing a Special Advocacy Licence. In practice, however, no NGO has ever been issued with such licence.⁶⁵

The proclamations establishing the Human Rights Commission and the institution of the Ombudsman also allow the *actio popularis*. Under their article 22, both instruments make it possible for complaints to be lodged by a third party (without the need to show a vested interest) and even anonymously.⁶⁶ This needs to be exploited by CSOs to set the human rights protection mandate of the institutions in full motion by submitting complaints on behalf of groups or members of society whose rights are violated.

The Environmental Pollution Control Proclamation,⁶⁷ under article 11, allows any person, without the need to show a vested interest, to lodge a complaint to the environmental authority or the relevant regional environmental agency against any person causing actual or potential damage. Moreover, if the concerned authority fails to take measures within 30 days or if the applicant is dissatisfied with the decision; such person may institute a court case.⁶⁸ In a similar manner, article 17 of the Environmental Impact Assessment Proclamation⁶⁹ allows any person dissatisfied with the decision or monitoring of the environmental authority/agency to submit a grievance notice to the head of the authority. These provisions should also be exploited by CSOs and civic-minded individuals.

6 Conclusion

Fundamental rights and freedoms are well-entrenched in the Ethiopian Constitution. The major international human rights treaties are part of the law of the land. There are many pieces of ordinary legislation protecting various aspects of human rights. A coherent reading of these legal instruments shows that the classic human rights are protected in the Ethiopian legal system and that their contents are sufficiently defined.

⁶⁵ The maiden trial of APAP, a local NGO of lawyers, to secure a Special Advocacy Licence as an organisation failed. The Ministry of Justice demonstrated in this application that it would rather issue a licence for individual staff of NGOs who fulfil the requirements set by art 10 of Proclamation 199/2000 and actually licensed two employees of APAP.

⁶⁶ Art 22(1) of both proclamations provides: 'A complaint may be lodged by a person claiming that his rights are violated or, by his spouse, family member, representative or by a third party.'

⁶⁷ Proclamation 300/2002.

⁶⁸ Art 11(2) Proclamation 300/2002.

⁶⁹ Proclamation 299/2002.

According to the Constitution and ordinary legislation, human rights are enforceable through judicial and quasi-judicial mechanisms. However, constitutional provisions are rarely invoked and applied by the courts. There is an erroneous tendency to take all cases in which constitutional provisions are invoked or the constitutionality of a law or decision is questioned as 'constitutional disputes' that are within the jurisdiction of the House of Federation. However, according to the applicable law, courts may refer an issue to the Council of Constitutional Inquiry only when they believe that a certain constitutional provision needs authoritative interpretation. They are not at all barred from deciding cases in which a constitutional provision is invoked or the constitutionality of a law or decision is contested.

International human rights treaties ratified by Ethiopia are rarely invoked by litigants and applied by courts of law, even in cases that would best be settled by their application. There is now a precedent requiring the judicial application of relevant provisions of ratified treaties. The non-publication of the treaties in the official gazette is partly the reason and hence they should be printed with translations into local languages.

The above overview shows that the substantive and institutional aspects of justiciability of human rights are guaranteed in Ethiopia. The *actio popularis* should be allowed as part of the basic procedural laws of the country so as to ensure a higher degree of justiciability of the rights protected. The judicial practice should be brought in line with the law and courts should develop human rights jurisprudence through the application and enforcement of the human rights provisions of the Constitution and ratified treaties. Specialised training in human rights and their justiciability targeting members of the judiciary would reinforce such an endeavour.

In search of philosophical justifications and suitable models for the horizontal application of human rights

Danwood Mzikenge Chirwa*

Associate Professor of Law, University of Cape Town, South Africa

Summary

This article critiques the dominant view that human rights do not bind non-state actors. It ties the dominant discourse to the natural rights theory and, to a lesser extent, the positivist school of thought. A critique of these traditions reveals that there are no insurmountable philosophical barriers to recognising the application of human rights to non-state actors and the private sphere. Drawing on Marxist and feminist philosophical schools, as well as African conceptions of human rights, it argues that the view that non-state actors should be bound by human rights can be defended philosophically. The article ends with an analysis of the various options through which human rights obligations of non-state actors may be enforced within a domestic constitutional framework.

1 Introduction

The question whether non-state actors should be bound by human rights is one of the most current issues in comparative international and constitutional law. Interest in this issue has been heightened in the context of globalisation, which has witnessed the rise of new actors (such as transnational corporations (TNCs), international financial institutions and multilateral organisations) on the international and domestic scenes with powers akin to, and in some cases dwarfing,

* LLB (Hons) (Malawi), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLD (Western Cape); Danwood.Chirwa@uct.ac.za

those of states.¹ Nowadays these actors influence government policies concerning the provision of social services and goods and political process, and have increasingly also participated in the provision of basic services through privatisation.² Furthermore, non-state actors, like states, often violate human rights severally or in complicity with states.³

However, the human rights doctrine has thus far not helped much in resolving the human rights challenges posed by non-state actors. Very few constitutions recognise the application of the Bill of Rights to non-state actors,⁴ and progress towards the adoption of human rights standards for TNCs and other business enterprises⁵ hit a snag in 2005 following the dissolution of the mandate of the Sub-Commission on the Promotion and Protection of Human Rights in this area and the appointment in the same year of a nominal position of Special Representative for the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises.

Central to the reluctance to recognise the obligations of non-state actors in relation to human rights is the age-old notion that human rights bind states only, not non-state actors. This article attributes this thinking mainly to the natural rights theory and, to some extent, the positivist school. It will therefore critique these theories with a view to providing a theoretical basis for recognising the applicability of human rights to non-state actors and the private sphere. In doing so, it will draw on the Marxist and feminist jurisprudential schools as well as African conceptions of rights. The final section of the article explores the emerging models for extending the application of human rights to non-state actors and the private sphere, which reflect a departure from the strictures of the natural rights and positivist schools.

¹ For the impact of globalisation on state sovereignty, see P Alston 'The myopia of the handmaidens: International lawyers and globalization' (1997) 8 *European Journal of International Law* 435; M Reisman 'Designing and managing the future of the state' (1997) 8 *European Journal of International Law* 409 412; S Sur 'The state between fragmentation and globalization' (1997) 8 *European Journal of International Law* 421 422.

² In Southern Africa, eg, a number of TNCs have been involved in the provision of such important basic services as water and electricity. See generally D McDonald & G Ruiters (eds) *The age of commodity: Water privatization in Southern Africa* (2005); DM Chirwa 'Privatisation of water in Southern Africa: A human rights perspective' (2004) 4 *African Human Rights Law Journal* 218.

³ See, eg, D Orentlicher & T Gelatt 'Public law, private actors: The impact of human rights on business investors in China' (1993) 14 *Northwest Journal of International Law and Business* 1 66; L Saunders 'Rich and rare are the gems they war: Holding De Beers accountable for trading conflict diamonds' (2001) 24 *Fordham International Law Journal* 1402.

⁴ The exceptions in Africa are Cape Verde, The Gambia, Ghana, Malawi and South Africa.

⁵ See UN Norms on the Responsibilities of Transnational Corporations and Other Business Organisations with Regard to Human Rights, UN ESCOR, 55th session, Agenda Item 4, UN Doc E/CN.4/Sub2/2003/12/Rev.2.

2 Philosophical approaches supporting vertical application

2.1 Natural rights theory

The natural rights theory is the tradition most intricately linked to the state-centric application of human rights.⁶ Developed in the seventeenth to eighteenth centuries, this theory was premised on the belief that the state formed part of 'a divine strategy' and was therefore 'natural'.⁷ However, the concern about individual security and freedom in a stateless society prompted theorists of the time to design a theoretical justification for the institution of the state whose primary purpose was to provide security and protect individual freedom.⁸ This was achieved by conceptualising the relationship between the state and the individual in terms of a social contract. To avoid the chaos that would implode under the weight of unlimited individual freedom, John Locke theorised that individuals have to submit to the body politic while retaining their civil rights of life, liberty and property.⁹ The exercise of political power by a government was in turn contingent upon the discharge of the obligation to respect these natural rights of individuals. In so doing, this theory produced two spheres — the public sphere involving the relationship between the state and the individual and the private sphere involving individuals *inter se*.

The twin principles of state sovereignty and liberalism, which were both gaining ground at the time the natural rights theory was formulated, influenced the development of the distinction between the public and the private within the natural rights theory.¹⁰ According to Steiner and Alston:¹¹

It is partly the prominence of the rights related to notions of individual liberty, autonomy and choice and the right related to property protection that produces the sharp divisions in much liberal thought between the state and the individual, between the government and nongovernmental sectors, between what are often referred to as the public and private realms or spheres of action.

⁶ GE Frug 'The city as a legal concept' (1980) 93 *Harvard Law Review* 1059 1099-1100.

⁷ S Avineri *Hegel's theory of the modern state* (1972) 177; A Gillespie 'Ideas of human rights in antiquity' (1999) 17 *Netherlands Quarterly of Human Rights* 233 251.

⁸ H Steiner & P Alston 'Comment on some characteristics of the liberal political tradition' in H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 361 363.

⁹ See M Freeman 'Is a political science of human rights possible?' (2001) 19 *Netherlands Quarterly of Human Rights* 123 125.

¹⁰ See Frug (n 6 above) 1088. See also A Pollis 'Towards a new universalism: Reconstruction and dialogue' (1998) 16 *Netherlands Quarterly of Human Rights* 5 12.

¹¹ Steiner & Alston (n 8 above) 363.

Thus, the social contract provided a legitimate basis for the rule of the nation-state, which was then considered the best means of protecting the individual from various groups contending for power, while liberalism promoted individualism, economic freedom, formal autonomy and abstract equality. The inviolability of privacy was promoted because natural rights rested on the belief that individuals were autonomous beings capable of making rational choices.¹² Consequently, the conduct of private actors in the private sphere fell outside the concern of natural rights.¹³

It is immediately apparent from this discussion that the natural rights theory was based on the wrong assumption that people are born equal and free. This is a point that is well illustrated by feminist writers and the Marxist theory discussed later in this article. These theories converge on the point that the natural rights theory's conception of equality ignored the impact of systemic factors that impede the full exercise by individuals of their freedom and make them vulnerable to victimisation by others in both the private or public spheres. Consequently, the natural rights theory failed to provide protection to individuals from such serious human rights abuses committed in the private realm as slavery and violence against women.¹⁴ As was noted in the introductory section, non-state actors (especially TNCs) now exert increasing influence on international and domestic state policies with both a direct and indirect impact on the enjoyment of human rights than was the case when this theory was being formulated. This development has undercut the assumption that the private sphere is made up of equal parties and thus bolstered the argument for extending the application of human rights to this sphere.

The natural rights theory also wrongly assumed that human beings are entirely autonomous, self-interested and egoistic individuals. Again, this is a point that is well illustrated by the Marxist critique, which posits that private relations consist of structural socio-economic inequalities. Furthermore, Pollis has argued that, even during the Age of the Enlightenment, 'men and women were', at a minimum, 'in a complex web of interpersonal relationships which included reciprocal rights and obligations'.¹⁵ African conceptions of society, as will be shown below, support a conception of human rights which pays homage to the notion of individual duties to one another.

The view that individuals are not egocentric but that they live in a society where they depend on and owe obligations to one another can be said to be consistent with the rationale behind the social contract

¹² D Sidorsky 'Contemporary reinterpretations of the concept of human rights' in D Sidorsky (ed) *Essays on human rights: Contemporary rights and Jewish perspectives* (1979) 89.

¹³ Steiner & Alston (n 8 above) 363.

¹⁴ See R Gaete *Human rights and the limits of critical reason* (1993) 114.

¹⁵ Pollis (n 10 above) 10.

itself. As originally conceived, the natural rights theory held that natural rights existed independently from the state since they predate the state. The formation of a limited government can therefore be seen as an implicit acknowledgment of the duty of individuals to exercise rights responsibly in order to avoid inflicting harm on each other. While the natural rights theory regards the state as the natural means of protecting rights, the social contract can be regarded as having tacitly endorsed the fundamental obligation on the part of every individual not to interfere with the freedom of another. This is a fundamental obligation on the part of everyone, which, if observed universally, would render the state's duty to protect rights irrelevant.¹⁶ The argument for the application of human rights in the private sphere therefore reinforces the recognition of duties that private actors owe one another for them to coexist in harmony and peace, which arguably necessitate the conclusion of the social contract in the first place.

It can therefore be argued that the public/private distinction in the application of human rights not only arose at a time when it was contextually required, but that it was also based on wrong assumptions about the nature of human beings and how they relate to each other. The realisation that private relations are not constituted by equal parties and the fact that non-state actors possess enormous powers in contemporary times demand a rethink of this divide.

2.2 Positivism

Positivism endorses the public/private divide in its application of human rights because of the prominence it gives to the state in the protection of rights. Although the definition of positivism varies from one theorist to another,¹⁷ the central theme is simple: Law is what it is and not what it ought to be. In other words, the law is what can be ascertained through a state's legal processes. Bentham, for one, considered law as '[a]n assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning conduct to be observed by a certain person or class of persons, who are supposed to be subject to his power'.¹⁸ Likewise, Austin stated that the science of jurisprudence 'is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness'.¹⁹ In demonstrating that law was equivalent to a legal system, Kelsen also brought the positivists school firmly within the state machinery.²⁰

¹⁶ H Shue *Subsistence, affluence, and US foreign policy* (1980) 55.

¹⁷ HLA Hart 'Positivism and the separation of law and morals' (1958) 71 *Harvard Law Review* 601 n 25.

¹⁸ J Bentham 'An introduction to the principles of morals and legislation' in C Morris (ed) *The great legal philosophers: Selected readings in jurisprudence* (1959) 262 278.

¹⁹ J Austin *The province of jurisprudence determined* (HLA Hart ed) (1954) 126.

²⁰ See generally H Kelsen *Introduction to the problems of legal theory* (trans BL Paulson & SL Paulson) (1992).

It is from positive laws that legal rights emanate according to the positivist school. Thus, on the basis that natural rights originated from imaginary law, Bentham ridiculed them categorically as 'nonsense upon stilts'.²¹ To underscore the inseparable connection between the state and human rights, Hart, a more contemporary positivist, stated that '[g]overnment among men exists not because men have rights prior to government which government is to preserve, but because without government and law men have no rights and can have none'.²² The positivist school, therefore, defines human rights as those that the state has recognised through positive law. One cannot look beyond state law to discover human rights.

It can therefore be seen that the positivist tradition associates the source of human rights closely with the state. This theory reinforces the role of the state in protecting human rights. To this extent, the positivist doctrine joins paths with the natural rights theory in that they both tacitly and expressly consider the state as the principal mechanism of protecting rights. Since the state confers rights, those rights must bind it.

However, it must be noted that while positivism provides a basis for determining rights, it does not provide any further theoretical framework to determine the content of rights and how they must apply. This is so because of its insistence on the distinction between law and morality.²³ This distinction enables the positivist theory to hold that human rights are only those rights granted by the state. Morality has no relevance in the determination of what human rights are. It can play a role in informing law reform or which new rights to recognise, but it does not assist in the determination of what is law.

Without such a basis, it is possible for the state to grant rights to individuals or groups in both the private and public domains as long as such application is authorised by positive law. For example, the South African Constitution, as noted earlier, expressly recognises the horizontal application of human rights. The validity of such a provision can only be based on the enactment of such a provision in compliance with the state processes of enacting law and not on some moral or other basis. Since this provision was adopted within a legitimate and legal process, this theory would consider it to be valid. At the same time, the positivist tradition would also validate the constitutional position in Canada, which restricts the application of human rights to state action and allows a very limited application to conduct of non-state

²¹ Quoted in AJ Sebok *Legal positivism in American jurisprudence* (1998) 30.

²² HLA Hart 'Utilitarianism and natural rights' in HLA Hart (ed) *Essays in jurisprudence and philosophy* (1983) 182.

²³ Modern adherents to the positivist school at least concede that inner morality is essential to every legal system, but they do not agree on what constitutes that inner morality. See JP Maniscalco 'The new positivism: An analysis of the role of morality in jurisprudence' (1995) 68 *Southern California Law Review* 989.

actors.²⁴ There is therefore a danger implicit in this theory's reliance on procedures of law making and the lack of the recognition of the role of morality in determining the validity of law. It is that this theory can act as a great resource to justify the *status quo*.²⁵

In short, the positivist theory provides the criteria for determining the source of rights but it does not provide a benchmark to determine what the content of rights should be and how they should apply. While it clearly supports the position that the state is the primary bearer of the obligation to protect human rights, it does not provide a basis to restrict their application to states only.

3 Theories that support horizontal application

3.1 The Marxist critique

One of the enduring contributions of Marxism lies in its critique of the public/private dichotomy in the application of human rights. This theory advocated a contextual analysis of law, human rights and society. Rights, according to Marx, could not be eternal or immutable because they took shape within a particular historical context.²⁶ He contended that rights 'can never be higher than the economic structure of society and its cultural development conditioned thereby'.²⁷ He argued that '[n]one of the supposed rights of man goes beyond the egoistic man ... an individual withdrawn behind his private interests and whims and separate from the community'.²⁸

Marxists also held that the state was a reflection of unequal conditions.²⁹ The state in a capitalist environment, Marxists argued, was an institution of compulsion, oppression and exploitation by the bourgeoisie of the working majority. In essence, the Marxist critique highlighted the fact that the concept of human rights and the institution of the state can serve the interests of those that are powerful in society or legitimise systemic and other economic inequalities in the private sphere. This is a concern that is raised precisely by the question of the non-state actors' responsibility for human rights currently.

The Marxist school expressly embraced the notion of duties of individuals to the community. Unger has observed that 'the interests of the individual' in a socialist conception of rights 'are subordinate to

²⁴ See *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 595.

²⁵ IG Shivji *The concept of human rights in Africa* (1989) 48.

²⁶ C Synnwich *The concept of socialist law* (1990) 88.

²⁷ K Marx 'Critique of the Gotha programme' in R Tucker (ed) *The Marx-Engels reader* (1978) 528.

²⁸ K Marx 'On the Jewish question' in D McLellan (ed) *Karl Marx: Selected writings* (1971) 54.

²⁹ RWM Dias *Jurisprudence* (1985) 398.

those of society and, in particular, to the collective enterprise of building socialism ... and that the rights of the individual are inseparably linked to his duties'.³⁰ Bloch has stated similarly that '[t]he solidarity of socialism ... signifies that the "human" in "human rights" no longer represents the egoistic individual, but the socialist individual who, according to Marx's prophecy, has transformed his *forces propres* into a social and political force'.³¹ Natural rights, argued Marx, concerned themselves exclusively with political emancipation as opposed to human emancipation.³² As a result, man was reduced on the one hand to 'a member of civil society, an egoistic and independent individual' and to 'a citizen, a moral person' on the other hand.³³ While in the public (political) sphere individuals were treated as communal beings, argued Marx, the private sphere became the arena for degrading others.³⁴ This prompted him to remark that '[t]he *recognition of the rights of man by the modern state* has only the same significance as the *recognition of slavery by the state in antiquity*'.³⁵ He therefore submitted that the distinction between private law and public law was misconceived, arguing that 'man must recognise his own forces as social forces, organise them, and thus no longer separate social forces from himself in the form of political forces'.³⁶

However, it must be mentioned that Marxists did not call for the horizontal application of human rights. They instead envisaged the emergence of a strong state, after the revolution by the working class, which would control the distribution of resources in the transition (socialism) to a classless society (communism).³⁷ During the transition, the state would determine what rights to guarantee with a strong emphasis on individual duties to the community.³⁸ The state would therefore regulate private conduct for the benefit of everyone. Thus, it can be seen that Marxism did not envisage a situation where non-state actors would have had as much influence as they do currently because freedom and formal equality in the private sphere would be curtailed to give effect to the notion that every individual has duties to the community in which he or she lives.

Nevertheless, as a theory, the Marxist school directly challenged the distinction between the 'public' and the 'private', arguing that such

³⁰ AL Unger *Constitutional development in the USSR: A guide to the Soviet constitutions* (1984) 274.

³¹ E Bloch *Natural law and human dignity* (trans DJ Schmidt) (1986) 178.

³² Marx (n 28 above) 57.

³³ As above.

³⁴ See K Marx 'The holy family' in TB Bottomore & M Rubel (eds) *Karl Marx: Selected writings in sociology and social philosophy* (1963) 224.

³⁵ As above.

³⁶ Marx (n 28 above) 57.

³⁷ As above.

³⁸ Unger (n 30 above) 274.

distinctions helped to blur the structural socio-economic inequalities in society. Although it was premised on the ideal of a strong socialist state to regulate private and public conduct before a classless society could be achieved, it expressly conceded that individuals were not as equal and autonomous as made out by the natural rights theory.

3.2 The feminist critique

Feminism has been at the forefront in critiquing the public/private distinction in the application of human rights and the law generally.³⁹ Feminist theorists argue that this distinction is 'aggressively male' and masks the subordination of women to men in the so-called private sphere.⁴⁰ Pateman succinctly contends:⁴¹

The separation of the 'paternal' from political rule, or the family from the public sphere, is also the separation of women from men through the subjection of women to men. The fraternal social contract creates a new modern patriarchal order that is presented as divided into two spheres: civil society or the universal sphere of freedom, equality, individualism, reason, contract and impartial law — the realm of men or 'individuals'; and the private world of particularity, natural subjection, ties of blood, emotion, love and sexual passion — the world of women in which men also rule.

Feminists contend that infractions in the private sphere affect women more than men, who are in most cases the oppressors.⁴² Consequently, the public/private divide serves the interests of men who dominate the public sphere and fear oppression from the state, but it does not benefit women who do not participate much in the public sphere and suffer oppression in both the private and public domains.⁴³ According to Charlesworth, the law has been used to exclude women from the public sphere — from professions, from the market place, from the vote — but it has not regulated the areas of social, economic and moral life, which encompass the family, home and sexuality, and are associated with women.⁴⁴ As a result, such abuses as domestic violence and rape committed in the home, for example, are rarely the subject of state intervention or legal regulation while the same acts when committed

³⁹ C Pateman 'Feminist critiques of the public/private dichotomy' in SI Benn & GF Gaus (eds) *Public and private in social life* (1983) 281.

⁴⁰ See eg R Lister *Citizenship: Feminist perspectives* (1997). See also C Romany 'Women as aliens: A feminist critique of the public/private distinction in international human rights law' (1993) 6 *Harvard Human Rights Journal* 87 100-103.

⁴¹ C Pateman *The disorder of women: Democracy, feminism and political theory* (1989) 43.

⁴² See AX Fellmeth 'Feminism and international law: Theory, methodology, and substantive reform' (2000) 22 *Human Rights Quarterly* 658 668.

⁴³ As above.

⁴⁴ H Charlesworth 'Worlds apart: Public/private distinctions in international law' in M Thornton (ed) *Public and private: Feminist legal debates* (1995) 243 245-246. See also P Hunt *Reclaiming social rights: International and comparative perspectives* (1996) 86.

by state actors attract legal responsibility.⁴⁵ In view of these arguments, feminists argue that the public/private distinction in the application of human rights and the law generally is undesirable.

In conclusion, the feminist critique challenges the characterisation of the private sphere as involving equal and free parties by showing that women have been treated historically as second-rate citizens and have suffered a wide range of abuses in the private sphere. The feminist critique cogently supports the recognition of the horizontal application of human rights.

3.3 African conceptions

African conceptions of human rights lend support to the idea of human rights obligations for non-state actors.⁴⁶ Studies of certain ethnic groups in Africa reveal that these societies afforded limited protection of what are now called human rights. The concept of human rights in Africa was communitarian in the sense that it provided protection based on ascribed status and membership of the community,⁴⁷ and sought a vindication of communal well-being.⁴⁸ However, individual rights were also recognised.⁴⁹

Significantly, African societies conceived of guarantees of human rights as embodying individual obligations. The basis of the right/duty dialectic lay in the African notion that an individual formed an integral part of the community.⁵⁰ According to Ibhawoh:⁵¹

For every right to which a member of society was entitled, there was a corresponding communal duty. Expressed differently, 'the right of one kinship member was the duty of the other and the duty of the other kinship

⁴⁵ See C Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 486 489-491; DQ Thomas & ME Beasley 'Domestic violence as a human rights issue' (1993) *Human Rights Quarterly* 36 40; UA O'Hare 'Realising human rights for women' (1999) 21 *Human Rights Quarterly* 364 369.

⁴⁶ Some have argued that African societies did not know human rights before colonialism. See eg RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' in J Donnelly (ed) *Universal human rights in theory and practice* (1989) 89. For a contrary view, see M Mutua 'The Banjul Charter: The case for an African cultural fingerprint' in AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 68 78; T Fernyhough 'Human rights and pre-colonial Africa' in R Cohen *et al* (eds) *Human rights and governance in Africa* (1993) 40; CC Mojekwu 'International human rights: The African perspective' in JL Nelson & VM Green (eds) *International human rights: Contemporary issues* (1980) 85 86.

⁴⁷ Mojekwu (n 46 above) 86.

⁴⁸ JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309 321.

⁴⁹ Eg the rights to life, land, marriage, personal freedom, fair trial, welfare, conscience and association See K Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (1987) 154; Fernyhough (n 46 above) 39 76.

⁵⁰ J Mbiti *African religions and philosophy* (1970) 141.

⁵¹ B Ibhawoh 'Cultural relativism and human rights: Reconsidering the Africanist discourse' (2001) 19 *Netherlands Quarterly of Human Rights* 43 53-54.

member was the right of another'. Although certain rights attached to the individual by virtue of birth and membership to the community, there were also corresponding communal duties and obligations.

Julius Nyerere also observed that common obligations among African societies of individuals to others, their families, and the communities included: deference to age because a long life was generally associated with wisdom and knowledge; solidarity with fellow human beings, especially in times of need; and reciprocity in labour issues and for generosity.⁵²

Rights and duties in Africa were inseparable. They served to highlight the reciprocal relationship between the individual and the community to which he or she belonged. A combination of rights and duties was necessary to achieve and maintain unity, cohesion and viability.⁵³ These rights and obligations were not framed as legal entitlements because African societies did not make clear-cut distinctions between morality, religious values and laws, which all formed part of a 'homogenous cosmology'.⁵⁴ However, they were enforceable within the existing procedures of societies.⁵⁵

The notion of individual duties has been integrated in both the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁵⁶ While the extent to which emphasis can be placed on these duties relative to rights will remain a topic of debate,⁵⁷ it is clear that human rights conceptions in Africa lend credence to the call for the obliteration of the public/private divide in the application of human rights.

4 Horizontal application in practice

Having thus far provided the philosophical justification for the horizontal application of human rights, this article will now provide an overview of the emerging constitutional practices regarding the application of human rights to non-state actors and in the private sphere.

⁵² Mutua (n 46 above) 75.

⁵³ Mutua (n 46 above) 81.

⁵⁴ Ibhawoh (n 51 above) 46.

⁵⁵ As above. The communitarian conception of rights is not exclusive to pre-colonial African societies. Pollis notes that the values of human dignity and humanity also existed in Confucianism and Buddhism. In these societies, a community was responsible for ensuring 'the survival and security needs both of its members and those outside the communal group', 'for without this there was no human dignity'. See Pollis (n 10 above) 16.

⁵⁶ See arts 27-29 and 20 & 31 respectively.

⁵⁷ See eg HWO Okoth-Ogendo 'Human rights and peoples' rights: What point is Africa trying to make?' in Cohen *et al* (n 46 above) 74-79.

The aim is to find practical methods of enforcing human rights against non-state actors.

4.1 The doctrine of state responsibility

Constitutions that adhere strictly to the traditional view that non-state actors cannot be bound by human rights do not recognise that the state has positive obligations in relation to human rights. The Constitution of the United States of America is a case in point. Under this Constitution, a state can only be held responsible for a human rights violation where the conduct leading to the violation can be classified as 'state action'.⁵⁸ This viewpoint reflects an extreme strand of natural law, which considers human rights obligations as negative injunctions against the state — all that is required of the state is to refrain from interfering with individual freedom.

The doctrine of state responsibility constitutes an acknowledgment that non-interference is not enough to ensure the protection of human rights, more especially because human rights may be violated by non-state actors. To curb such violations, the state must take positive measures. This idea has its origin in international law. Originally intended to protect the rights of aliens, it has been developed to impose state responsibility for internationally wrongful acts generally, committed by state and non-state actors.⁵⁹

In international human rights law, this doctrine has metastasised into the duty to protect, which posits that the state has the obligation to take positive steps to protect citizens and other people within its jurisdiction from violations that may be perpetrated by private actors.⁶⁰ It entails that the state should prevent violations, regulate non-state actors or investigate violations when they occur, prosecute the perpetrators and provide redress to victims.⁶¹

This duty is not absolute because states cannot be found liable for every human rights violation that occurs in private. The state will only be found responsible where it fails to exercise *due diligence* to

⁵⁸ See HC Strickland 'The state action doctrine and the Rehnquist Court' (1991) 18 *Hastings Constitutional Law Quarterly* 587 645, noting that '[t]he state generally has no constitutional obligation to intervene in private disputes either to protect individuals from harm inflicted by other private entities or to force the wrongful private entities to compensate the victims of their wrongdoing'.

⁵⁹ I Brownlie *System of the law of nations: State responsibility: Part 1* (1983) 9; *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ (Ser A/B) No 74 28; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3.

⁶⁰ H Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1980) 55; A Eide 'Economic, social and cultural rights as legal rights' in A Eide et al (eds) *Economic, social cultural rights: A textbook* (1995) 21 37.

⁶¹ DM Chirwa 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 1 13-14.

prevent the violation or react to it. This test was developed by the Inter-American Court of Human Rights in *Velásquez Rodríguez v Honduras*,⁶² where the state was found responsible for the disappearances of more than 100 persons in Honduras. In finding the government liable, the Court stated that a human rights violation which is initially not directly imputable to a state can lead to international responsibility of the state 'not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it'.⁶³

The due diligence test was applied in the *SERAC* case⁶⁴ by the African Commission on Human and Peoples' Rights (African Commission), in which Nigeria was found responsible for violations of a range of rights recognised in the African Charter committed by the state itself and oil companies in Ogoniland.

At the domestic level, South Africa offers an example where state responsibility has been invoked to address human rights wrongs perpetrated by non-state actors. In *Camichele v Minister of Safety and Security and Another*,⁶⁵ the Constitutional Court held that a recommendation by the police to release a person accused of rape, who had a history of assaults, on bail could give rise to state responsibility for the assault committed by the accused person while on bail. It stated that South Africa had a duty 'to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights'.⁶⁶

Essentially, the doctrine of state responsibility reinforces the role of the state as the primary duty-bearer in relation to human rights. However, it has redefined that role from a non-interventionist one to an interventionist one as required by the Marxist and feminist schools of thought. In holding the state responsible, the state is compelled to take measures such as the enactment of legislation and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere. In the end, non-state actors assume indirect obligations regarding human rights.

However, this doctrine does not solve all the problems posed by non-state actors in relation to human rights. As noted earlier, certain non-state actors, especially MNCs, have become as powerful as, or more powerful than states, while many states, especially those in the developing world, have increasingly lost the capacity to control or regulate these actors due to a range of reasons, including resource constraints, dependency on corporations, corruption and the fluidity

⁶² [1988] Inter-Am Court HR (Ser C) No 4.

⁶³ n 62 above, para 172.

⁶⁴ *Social and Economic Rights Action Centre (SERAC) & Another* (2001) AHRLR 60 (ACHPR 2001).

⁶⁵ 2001 10 BCLR 995 (CC).

⁶⁶ n 65 above, para 63.

of certain non-state actors.⁶⁷ Where a non-state actor has the capacity to redress the violation itself, it does not make sense to hold the state alone responsible. This is particularly the case where the non-state actor derives a financial or other benefit from the violation. More importantly, the doctrine of state responsibility does not hold the state responsible for every human rights violation committed by non-state actors. The state will be exonerated from responsibility if it establishes that it exercised due diligence to prevent the violation and to respond to them. This means that many violations of human rights may not be accounted for by the state.

It is therefore critical that state responsibility should be regarded as a minimum means of holding non-state actors accountable for human rights and should be complemented with other devices.

4.2 Indirect application through private law

Human rights can be enforced against private actors through private law. This idea is best exemplified by the so-called *Drittwirkung* doctrine developed by German courts, which literally means 'third party effect'. German courts have held that basic rights under the German Constitution establish an objective order of values, which must influence the development of private law. It dictates that '[e]very provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit'.⁶⁸ In German practice, these rights influence the development of private law through the provisions of that law which contain mandatory rules of law forming part of the *ordre public*.⁶⁹ These are rules which 'for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent'.⁷⁰ They include such general phrases as 'good faith', 'public good', 'good morals', and 'reasonableness'.

The landmark *Lüth* case⁷¹ illustrates the application of the *Drittwirkung* doctrine. A firm director had been granted an injunction restraining an activist from urging the German public not to see a movie produced by a former producer of anti-Semitic films during the Nazi regime and asking theatre owners and distributors not to show or distribute the film. The injunction was granted by the lower court on the ground that the actions of the activist amounted to actionable incitement under article 826 of the German Civil Code. The injunction was quashed by the Federal Constitutional Court on the ground that the lower court had failed to consider the basic right to freedom of opinion when granting

⁶⁷ See Chirwa (n 61 above) 26-28 33-35.

⁶⁸ *Lüth* case (1958), 7 BVerfGE 198. The facts and holding as discussed herein are based on the English translation of the case in DP Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1997) 361-368.

⁶⁹ n 68 above, 363.

⁷⁰ As above.

⁷¹ As above.

the injunction in favour of the film director. It stated that 'where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual interests must, in principle, yield'.⁷² In essence, the German Civil Code was interpreted against the backdrop of the right to freedom of opinion.

The *Drittwirkung* doctrine has been adopted by courts in Italy, Spain, Switzerland and Japan,⁷³ and by the European Court of Human Rights.⁷⁴ It has also been codified in the South African Constitution in sections 8(3) and 39(2).⁷⁵

The *Drittwirkung* doctrine constitutes a significant departure from the traditional view that human rights do not bind non-state actors. It proceeds from the assumption that private relations, which have traditionally been regulated by private law, often involve parties who have unequal bargaining powers and whose freedom is affected by wide-ranging systemic factors. It is therefore important for human rights to infiltrate into this arena so that the weak, vulnerable and disadvantaged can be given effective protection. Its greatest advantage is that it recognises the importance of private law (both statutory and common law) as a means of redressing human rights violations. Many common law actions closely approximate the claims that could be based on human rights provisions. For example, the common law actions of defamation, false imprisonment, nuisance, negligence, assault and battery can adequately address violations concerning the rights to dignity, liberty, privacy, and security of the person. Statutes are also often enacted to give effect to specific rights. However, it must also be acknowledged that not all private law principles, including legislation, give full effect to human rights. It is therefore important to empower courts to develop or interpret private law in accordance with the Bill of Rights so that rights are not undermined in the private sphere. By so doing, non-state actors become constrained by human rights and can be considered to be bound by them.

⁷² n 68 above, 367.

⁷³ A Barak 'Constitutional human rights and private law' in D Friedmann & D Barak-Erez (eds) *Human rights in private law* (2001) 13 22; MJ Horan 'Contemporary constitutionalism and legal relationships between individuals' (1976) 25 *International and Comparative Law Quarterly* 848 864-866.

⁷⁴ A Clapham 'The "*Drittwirkung*" of the Convention' in R MacDonald *et al* (eds) *The European system for the protection of human rights* (1993) 163.

⁷⁵ The former provides that when applying a provision of the Bill of Rights to a natural or juristic person, a court 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. The latter provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

4.3 Direct application

The concept of direct responsibility is a manifestation of the full horizontal application of human rights. It gives full expression to the argument advanced in this paper that non-state actors have human rights obligations which can be enforced against them. Direct application means that a victim of a human rights violation can bring a claim based directly on a provision in the Bill of Rights against a non-state actor or mount a defence to a private action based directly on a human right. Many factors would have to be considered before a non-state actor could be held directly responsible for a given human right. These include the nature of the right, the nature of the duty, the extent of the violation, the nature of the non-state actor, and the relationship between the non-state actor and the victim.

The notion of direct responsibility of non-state actors has significant procedural advantages as it presents an opportunity to the claimant to bring alternative claims in one action — one based on the common law and another on the Constitution. It is particularly ideal where no private law action exists to remedy the violation alleged and have been allowed in Ireland. In *Meskeil v CIÉ*, Walsh J stated that:⁷⁶

[a] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it.

The question that immediately arises is this: Does the claimant have to exhaust private law remedies before he or she can rely directly on a constitutional right? In *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*,⁷⁷ Henchy J addressed this question thus:⁷⁸

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the state and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts — for example, negligence, defamation, trespass to a person or property — a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course, in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v CIÉ IR 121*); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional rights.

⁷⁶ [1973] 1 IR 121 134.

⁷⁷ [1988] 1 LRM 629.

⁷⁸ As above.

The Irish jurisprudence shows that a constitutional claim may be brought against a non-state actor where no private law remedy exists to rectify the violation or where such a remedy exists but it is ineffective. It must be noted, however, that courts in Ireland do not have the mandate to develop the common law to give effect to a provision in the Bill of Rights. This can be contrasted with South Africa, where courts have been given express powers in this regard. Nevertheless, it is not clear even under the South African Constitution whether the duty to develop the common law is broad enough to allow courts to create new causes of action in private law aimed at giving effect to rights.

The ideal model of the horizontal application of a bill of rights would therefore seem to be one that combines both the indirect approach — which permits a consideration of these rights when interpreting and applying private law — and the direct approach — which allows victims of rights to bring constitutional claims against non-state actors where private law remedies are inadequate to address the claim or are non-existent. To allow for the harmonious development of private law and constitutional law, the claimant must shoulder the burden of proving that a particular human rights wrong cannot be dealt with through private law (and the indirect application of the common law). This approach does not deny that human rights apply to non-state actors, but it rather is a pragmatic approach to effectuating the idea of the horizontal application of human rights.

5 Conclusion

In conclusion, this article has argued that the state-centric application of human rights is an outdated concept attributable to the natural rights theory. The separation of the public from the private, which informed the manner in which rights were conceptualised within this doctrine, was influenced by conditions of the time which demanded the pursuit of liberalism and formal equality in the private sphere and a mechanism for restricting state interference in the private realm. To some extent positivist thinking lent support to the vertical application of human rights by defining rights as those recognised by the state. A critique of both these schools has revealed that they both do not present insurmountable obstacles to redefining the application of human rights.

This article has demonstrated that a number of jurisprudential schools support the horizontal application of human rights. The first is the Marxist school, which exposed the potential of the natural rights school as a tool for powerful actors to oppress poor and often defenceless people and also advocated for the collapsing of the distinction between public and private law. The second is the feminist critique, which has demonstrated that the public/private divide operates to serve the interests of men and shield non-state actors from human

rights responsibility for abuses committed by them against women in the private sphere. African conceptions of human rights also lend credence to the recognition of binding human rights obligations of private actors.

This does not mean that states will now cede their responsibilities or have diminished responsibilities in relation to human rights. Of course, states are and will remain the principal duty bearer. It is consistent with the ideal of the horizontal application of human rights to hold states responsible for failing to take measures to prevent violations of human rights or to respond to them. In the process, non-state actors become indirectly responsible for human rights. However, horizontal application demands that human rights should be considered when determining private disputes, whenever necessary. This requires that the private law should be subject to the Bill of Rights. Parties to private litigation should be allowed to call in aid human rights provisions to buttress their positions. Where private law remedies are non-existent, inadequate or ineffectual, it should be possible for claimants to bring direct constitutional claims, where applicable, against non-state actors. A combination of direct and indirect application would help to cure any inconsistencies between private law and human rights, narrow down the imaginary and illusory divide between public law and private law, and ultimately give full effect to the notion of the horizontal application of human rights.

The drafting of the Constitution of Swaziland, 2005

Thulani Maseko*

Attorney of the courts of Swaziland

Summary

Swaziland gained independence from the United Kingdom on 6 September 1968, under a written, Westminster-type Constitution (the Independence Constitution). This Constitution was unlawfully repealed by His Majesty King Sobhuza II on 12 April 1973, promising that all the people of Swaziland would craft their Constitution in complete liberty and freedom, without outside pressure. In pursuit of this goal, a number of commissions were established to solicit the citizens' views on the type of constitution they wanted to govern them. Because the Independence Constitution was abrogated on the ground that it was imposed by departing colonial masters, it was expected that the Constitution to be drawn after independence would truly reflect the aspirations of all the people. This article, therefore, interrogates the question whether, in light of the wave of constitution making in Africa in the 1990s, the Swaziland constitution-making process fulfilled the requirements of an all-inclusive, participatory, transparent and accountable process. The article examines the independence of the King's appointed constitutional review bodies, given that, in order to produce a credible, legitimate and durable constitution, the review bodies must be as independent from the government as possible. Further, the article looks at the role of the African Commission on Human and Peoples' Rights as well as the Swaziland courts in enhancing a people-driven process. The article concludes that the Swaziland constitution-making process did not

* BA, LLB (Swaziland), LLM (Human Rights and Democratisation in Africa) (Pretoria); trmaseko@yahoo.com. While pursuing his LLM, the author did short courses on Election Observation and International Law. He served an internship at the Constitutional Court of the Republic of South Africa as Justice Pius N Langa's clerk. He is a founder member of the National Constitutional Assembly (Swaziland) as well as Lawyers for Human Rights (Swaziland). As a practising lawyer, he has handled a number of human rights cases and he successfully represented Lawyers for Human Rights in a complaint filed with the African Commission on Human and Peoples' Rights against the Kingdom of Swaziland.

herald a departure from the constitutional order that existed prior to the adoption of the Constitution of the Kingdom of Swaziland Act 1 of 2005. Despite the adoption of this Constitution, the Kingdom does not qualify as a constitutional and democratic state with a justiciable bill of rights capable of enforcement by an independent judiciary.

1 Introduction

We live in an era of constitution drafting. Of the close on 200 national constitutions in existence today, more than half have been redrafted. New nations and radically new regimes, seeking the democratic credentials that are a precondition for recognition by other nations and by other international political, financial, aid and trade organisations, make the writing of a constitution a priority.¹

In the 1990s, the drafting of constitutions in Africa has become the norm, following decades of one-party rule, military dictatorships and no-party regimes.² African states engaged in the process of crafting new constitutions in search of democratic and legitimate governance based on the free will of the people, and to foster a culture of democracy and respect for and the promotion of fundamental rights and freedoms. A transition to democracy is a lofty undertaking, meeting the challenge of developing constitutional and institutional mechanisms to build viable and durable democratic values and practices that would guarantee political stability, a peaceful and orderly change of government,³ the rule of law and a complete respect for fundamental human rights⁴ and the civil liberties of the individual.

Constitution drafting is seen as a means of bringing peace and creating stability and prosperity, where a country's people take charge of governance and their political and economic destiny in complete

¹ V Hart 'Democratic constitution making' Special Report 107, United States Institute of Peace <http://www.usip.org/pubs/specialreports/sr107.html> (accessed 3 August 2005). See also G Arnold *Africa: A modern history* (2005) 813, where he writes: 'No other region of the world has seen so much constitution making — or re-making — as Africa over the last 40 years and the new constitution worked out by the Constitutional Commission for Eritrea (CCE) following the end of its war of independence from Ethiopia in 1991 is worth examining. The constitution had to serve the basic aims of nation building, equitable development and stability, the building of democracy, the protection of human rights and assurance of popular participation.'

² JSM Matsebula *A history of Swaziland* (1988) 265 states that the Royal Constitutional Commission, appointed by King Sobhuza II on 6 September 1973, recommended that Swaziland should be declared a no-party state.

³ Declaration on Unconstitutional Changes of Government (2000) AHG/Dec.150 (XXXVI) <http://www.africa-union.org/root/au/Documents/Decisions/hog/10HoGAssembly2000.pdf> (accessed 15 August 2005).

⁴ J Oloka-Onyango & J Mugaju 'Introduction: Revisiting the multiparty versus movement system debate' in J Oloka-Onyango & J Mugaju (eds) *No-party democracy in Uganda myths and realities* (2000) 1.

freedom.⁵ The Kingdom of Swaziland was not immune from these new winds of change,⁶ as it remained the only absolute monarch⁷ in the Southern African region after Lesotho adopted a democratic Constitution in 1993,⁸ with the King becoming a constitutional monarch.⁹

The idea of crafting new and democratic constitutions developed out of a need for autochthonous constitutions that would give birth to democratic constitutionalism. The independence constitutions,¹⁰ otherwise called first generation constitutions (with the exception of those of the Republic of Botswana¹¹ and The Gambia¹² before the *coup*) were repealed, amended and jettisoned by newly-independent African states, for many reasons, among them, that these were imposed¹³ by the departing masters on the African peoples, and that, being products of western democracies, they were not suitable for economic devel-

⁵ Eg, as long ago as 12 April 1973, His Majesty King Sobhuza II of Swaziland stated as follows when he unlawfully repealed the 1968 Independence Constitution: '[t]hat I and *all my people* heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a constitution created by ourselves for ourselves *in complete liberty* without outside pressures; as a nation we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of *all our people*' (my emphasis).

⁶ T Clark *Great speeches of the 20th century* (2008) 161 171.

⁷ J Hatchard *et al* (eds) *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 22. Of course, in terms of the King's Proclamation to the Nation of 12 April 1973, according to which His Majesty King Sobhuza II repealed the 1968 Independence Constitution, the King said: 'Now therefore, I, Sobhuza II, King of Swaziland, hereby declare that, in collaboration with my cabinet and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself and shall, for the time being, be exercised in collaboration with my Cabinet Ministers.' This position was reaffirmed by His Majesty King Mswati III after he had assumed the throne in 1982 and he declared by King's Decree 1 of 1982, when he declared: 'I hereby reaffirm that in terms of Swazi law and custom, the King holds the supreme power in the Kingdom of Swaziland and as such all executive, legislative and judicial powers vests in the King who may from time to time by decree delegate certain powers as functions as he may deem fit.'

⁸ Constitution of Lesotho Order 16 of 1993 http://www.lesotho.gov.ls/documents/Lesotho_Constitution.pdf (accessed 26 August 2005).

⁹ Sec 44 of the Constitution of Lesotho 1993 reads: '(1) There shall be a King of Lesotho who shall be a constitutional monarch and head of state.'

¹⁰ Swaziland Independence Constitution Act 50 of 1968, Statutes of Swaziland.

¹¹ C Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Journal on Human Rights* 93 108.

¹² The *coup* occurred in 1994. See in this regard *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

¹³ M Sinjenga 'Constitutionalism in Africa: Emerging trends: The evolving African constitutionalism' (1998) 60 *The Review* 23. See also Hatchard (n 7 above) 314.

opment in Africa.¹⁴ Baloro¹⁵ writes that, at the initial stages, in most cases, what was put in place was a one-party regime which usually, at least nominally, espoused one political ideology or the other, for example, socialism-African-unionism in Kwame Nkrumah's Ghana, African socialism and *ujaama* in Julius Nyerere's Tanzania and humanism in Kaunda's Zambia.

Be that as it may, there can be little doubt that the constitution-making wave of the 1990s was primarily a search for constitutionalism. It has long been suggested that:¹⁶

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules and the arbitrariness of discretion are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.¹⁷

Although others contend that constitutionalism is firmly set in a western liberal democratic mould,¹⁸ it is generally accepted that African lawyers have uncritically operated within this Diceyan conceptual framework, refined by De Smith¹⁹ and blessed by the Law of Lagos.²⁰ It is acknowledged that constitutionalism concerns itself with two fundamental pillars: the limitation of governmental power and the protection of fundamental rights, freedoms and civil liberties of the individual.²¹ Classical constitutionalism, as expounded by Dicey, has been taken to greater heights by academics and scholars who now speak of modern constitutionalism. Blutlerichie²² put it very well when he said:²³

¹⁴ As above.

¹⁵ J Baloro 'Democracy and human rights in Swaziland: Study of the law and practice regarding free association and assembly' in C Okpaluba *et al* (eds) *Human rights in Swaziland: The legal response* (1997) 30-31.

¹⁶ A de Smith *The new Commonwealth constitutions* (1964) 106.

¹⁷ Reproduced in Hatchard (n 7 above) 1.

¹⁸ As above.

¹⁹ IG Shivji 'State and constitutionalism: A democratic perspective' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 27.

²⁰ The Internal Commission of Jurists (ICJ) organised the African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations as well as countries of other continents, assembled in Lagos, Nigeria, in January 1961, to discuss freely and frankly the rule of law with particular reference to Africa, and reaffirmed the Act of Athens and Declaration of Delhi, which in turn reaffirmed the concepts of constitutionalism; http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos (accessed 8 September 2005).

²¹ KC Wheare *Modern constitutions* (1951) 7 writes that '[c]onstitutions spring from a belief in limited government'.

²² DT Blutlerichie 'The confines of modern constitutionalism' (2004) 3 *Pierce Law Review* 1 <http://ssrn.com/abstract=1031529> (accessed 21 June 2005).

²³ Blutlerichie (n 22 above) 6.

Modern constitutionalism as I use the term throughout the rest of this project refers to a set of formal legal and political concepts ... These concepts, which serve as a cornerstone of liberal political and legal theory (and evolved to support that theory), are the division and limitation of government power, the recognition and protection of certain individual rights, the protection of private property and the notion of representative or democratic government. These concepts are the backdrop against which the modern constitutionalist enterprise is judged.

Despite the fact that the basic tenets of constitutionalism are by and large well accepted, they have not been without criticism. Gutto²⁴ argues that the classical formulation by Dicey is representative of a narrow conception of state power as simply dividing it into three arms. He advances the argument that the judiciary is the most passive branch in that its effective operation is dependent on the mobilisation of the law by private citizens. The exercise of power in modern society can no longer be left to the conventional structures of government, but also includes the role played by civil society, such as non-governmental organisations (NGOs),²⁵ in influencing policies and the direction of government.

It is contended that constitutionalism, democracy and human rights are intertwined and interconnected.²⁶ Mapunda²⁷ proposes that

[c]onstitutionalism and democracy are inextricably interlinked. The Universal Declaration of Human Rights 1948; and all major United Nations resolutions; the International Covenant on Civil and Political Rights of 1966; the constitutions of modern states; of the African Charter on Human and Peoples' Rights states — all these recognise '[c]onstitutionalism and democracy as an integral part of fundamental human rights'.

Indeed, it is now generally accepted that constitutionalism in liberal political discourse revolves around issues of limited powers of government and the protection and promotion of individual rights. These issues make room for the rule of law, the separation of powers, periodic elections and the independence of the judiciary.²⁸ Constitutionalism also implies that the constitution cannot be suspended, circumvented

²⁴ SBO Gutto 'The rule of law, democracy and human rights: Whither Africa?' (1997) 3 *East African Journal of Peace and Human Rights* 130 133.

²⁵ This is illustrated by the fact that the AU adopted the Kigali Declaration in 2003, para 28, which emphasises the role played by civil society organisations in promoting and defending human rights. See C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

²⁶ Butleritchie (n 22 above); see also W Osiatynnski 'Constitutionalism, democracy, constitutional culture' in W Wyrzykowski (ed) *Constitutional cultures* (2000) 151-158 and R Henwood 'Constitutional culture in Africa' in W Wyrzykowski (ed) *Constitutional cultures* (2000) 107-122.

²⁷ AM Mapunda 'Conditions for the functioning of a democratic constitution' *Conference on Constitutionalism and the legal system in a democracy East and Central Africa Chief Justice Colloquium* (1995) 35.

²⁸ JO Ihonvbere *Towards a new constitutionalism in Africa* (2000) 13; see also F Kanyongolo 'The constitution and the democratic process in Malawi' in O Sichone (ed) *The state and constitutionalism* (1998) 2.

or disregarded by political organs of government, and that it can be amended only in accordance with the procedures appropriately enshrined to change the constitutional character, and that it gives effect to the will of the people acting in a constitutional mode.²⁹ Accordingly, the Swaziland constitution-making exercise must be understood in the context of achieving the creation of a limited government.³⁰

2 The writing of the Constitution of the Kingdom of Swaziland Act 1 of 2005

The constitution of a nation is not simply a statute which mechanically defines the structures of government. It is a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation, and the articulation of the values bonding its people and disciplining its government.³¹

Bradley and Wade³² define a constitution as something *antecedent* to a government; government being merely the creation of a constitution. A constitution is not the act of a government, but of a people constituting a government and a government without a constitution is power without right. These definitions tell us a lot about the nature of a constitution and its necessity. Put differently, a constitution is an account of the ways in which a people establish and limit the power by which they govern themselves, in accordance with the ends and purposes that define their existence as a political community.³³ This explains why the process of making a constitution is as important as the product and its observance.

The following questions are pertinent to constitution making, particularly in the context of Swaziland: Do the constitutions of Africa crafted in the 1990s, particularly which of Swaziland, 'reflect the national soul'? Does it identify the values, ideals and aspirations of the nation? Does it have in-built mechanisms to limit the power and discipline the government? Does it promote and protect fundamental human rights and freedoms and civil liberties of the individual? Two preliminary issues are worth highlighting. These are: Who are the people? Who is the nation? This is precipitated by the fact that, more often than not, African leaders refer to and purport to do things for and on behalf of

²⁹ L Henri 'Elements of constitutionalism' (1998) 60 *The Review* 12.

³⁰ As to whether or not the new Swaziland Constitution achieves this, a comprehensive discussion is made by Fombad (n 11 above).

³¹ *S v Acheson* 1991 2 SA 805 813 (Nm High Court) *per* Mahomed AJ (as he then was), cited with approval by Masuku J in *Rex v Mandla Ablon Dlamini* Criminal Case 7/2002 (HC) (unreported) 7.

³² AE Bradley *et al* (eds) *Constitutional and administrative law* (1995) 5.

³³ H Belz 'Written constitutionalism as the American project' http://www.constitution.org/cmt/belz/lcfl_i.htm (accessed 3 August 2005).

their 'people' or the 'nation', even if the decisions they take are detrimental to the very people they lead. This is significant in the context of Swaziland because, when the 1968 Independence Constitution was repealed, the King supposedly acted for and with the full consent of the Swazi people:³⁴

[T]hat I and my *people* heartily desire at long last, after a long constitutional struggle, to achieve full freedom and independence under a *constitution created by ourselves for ourselves* in complete liberty without outside pressures; as a *nation* we desire to march forward progressively under our own constitution guaranteeing peace, order and good government and the happiness and welfare of all our *people*.³⁵

In ancient Greek, the term 'people' referred to the many disadvantaged and landless masses.³⁶ However, in modern constitutional and democratic terms, 'people' has been used in a number of ways. People may be viewed as a single, cohesive and collective body bound together by a common or collective interest, in which case they are one and indivisible. This view tends to generate a model of democracy that focuses on the general or collective will of, rather than the private will. 'People' may also mean 'the majority'. Used in this sense, democracy means the strict application of the principle of majority rule in which the will of the many or numerically strongest overrides that of the minority, hence, degenerating the term into the tyranny of the majority. In the final analysis, 'people' can be thought of as a collection of free and equal individuals, each of whom has the right to make independent decisions.³⁷

Alongside the term 'people' is the word 'nation'. Heywood suggests that this word symbolises a psycho-political construct.³⁸ What sets a nation apart from any other groups or collectivity is that its members regard themselves as a nation. A nation perceives itself as a distinctive political community. For the sake of constitutional developments, it becomes crucial that a people as a nation come to some consensus on issues affecting governance. One person or a clique acting alone cannot claim to be acting for and on behalf of a people or a nation without their involvement.³⁹ The question that arises from this analysis is whether the King had the authority to repeal the Constitution on behalf of the people of Swaziland.⁴⁰

³⁴ Oloka-Onyango & Mugaju (n 4 above)

³⁵ Decree 2(e) of the King's Proclamation (my emphasis).

³⁶ A Heywood *Politics* (2007) 69.

³⁷ As above.

³⁸ Heywood (n 36 above) 106.

³⁹ Art 19 of the African Charter prohibits the domination of a people by another and reads: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

⁴⁰ This part of the discussion is developed by the reference to the decisions of the courts mentioned below (nn 62 & 63). See also SH Zwane 'Constitutional discontinuity and legitimacy: a comparative study with special reference to the 1973 constitutional crisis in Swaziland' unpublished LLM dissertation, University of Edinburgh, 1998 36.

Swaziland gained independence from the United Kingdom of Britain on 6 September 1968⁴¹ through a Westminster-type constitution. Hlatshwayo⁴² outlines the structure of the Constitution and remarks that it established the three arms of government, being parliament,⁴³ the executive⁴⁴ and the judiciary.⁴⁵ This Constitution was preceded by a 1967 Constitution under which national elections were held under a multi-party system on 20 April 1967.⁴⁶

2.1 The abrogation of the 1968 Independence Constitution

There seems to be consensus among constitutional writers that the most significant factor responsible for the repeal of the Constitution was the emergence of the opposition Ngwane National Liberatory Congress (NNLC) in parliament after the 1972 general elections.⁴⁷ Hlatshwayo writes that the loss of three seats by the Imbokodvo National Movement (INM) ushered in a new era in Swaziland's political culture.⁴⁸ When the new parliament convened the next year, there was almost tangible tension between the ruling INM party and the opposition NNLC. It would seem that the INM Members of Parliament (MPs) were bent on making the life of the opposition difficult by exhibiting a somewhat hostile attitude. This tension came to a breaking point when the government declared one of the opposition members, Thomas Bhekindlela Ngwenya, a prohibited immigrant.

It has been suggested that the repeal of the Constitution is perhaps one of the most significant events in the constitutional history of Swaziland.⁴⁹ It is important because it marked the first constitutional crisis of the newly-independent state, and its cause can be traced to the existence of constitutional rules from two separate sources within one system.⁵⁰

⁴¹ Swaziland Independence Constitution Act 50 of 1968.

⁴² NA Hlatshwayo 'The ideology of traditionalism and its implications for principles of constitutionalism: The case of Swaziland', unpublished LLM dissertation, Faculty of Graduate Studies, 1992 130.

⁴³ Ch V 1968 Constitution.

⁴⁴ Ch VII 1968 Constitution.

⁴⁵ Ch IX 1968 Constitution.

⁴⁶ Matsebula (n 2 above) 243.

⁴⁷ Matsebula (n 2 above) 257, Zwane (n 40 above) 26 as well as Khumalo contend that the different sources were that the independence Constitution attempted to separate the elements of the traditional political system from the modern constitution system within one system, 96.

⁴⁸ Hlatshwayo (n 42 above).

⁴⁹ B Khumalo 'Legal pluralism and constitutional tensions: the evolution of the constitutional system in Swaziland since 1968' unpublished LLM dissertation, Faculty of Graduate Studies, York University, Ontario, 1993 96.

⁵⁰ Khumalo (n 49 above) 99.

2.2 The Bhekindlela Thomas Ngwenya cases

The political controversy over the presence of the NNLC in parliament resulted in three of the most significant judicial pronouncements in the short history of the modern Constitution. The Ngwenya⁵¹ cases were a test of the role of the judiciary as the custodian of the Constitution, fundamental rights and freedoms.⁵² Before the elected members of parliament could be sworn in, it was alleged that one of the members of the opposition NNLC, Bhekindlela Thomas Ngwenya, did not have Swaziland citizenship. The Deputy Prime Minister, as Minister responsible for immigration, issued a declaration declaring Ngwenya a prohibited immigrant.⁵³ Ngwenya challenged the declaration, seeking an order declaring him to be 'a citizen of Swaziland'. Delivering judgment, Sir Phillip Pike CJ (as he then was) observed that, in view of the importance of the matter, affecting as it did the fundamental rights of a person who claimed to be a citizen and who had been resident in Swaziland for some years until his deportation, the case had to be heard by a full bench of two judges. As well, the court was not satisfied that the government had proved that Ngwenya was not a citizen of Swaziland, and consequently the deportation order was set aside.

Government appealed. While the appeal was pending, an amendment to the Immigration Act⁵⁴ was rushed through and tabled in parliament and quickly passed into law. The Amendment Act established a tribunal to decide cases of disputed nationality. An appeal against its decision could be made to the Prime Minister whose decision was final, thus excluding the jurisdiction of the courts. Its application was to be retrospective.⁵⁵ The tribunal invited Ngwenya to appear before it so that it could determine his citizenship status.⁵⁶ This was despite the fact that Ngwenya's citizenship had been confirmed by the High Court. The tribunal came to the conclusion that Ngwenya was not a citizen of Swaziland in that he was born in the Republic of South Africa. Ngwenya challenged the competence of the decision of the tribunal as well as its constitutionality.⁵⁷ Hill CJ (as he then was) dismissed the application.⁵⁸

⁵¹ *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88.

⁵² n 51 above, 102.

⁵³ Purportedly issued in terms of sec 9(1)(g) of the Immigration Act 32 of 1964, published under *Government Gazette* 65 of 1972.

⁵⁴ Immigration (Amendment) Act 22 of 1972.

⁵⁵ Khumalo (n 49 above) 105.

⁵⁶ RS Mthembu 'Human rights and parliamentary elections in Swaziland' in Okapaluba (n 15 above) 124.

⁵⁷ *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR (HC) 119.

⁵⁸ Khumalo writes that in the intervening period between the first application and this one, Chief Justice Sir Phillip Pike had vacated his office. He does not tell us the reasons (107).

This judgment was clearly wrong, based on a deliberate lack of appreciation of the relationship between an act of parliament on the one hand, and the Constitution on the other, as well as the role of the courts in protecting and promoting fundamental rights and freedoms. Overturning Hill CJ, the Court of Appeal⁵⁹ held that, constitutionally, legislative interference with the jurisdiction of the High Court would be an alteration of the Constitution; hence it required a joint sitting of parliament in compliance with the requirements of section 134 of the Constitution. This finding of the Court of Appeal enraged government.⁶⁰ It was as a result of this decision that the Constitution was repealed. On the afternoon of 12 April 1973, the Prime Minister introduced a motion in both houses of parliament to the effect that the Constitution be abrogated.⁶¹ Members of the opposition walked out of parliament in protest to these constitutional manoeuvres, and the motion received unanimous support from both houses.⁶² On the same day, King Sobhuza II announced the repeal of the Constitution.⁶³

2.3 Judicial pronouncements on the proclamation

Both the High Court⁶⁴ and the Court of Appeal of Swaziland⁶⁵ concluded that the Constitution was unlawfully repealed. The High Court delivered two separate judgments in terms of which it held this. As to whether the King's proclamation could be set aside, the two judges hearing the matter disagreed. Masuku J concluded that it could not be set aside because it had become a *grundnorm*, while Sapire CJ (as he then was) made the following observations:⁶⁶

The late King purported to act in accordance with powers he claimed to have, but which were nowhere to be found provided for in the 1968 independence Constitution. I appreciate that a host of conundrums stem both from the view I express, and that enumerated by my brother. If the abrogation by proclamation of the 1968 Constitution was incompetent in 1973, can the passage of time alone convert what was invalid into a *grundnorm*? At what stage did that which was invalid become valid? If the validity had been tested in earlier years close to 1973 what would have been the result? Can the 1973 Proclamation and the later confirmatory decrees become of

⁵⁹ *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR (CA) 123.

⁶⁰ Mthembu, Hlatshwayo and Khumalo all agree that the government was not pleased with the decision and this led to the ruling party manoeuvring the Constitution and its electoral process.

⁶¹ Matsebula (n 2 above) 258.

⁶² Hlatshwayo (n 42 above) 145.

⁶³ As above.

⁶⁴ *Lucky Nhlanhla Bhembe v The King Criminal Case 75/2002 (HC) per Masuku J; Nhlanhla Lucky Bhembe & Ray Gwebu & Another Criminal Case 75 & 11 of 2002 per Sapire CJ* (unreported).

⁶⁵ *Gwebu & Another v Rex* (2002) AHRLR 229 (SwCA 2002).

⁶⁶ n 64 above, 3.

themselves a valid empowerment of the King to legislate by decree? Does it really alter the outcome because the issue is only put squarely to the test some thirty years after the event? Is not the process by which my brother sees the development and establishment of the *grundnorm*, nothing more than the negation of the rule of law? I would be hard pressed to answer these questions with confidence, but incline to the view that the opinions endorsed by my brother are a negation of the rule of law. I question whether the King ever has had power to amend much less to abrogate the Constitution, whether by decree or otherwise. The 1968 Constitution had, as my brother has observed, provision for its amendment. Perceived impracticability of this provision could not itself empower or justify abrogation.

This was judicial activism at its best. However, the Court of Appeal⁶⁷ disagreed, holding that what happened in 1973 was a successful 'revolution' on the strength of the judgments of *Madzimbamuto v Lardiner-Burke and Another*,⁶⁸ *Mangope v Van der Walt and Another NNO*,⁶⁹ as well as *Michell and Others v Director of Public Prosecutions*.⁷⁰ The Court, *per* Browde JA, said that:⁷¹

Finally, the indications before us are that the government was not opposed, at least ostensibly, to a democratic dispensation. I say this despite a strong feeling amongst many that thus far this ostensible attitude has been mere lip-service.

I argue that the Court missed a golden opportunity of helping to rewrite in a constructive⁷² way the constitutional history of Swaziland. I contend that not only is such statement erroneous, but also misleading because respect for fundamental rights and freedoms, even at the time the decision was delivered, was absolutely nil, as the very proclamation which the Court was called upon to decide its validity denied citizens their rights.⁷³ It is amazing that in the face of this draconian piece of legislation, the Court of Appeal could say that the government was not

⁶⁷ n 65 above.

⁶⁸ (1968) 3 All ER 561 (PC).

⁶⁹ 1994 3 SA 850 (BGD).

⁷⁰ (1987) LRC (Const) 127.

⁷¹ n 65 above, 238 para 36.

⁷² NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 67.

⁷³ Eg Decrees 11, 12 and 13 of the Proclamation expressly prohibited any form of political activity. Decree 11 reads: 'All political parties and similar bodies that cultivate and bring about disturbances and ill feelings within the nations are hereby dissolved and prohibited.' Decree 12 reads: 'No meetings of a political nature and no processions shall be held or take place in any public place unless with the prior consent of the Commissioner of Police, and consent shall not be given if the Commissioner of Police has reason to believe that such meeting, procession or demonstration is directly or indirectly related to political movements or other riotous assemblies which may disturb the peace or otherwise disturb the maintenance of law and order.' Decree 13 reads: 'Any person who forms or attempts or conspires to form a political party or who organises or participates in any meeting, procession or demonstration in contravention of this decree shall be guilty of an offence and liable on conviction to imprisonment not exceeding six months.'

opposed to a democratic dispensation, yet the constitution-making process had never been spared criticism. The criticism was fundamentally that the political environment was not conducive to effective free and genuine citizen participation in the constitution-making process. It is regrettable that the Court came to this conclusion, particularly because it had observed, in the very same judgment, the relevance of the African Charter on Human and Peoples' Rights (African Charter) in human rights discourse. In our view, the Court of Appeal ought to have declared the proclamation null and void, notwithstanding that the African Charter had not been incorporated into national law.⁷⁴ It would have been better if the Court did not pronounce on the willingness or otherwise of the government to embrace democratic governance as this issue still remains hotly contested.

2.4 The Royal Constitutional Commission 1973

The search for a constitution for Swaziland began as far back as 6 September 1973 when Sobhuza II appointed the Royal Constitutional Commission (RCC) with the mandate of travelling throughout Swaziland in order to get the views of the Swazi people on the form of constitution they wanted.⁷⁵ The RCC made two fundamental recommendations: that Swaziland be declared a no-party state with the Swazi National Council (SNC) being the only policy-making body, and that there must be a two-chamber house of parliament composed of the assembly and senate. The Constitution Advisory Committee (CAC), whose task it was to look at the report of the RCC and advise the King on the suitability of the report, followed it.

2.5 The Tinkhundla Review Commission (TRC) 1992

As pressure for constitutional reforms mounted,⁷⁶ the King appointed a number of committees and commissions. The first of this came to be popularly known as Vusela I and its mandate was the same as the earlier

⁷⁴ *Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria & Others* (unreported) Suit M/102/93, High Court of Lagos State *per* the Honourable Justice Onalaja O found that the fact that Nigeria had ratified and incorporated the Charter means that municipal law cannot prevail over international law. The judge continued to hold that, even if the Charter had not been incorporated, the position would have remained the same; discussed by PB Ngabirano 'Case comment — Does municipal law prevail over international human rights law in Africa? *Registered Trustees of the Constitutional Rights Project (CRP) v The President of the Federal Republic of Nigeria & Others*' (1995) 2 *East African Journal of Peace and Human Rights* 102.

⁷⁵ Matsebula (n 2 above) 265.

⁷⁶ Organisations such as the Swaziland Federation of Trade Unions (SFTU), the banned Peoples' United Democratic Movement (PUDEMO) and the Swaziland Youth Congress (SWAYOCO), Swaziland National Association of Teachers (SNAT), and later the Swaziland Federation of Labour (SFL) and the revived Ngwane National Liberatory Congress (NNLC) and others demanded genuine democratic changes.

1973 Commission discussed above. The system was severely criticised as people called for the introduction of multiparty democracy and a constitutional monarch,⁷⁷ the result of which was the appointment of the Tinkhundla Review Commission (TRC).⁷⁸ Its terms of reference included considering and making appropriate recommendations to promote the democratic process in Swaziland.⁷⁹

The TRC was accountable to the King⁸⁰ and its reports were to be confidential and not disclosed to anybody until further notice.⁸¹ Any member of the public who wanted to make submissions would do so in person and could not represent or be represented at any instance in any capacity.⁸² Because it was single-handedly appointed, the Commission was received with mixed feelings. Organised pro-democracy groups denounced it as being undemocratically appointed and that one person drew up its terms of reference.⁸³ It presented its report⁸⁴ to the King and recommended, among others, that there must be a written constitution for Swaziland.⁸⁵ Some people wanted political parties while others did not.⁸⁶ It further recommended that it had carefully considered both views and was of the view that a multiparty system is not one of the principles of democracy whilst it is certainly one of its mechanisms. It, however, concluded that the nation's opinion on a multiparty system or the unbanning of political parties be tested in the future.⁸⁷

2.6 The Constitutional Review Commission (CRC) 1996

At the height of political unrest and instability,⁸⁸ the King appointed the Constitutional Review Commission (CRC),⁸⁹ chaired by his brother,

⁷⁷ Baloro (n 15 above) 51.

⁷⁸ Established by Decree 1 of 1992.

⁷⁹ Sec 3(d) Decree 1 of 1992.

⁸⁰ Sec 4 Decree 1 of 1992.

⁸¹ Sec 5 Decree 1 of 1992.

⁸² Sec 9 Decree 1 of 1992.

⁸³ One of the members, Mandla Hlatshwako, refused to participate in the Commission and his organisation, PUDEMO, refused that he be part of it because they had not mandated him. See JB Mzizi 'Leadership, civil society and democratisation in Swaziland' in A Bujra *et al* (eds) *Leadership, civil society and democratisation in Africa: Case studies from Southern Africa* (2002) 165; see also R Russon 'Social movements and democratisation in Swaziland' in L Sachikonye (ed) *Democracy, civil society and the state: Social movements in Southern Africa* (1995) 66.

⁸⁴ TRC Report 30 June 1992.

⁸⁵ n 84 above, 44.

⁸⁶ n 84 above, 49.

⁸⁷ n 84 above, 88.

⁸⁸ The country was experiencing an unprecedented wave of labour and political demonstration predominantly led by the labour unions, particularly the SFTU under the leadership of the charismatic Secretary-General Jan Sithole, which was joined by the SNAT and later the SFL. The protests continue to date.

⁸⁹ Established by Decree 2 of 1996.

Prince Mangaliso Dlamini. Although its terms of reference were initially to produce a draft constitution for Swaziland, the mandate was subsequently changed so that it had to produce a report.⁹⁰ It presented its report to the King in August 2001.⁹¹ The report was shallow, lacked statistical support for the recommendations, and was misleading and contradictory in many respects. It stated that the Commission was⁹²

truly representative of all political persuasions and opinions. Members were drawn from political organisations, trade unions, medical doctors, lawyers, civil servants, the private sector, university professors and lecturers, businessmen, chiefs, priests, whites, coloureds and indigenous Swazis.

It did not mention that the members did not represent constituencies, but served in their individual and personal capacities. Section 4 of the Decree reads:⁹³

Representation

- 4 Any member of the public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission.

That the members did not represent any body is clear from the Commission's admission that for the reason of section 4 above, 'group submissions were not allowed ... In a way, it could be said that the collection of the submissions was done "*in camera*".'⁹⁴ I contend that the recommendations of the CRC failed to ensure that the writing of the Constitution would guarantee constitutionalism. It failed to ensure that the three arms of government were clearly demarcated and delimited.⁹⁵ In making the King an absolute monarch, it recommended that 'there is a (small) minority which recommends that the powers of the monarchy must be limited'.⁹⁶ It recommended that the King continues to hold executive authority with the power to appoint and dismiss the Prime Minister and Ministers,⁹⁷ fundamental rights and freedoms must not be incompatible with Swazi custom and tradition,⁹⁸ the right to freedom of association and assembly, to form and join political parties,

⁹⁰ Swaziland Constitutional Review (Amendment) Decree 1 of 2000.

⁹¹ CRC Final Report on the submissions and progress report on the project for the recording and codification of Swazi law and custom (undated).

⁹² CRC Report (n 91 above) 21.

⁹³ The meaning of this section was a subject of debate in the challenge of the constitutional validity of the Constitution discussed below (n 145).

⁹⁴ CRC Report (n 91 above) 27.

⁹⁵ CRC Report (n 91 above) 21. The reference to Swazi law and custom is as provided for under Amendment Decree 1 of 1982 and the Kings' Proclamation as it makes the King an absolute monarch by vesting all powers in him.

⁹⁶ As above.

⁹⁷ CRC Report (n 91 above) 80-81.

⁹⁸ CRC Report (n 91 above) 83.

continue to be restricted as political parties must remain banned.⁹⁹ While courts are the custodians of the law, they are to apply the law with due regard to the customs and traditions of the Swazi people. The courts' jurisdiction on bail matters is severely curtailed in that they should not grant bail.¹⁰⁰ That the recommendations were not intended to produce a constitution that would ensure constitutionalism was expressed aptly by Okpaluba when he said:¹⁰¹

If you give me the Constitutional Review Commission document, there is nothing to put down there, there is no principle there that can enable anybody to draft anything ... If you talk of Swaziland, I think the CRC had every opportunity to put in some of those things there. They had five (5) years to do that. Where are the documents they are supposed to have read, to show the homework they did, that they have consulted the people?

2.7 The Constitution Drafting Committee (CDC) 2002

Like the previous bodies, the King handpicked members of the Constitution Drafting Committee (CDC),¹⁰² once again chaired by his brother, Prince David Dlamini. Its function was to draft, in consultation with the Attorney-General and other experts, a constitution suitable for the Kingdom of Swaziland¹⁰³ and was accountable to the King.¹⁰⁴ Criticism against it being undemocratically elected fell on deaf ears as the Committee continued its work. Dissenting voices called for a more open and democratically-elected, all-inclusive and broad-based structure. Organisations demanded, among others, that all obstacles and impediments to free political participation and activity be removed; the prince-led CDC be democratised and widened up to encompass all stakeholders on agreed ground rules and terms of reference; there must be put in place an interim transitional executive authority; there must be put in place an autonomous electoral body and there must be agreement on an appropriate time for democratic elections.¹⁰⁵

⁹⁹ CRC Report (n 91 above) 95.

¹⁰⁰ CRC Report (n 91 above) 82.

¹⁰¹ C Okpaluba 'Constitutionalism and constitution making' paper delivered at the workshop on 21-23 June 2002 of the Council of Swaziland Churches in conjunction with the Southern African Conflict Prevention Network (SACPN) *Bridging the divide* 35.

¹⁰² Decree 1 of 2002.

¹⁰³ Sec 3 Decree 1 of 2002.

¹⁰⁴ Sec 9 Decree 1 of 2002.

¹⁰⁵ There was a demand that the October 2003 national elections be postponed pending the finalisation of the Constitution, in terms of which elections would be conducted even if they would establish an interim government.

The Commonwealth Expert Team later observed:¹⁰⁶

[W]e do not regard the credibility of these national elections as an issue: no elections can be credible when they are for a parliament which does not have power and when political parties are banned.

The report further recommended an early promulgation of a new constitution providing for the power to be held by parliament, the unbanning of political parties and ensuring respect for the rule of law and the establishment under the Constitution of an independent election management body and other issues.

2.8 Presentation of the draft Constitution and reactions

The CDC produced its first draft Constitution and presented it to the King on 31 May 2003.¹⁰⁷ The King extended its period to purportedly allow the people to read and make inputs before the Constitution could be adopted. Even as this was happening, the call for an open, all-inclusive process based on the free and popular will of all the people continued.¹⁰⁸ The draft Constitution was subjected to all forms of criticism, the first being that it was not written in the vernacular language¹⁰⁹ to enable the vast majority of illiterate Swazis to understand it. As a result, a SiSwati version was produced.

Local and international organisations represented the most criticism, among these the International Bar Association (IBA),¹¹⁰ which observed that, in order for a constitutional review and making process to be legitimate, it must satisfy four tests. These are that the process must be as inclusive as possible, as transparent as possible, as participatory as

¹⁰⁶ Commonwealth Secretariat 'Swaziland National Elections 18 October 2003: Report of the Commonwealth Expert Team' http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B9C9C4FF0-8E15-40E4-98B1-138FE7A81FF9%7D_SwazilandNationalElections_report.pdf (accessed 5 November 2003) 18.

¹⁰⁷ In his written presentation, the Chairperson informed the King and the world that they as the Committee had thought long and hard about the system that Swaziland should follow, and concluded that the country should remain a no-party state. From this it is clear that it is not the people who do not want democracy but those who were tasked to write the Constitution for and on behalf of the people.

¹⁰⁸ These calls were being made by many groups, including Lawyers for Human Rights, the newly formed Swaziland Coalition of Concerned Civic Organisation (SCCCO), later joined by the National Constitutional Assembly (NCA) formed on 27 September 2003 with a view to concentrate on influencing the direction of the process and, if need be, produce an alternative working constitution from the point of view of civil society. It was composed of various civil society groupings, including the banned political parties.

¹⁰⁹ A Kalu 'Language and politics: Towards a new lexicon of African constitutionalism' in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 37-51 39. The writer argues that, because African constitutions are written in foreign languages, they tend to convey values that are not upheld.

¹¹⁰ International Bar Association 'Striving for democratic governance: An analysis of the draft Swaziland Constitution August 2003' <http://www.ibanet.org/images/downloads/HRISwazilandAnalysis.pdf> (accessed 5 August 2005).

possible and it must be accountable to the people. Amnesty International (AI)¹¹¹ produced its observations, which it made available to the CDC. The CDC and government accused organisations of interfering in the process and refused them entry to local communities for purposes of conducting civic education.¹¹²

2.9 The context of the drafting of the 2005 Constitution

One of the major challenges that the CDC faced was that it worked while the country was facing a crisis in the rule of law. In November 2002, the Court of Appeal delivered two judgments:¹¹³ firstly, that the King lacked authority to make law by decree; and secondly committing the Commissioner of Police for contempt of court. In response, government issued a statement in which it refused to comply, contending that the judges had no power to strip the King of powers given to him by the Swazi people. The statement alleged that forces outside the system influenced the judges and that they had not acted independently. As a result, government declared that it would not recognise these judgments.¹¹⁴ In December 2002, all the judges of the Court of Appeal resigned.¹¹⁵ The full bench of the High Court, in defending the impaired integrity and dignity of the Court, issued an order that the Prime Minister purges his contempt.¹¹⁶ He refused.

Another case in which the government showed gross contempt for the rule of law is *Lindiwe Dlamini v Qethuka Sigombeni Dlamini and Tulujane Sikhondze*.¹¹⁷ In this case, the Attorney-General, in the company of the Major-General of the Umbutfo Swaziland Defence Force, Sobantu Dlamini, the Commissioner of Police, Edgar Hillary, and the Commissioner of Prisons, Mnguni Simelane, confronted the judges presiding over the case. They instructed the judges to stop hearing the matter or resign.¹¹⁸ The judges refused to resign, choosing to

¹¹¹ Amnesty International 'Memorandum to the Constitution Drafting Committee on the Draft Constitution for Swaziland October 2003' <http://www.amnesty.org.ru/library/Index/ENGAFR550042004?open&of=ENG-SWZ> (accessed 6 August 2005).

¹¹² Such organisations included Lawyers for Human Rights; Women and Law Southern Africa Research Trust (Swaziland Chapter); the Co-ordinating Assembly of Non-governmental Organisations (CANGO); and SCCCO, not to mention political parties.

¹¹³ *Gwebu* (n 65 above) and *Commissioner of Police & Two Others v Madeli Fakudze* Civil Appeal Case 38/2002 (unreported).

¹¹⁴ Press Statement 22/02 His Excellency the Right Honourable Prime Minister Dr BSS Dlamini 28 November 2002.

¹¹⁵ They only resumed work around June 2005 after a protracted process of negotiations with the government, after the Minister for Justice and Constitutional Affairs, who also was Chairperson of the Constitution Drafting Committee, filed an affidavit undertaking that all judgments of the court will be complied with. All along the country operated without a Court of Appeal.

¹¹⁶ *The Attorney-General v Ray Gwebu & Lucky Nhlanhla Bhembe* Case 3699/2002 (HC) (unreported).

¹¹⁷ Civil Case 3091/2002 (HC) (unreported).

¹¹⁸ A letter dated 1 November 2002 in court file confirmed this.

stand by their oath of office.¹¹⁹ Another case that deserves mention is that of Zwane.¹²⁰ Zwane was purportedly transferred from his position as clerk to parliament to that of Under-Secretary in the Ministry of Agriculture and Co-operatives. He challenged the transfer in the Industrial Court, which found in his favour. The Prime Minister and government refused to comply with the Industrial Court's judgment, contending that it had taken a political decision. To date it has been observed that the crisis in the rule of law continues.¹²¹ AI,¹²² the IBA and the International Commission of Jurists (ICJ)¹²³ discuss these developments fully.¹²⁴

In the meantime, dissenting voices to the regime were persecuted and prosecuted. A case in point is that of leaders of the trade unions¹²⁵ and the trial of Mario Masuku,¹²⁶ leader of the opposition Peoples' United Democratic Movement (PUDEMO). Masuku was charged with the crime of sedition¹²⁷ for allegedly uttering in public words translated to mean 'Down with His Majesty King Mswati's reign' and having made a statement in public persuading churches, schools, colleges and universities, as well as every house that all these places should become houses for revolution. The court acquitted and released him upon holding that the prosecution had failed to prove its case beyond reasonable doubt.¹²⁸

These are the conditions under which the Constitution of 2005 was written. The question that begs an answer is whether it can be said that the process was designed to give birth to a credible democratic constitution, reflecting the genuine aspirations and views of the Swazi people. In this study, it is argued that the Swaziland constitution-

¹¹⁹ Statement read in open court by Chief Justice Sapire, court file.

¹²⁰ Industrial Court Case 20/2002 (unreported).

¹²¹ Statement of the Coalition published in *The Times of Swaziland* 24 August 2005 <http://www.times.co.sz/058.html#article 9> (accessed 24 August 2005).

¹²² Amnesty International 'Swaziland human rights at risk in a climate of political and legal uncertainty' 20 July 2004 <http://www.amnesty.org/en/library/info/AFR55/004/2004/en> (accessed 8 September 2005).

¹²³ International Commission of Jurists 'Report of the Centre for the Independence of the Judges and Lawyers — Fact-Finding Mission to the Kingdom of Swaziland, June 2003' http://www.icjcanada.org/en/documents/2003-06_Swaziland.pdf (accessed 5 August 2005).

¹²⁴ nn 110 & 123 above respectively.

¹²⁵ Amnesty International Report on Swaziland <http://web.amnesty.org/web/ar2001.nsf/webafrcountries/SWAZILAND?OpenDocument> (accessed 8 September 2005); 'Swaziland: Fears of safety/ill treatment : Musa Dlamini, Mario Masuku, Jan Sithole and other trade union officials and political activities' <http://www.amnesty.org/en/library/info/AFR55/001/2000/en> (accessed 5 August 2005).

¹²⁶ *Rex v Mario Masuku* Criminal Case 84/2001 (HC) (unreported). See also Amnesty International Report on Swaziland 'Swaziland: Acquittal of Mario Masuku is an opportunity to end persecution of the opposition' <http://www.amnesty.org/en/library/info/AFR55/002/2002/en> (accessed 8 September 2005).

¹²⁷ Sec 4(1)(b) of the Seditious and Subversive Activities Act 46 of 1938, as amended.

¹²⁸ *Rex v Mario Masuku* (n 126 above).

making process was not designed to yield such a constitution, but instead to entrench the ruling Tinkhundla regime.

Four organisations filed an application to the High Court under the NCA¹²⁹ for an order, among others, that they are entitled to participate in the process, pursuant to the relevant provisions of Decree 2 of 1996, and that they are and have always been entitled in pursuit of their rights and legitimate expectations to participate in the constitution-making process in that the CRC was obliged at all material times to receive and consider oral and written presentations from applicants in terms of the African Charter and the New Partnership for Africa's Development (NEPAD).

While the proceedings were pending, the King, purportedly exercising customary powers, summoned the nation to the national cattle byre,¹³⁰ Ludzidzini Royal residence, to debate the draft Constitution. The four organisations, applicants in the above-mentioned matter, attended the meeting and raised objections to the discussion on the ground of the rule of *sub judice*.¹³¹ However, the meeting proceeded, the government contending that there was no court order stopping a discussion of the draft Constitution. Eventually, organised groups withdrew from the discussion after complaining to the Chairperson that the proceedings were in any event stage-managed and they were not given a fair chance to present their case.

2.10 Parliamentary debate and adoption of the Swaziland Constitution

In October 2004, the Swaziland Constitution Bill 8 of 2004 was presented and tabled before parliament. Before the debate started, the four organisations again filed an urgent application seeking an interdict, preventing parliament from debating and passing the Bill

¹²⁹ Civil Case 1671/2004 (HC) (unreported). This is supposedly a national meeting at the Royal residence where the people are summoned to attend a meeting at the King's cattle byre. They sit on the ground and presumably issues of national significance are discussed. This forum has been questioned as inappropriate for an effective way of addressing issues of governance. It is basically informed and influenced by Swazi law and custom and things are to be done in a particular customary way. Although it is supposed to be a traditional democratic way of getting the government's view of the people, it fails to live up to genuine democratic aspirations. Eg, views which are deemed to be unpopular to those of the ruling regime are not tolerated. It is therefore not at all an effective way of constitutional governance.

¹³⁰ Letter presented to the Chairperson of the meeting, Prince David, in September 2004. The cattle byre is supposedly a national assembly where the King addresses the nation; see Matsebula (n 2 above) 240.

¹³¹ *Swaziland Federation of Trade Unions, People's United Democratic Movement, Swaziland Federation of Labour, Ngwane National Liberatory Congress v Chairman of the Constitutional Review Commission & Five Others* Civil Case 1671/2004.

into law.¹³² The basis of the application was that, pending the determination of the main application discussed above, parliament must be interdicted from debating the Constitution. They contended that parliament was not independent and therefore not suited to enact a national constitution, in the light of its powerlessness. The full bench of all five judges¹³³ of the High Court heard the matter and dismissed it, upholding points *in limine*¹³⁴ raised by the Attorney-General on behalf of the respondents. It did not give reasons at the time.

In a subsequent judgment on 23 March 2005, the Court gave its reasons. An analysis of this disappointing judgment is beyond the scope of this study. It suffices to say that the judgment represents a very sad day for Swaziland in so far as judicial activism is concerned.¹³⁵ The Court missed yet another opportunity to rise to the occasion in defence of fundamental rights and freedoms to guarantee the right to participation. It wrongly found that, according to Decree 2 of 1996, organisations had no right to participate. It held that that labour unions were creatures of industrial law and therefore had no business with the Constitution and that political parties remained banned in terms of the King's proclamation.

Amidst the challenges to the process, the King, after referring back to parliament¹³⁶ the areas he wished to be revisited, signed the Constitution into law. The coming about of the 2005 Swaziland Constitution, which His Majesty King Mswati III signed into law, inside the cattle-

¹³² *Swaziland Federation of Trade Unions, Peoples' United Democratic Movement, Swaziland Federation of Labour, Ngwane National Liberation Congress v Chairman: Constitutional Review Commission & Seven Others* Civil Case 3367/2004.

¹³³ Annandale ACJ, Matsebula J, Maphalala J, Nkambule AJ & Shabangu AJ. It is important to mention that the appointment of Annandale ACJ as Acting Chief Justice, and the appointments of Nkambule J and Shabangu J were at the time being challenged by the Law Society of Swaziland in the matter filed as *Law Society of Swaziland v Swaziland Government & Five Others* Case 743/2003, in which the Society called upon the government to show cause why the appointment of Justices Nkambule and Shabangu as judges of the High Court and the appointment of Judge Annandale as the Acting Chief Justice could not be declared a nullity. Their very independence was therefore questionable. The applications were never finalised because there were no judges to determine them, government having frustrated the appointment of an outside judge or judges to adjudicate on it.

¹³⁴ The Attorney-General argued that the applicants had failed to establish urgency, that the court had no jurisdiction to entertain the matter since it was a matter affecting the principle of separation of powers, that the applicants had no *locus standi* and that the applicants had failed to set out grounds for an interdict, among others.

¹³⁵ L Tibatemwa-Ekrikubinza 'The judiciary and enforcement of human rights: Between judicial activism and judicial restraint' (2002) 8 *East African Journal of Peace and Human Rights* 145-173. See also Udombana (n 72 above).

¹³⁶ While parliament was in session debating the Bill, the Prime Minister rushed to parliament with a special message from the throne, the instruction which was to effect certain changes in the Bill as the King pleased.

byre,¹³⁷ on 26 July 2005,¹³⁸ has therefore taken 32 years. Although parliament enacted the Constitution and it was later rubber-stamped by the 'people' at the meeting convened at Ludzidzini Royal Residence, the adoption was still subject to a court challenge, which has since been determined.¹³⁹ The applicants sought an order directing the government to convene and constitute a constitutional assembly, national convention or such other democratic institution which the court deems necessary, which is broadly representative of the Swaziland society, including all representative bodies that are entitled to and are willing to take part.

It is not surprising that, while the King said that 'no one should complain about the Constitution, but follow what it says',¹⁴⁰ it remains rejected by many organisations.¹⁴¹ It is not enough that the international community has welcomed the Constitution.¹⁴² The Secretary of the Commonwealth, Don McKinnon, is on record as saying that the adoption of the Constitution represented a historic day for the people of Swaziland.¹⁴³ It should be noted that, while the international community, particularly the Commonwealth, played a significant role in ensuring that Swaziland has a written constitution, civil society in Swaziland, including political parties, has suggested that it has reneged from

¹³⁷ The Uganda Constitution of 1966 was famously referred to as the Pigeon Hole Constitution because President Amin advised members of his parliament that they would get their copies in their pigeon holes in parliament. See SWW Wambuzi (Chief Justice) (as he then was) 'Constitutionalism and the legal system in a democracy' Conference on constitutionalism and the legal system in a democracy East and Central Africa Chief Justice Colloquium, 28, 29 & 30 March 1995 6. Because of the adoption of the Swaziland Constitution inside the cattle-byre, it befits that we refer to it as the 'cattle-byre Constitution'.

¹³⁸ Adopted as the Constitution of the Kingdom of Swaziland Act 1 of 2005. *The Times of Swaziland* 27 July 2005 carried as a headline on the front page 'Historic!'; on the same note, *The Swazi Observer* 27 July 2005 proclaimed 'A new identity for Swaziland'.

¹³⁹ nn 149 & 154 below.

¹⁴⁰ *The Times of Swaziland* 27 July 2005; *The Swazi Observer* 27 July 2005.

¹⁴¹ Statement of the SCCCO published on 24 August 2005, the NCA statement of July 2005. People's United Democratic Movement (PUDEMO) said in 2004, and their position has not changed: 'We will only be interested in a constitution that would be inclusive of the entire people of Swaziland, not just a few. So we reject this draft constitution with contempt.' 'Swaziland Opposition demand legalisation of Parties' <http://www.irinnews.org/report.aspx?reportid=45051> (accessed 29 August 2005). Commenting during the visit by Njongonkulu Ndungane, the Bishop of the Anglican Church of Southern Africa, Swaziland's Anglican Bishop Meshack Mabuza, said on his country's controversial palace-driven constitutional reform process: 'It is not the content of the Constitution that bothers us, it is the process of the Constitution — it will only be legitimate if the people have a hand in the process.' 'Bishops wrap up Swaziland mission' <http://www.mg.co.za/article/2004-07-13-bishops-wrap-up-swaziland-mission> (accessed 29 August 2005).

¹⁴² L Sisay, United Nations Development Deputy Representative Resident to Swaziland, was quoted, saying: 'This is a very great day for Swaziland. I think Swazi's have witnessed the dawn of a new era' *The Swazi Observer* 27 July 2005.

¹⁴³ <http://www.thecommonwealth.org/Templates/System/LatestNews.asp?NodeID=144636> (accessed 1 September 2005).

its fundamental principles as enshrined in the Harare Declaration,¹⁴⁴ particularly paragraph 9 of the Declaration.

3 Decision of the African Commission on Human and Peoples' Rights ignored

It is important to mention that while the constitution-making process was going on, pending before the African Commission on Human and Peoples' Rights (African Commission) was a complaint by Lawyers for Human Rights (LHR).¹⁴⁵ In this complaint, LHR was alleging that the King's Proclamation of 1973 was in violation of articles 1, 2, 9, 10 and 13 of the African Charter. In the context of the constitution-making process, LHR complained that the Swaziland government had not put in place any mechanism to ensure effective and free citizen participation under article 13 of the African Charter. The complainant stated that the proclamation banned political parties and prohibited citizens from engaging in free political activity so that their participation in the process was more meaningful.

Indeed, the African Commission found that the proclamation was in violation of the African Charter as alleged by the complainant. It found that, although the proclamation was promulgated before Swaziland ratified the African Charter in 1995, its presence constituted a continuous violation, yet the Swaziland government had an obligation under article 1 to bring its laws in conformity with the African Charter. It was argued before the African Commission that, for purposes of constitution making, the banning of political parties undermined the people's capacity to participate freely and effectively in the process as the environment was not conducive to this. The African Commission agreed and recommended that the proclamation be brought into conformity with the provisions of the African Charter and that the state engages with other stakeholders, including members of civil society, in the conception and drafting of the new Constitution.

This decision has not been heeded by the Swaziland government. The government was to report to the African Commission within six months on what steps had been taken to comply with the African Commission's decision. However, no such steps have been taken, even in the face of a formal request to engage made by LHR¹⁴⁶ on behalf

¹⁴⁴ Adopted by the Heads of Government Meeting of the Commonwealth on 20 October 1991, Harare, Zimbabwe. See C Heyns *Human rights law in Africa Vol 1* (2004) 741.

¹⁴⁵ *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

¹⁴⁶ The letter was dated 2007, and is on file with the author and was hand-delivered at the office of the Minister for Justice and Constitutional Affairs as line minister responsible for the Constitution.

of the NCA. As a public relations exercise, Swaziland hosted the 43rd ordinary session of the African Commission, in which it portrayed a good image on the human rights situation in Swaziland.¹⁴⁷ LHR had occasion to reply to the Prime Minister's statement, indicating that, despite the coming into force of the Constitution, the human rights situation remained unchanged.¹⁴⁸

4 Application for declaration of invalidity of the Constitution

Pursuant to the adoption of the Constitution, an application¹⁴⁹ was brought to have it declared invalid on the ground that the process leading to its promulgation was not participatory, so as to include all the people of Swaziland in terms of the provisions of paragraph 2(e)¹⁵⁰ of the King's proclamation, as read with section 80(2)¹⁵¹ of the Establishment of the Parliament of Swaziland King's Order-in-Council. The crux of the argument was that the CRC misconceived its functions as given to it by section 4¹⁵² of Decree 2 of 1996 when it deprived political parties and all others of the right to participate in the making of the Constitution. This argument was also supported by the right to participate freely in one's government as guaranteed under international law as interpreted by the African Charter in the LHR communication mentioned above, particularly in the light of the fact that Swaziland has ratified not only the African Charter but also the International Covenant on Civil and Political Rights (CCPR) and other human rights instruments.

Both the High Court¹⁵³ and the Supreme Court of Swaziland¹⁵⁴ refused the application, holding that section 4 precluded organisations

¹⁴⁷ An address by the Prime Minister at the official opening of the session.

¹⁴⁸ Formal statement made in the NGO Forum in its capacity as an organisation with observer status with the Commission.

¹⁴⁹ *Jan Sithole NO (in his capacity as the Trustee of the NCA) & Others v The Prime Minister of Swaziland & Others* Case 2792 of 2006 (as yet unreported).

¹⁵⁰ n 5 above.

¹⁵¹ It reads: 'Repeal and savings. 80(2) Save in so far as is hereby expressly repealed or amended the King's Proclamation of the 12th April 1973 shall continue to be of full force and effect: Provided that the King may by decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people and brought into force and effect.'

¹⁵² Sec 4: 'Representation. 4 Any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent any one or be represented in any capacity whilst making such submission to the Commission.'

¹⁵³ In a unanimous judgment delivered by Banda CJ in which Mamba J and Maphalala J concurred.

¹⁵⁴ Civil Appeal 35 of 2008, judgment delivered by Tebutt JA in which Zietsman JA, Ramodibedi JA, Foxcroft JA and Ebrahim JA concurred (as yet unreported).

from participating as such in the constitution-making process.¹⁵⁵ A full analysis of these judgments is a subject for another day. It suffices to say that these judgments do not suggest that the judiciary is independent in Swaziland as observed by Fombad when he writes:¹⁵⁶

Taking into account the enormous challenges that have arisen in the last few years over the rule of law, judicial independence and the good administration of justice, it is submitted that the new Constitution does not appear to provide any basis for expecting any radical changes to the current situation. If the root cause of all these problems were caused by the exorbitant powers exercised by the King, the new dispensation has simply entrenched these powers in no uncertain terms. At the core of it is the fact that the scope for effective judicial independence is very limited.

5 Conclusion

The Tinkhundla system has been able to fool the world and the people of Swaziland into believing that the constitution-making process was genuine. The CDC succeeded in achieving this because it was composed of members whose interest was to entrench the *status quo*. The fact of the matter is that the regime entrenched itself under the guise of a constitution-making process which was neither inclusive, democratic or based on the genuine aspirations of the people of Swaziland. Hlatshwayo, who resigned from the CRC, puts it aptly when he remarks:¹⁵⁷

Swazi constitutional developments are very much like a journey taken by the slowest of all animals, and which has the capacity to convince its beholders that it is different from the animal they might have seen a few minutes before — the chameleon to be precise. *It is ever changing but never really changing.*

The difficulty with the Swaziland political-constitutional set-up is that those who are in power claim to have divine authority to rule. As such, they do not need legitimacy given by the people. In this regard, Hatchard observed that¹⁵⁸

[t]he troubled history of the two 'traditional' monarchies of Lesotho and Swaziland does not suggest that rulers with an obvious claim to legitimacy in the traditional sense are better able to deliver good governance to their peoples.

¹⁵⁵ In an earlier judgment, *MPD Supplies (Pty) Ltd & Another v The Prime Minister & Others* Civil Appeal 8 of 2007 (as yet unreported)) 31, the Supreme Court had said: 'Nevertheless, this Court is mindful that the Constitution is not just another law. It is the product of negotiation. Compromises and accommodations have inevitably been made. Therefore it constitutes a sacred covenant.'

¹⁵⁶ Fombad (n 11 above)

¹⁵⁷ n 103 above, 'Swaziland constitutional framework' 15 (my emphasis).

¹⁵⁸ Hatchard *et al* (n 7 above) 324.

In similar terms Currie,¹⁵⁹ writing on democracy and accountability, remarks that, at least since the French and American revolutions, it has been accepted that no person or institution has a divine right to govern others. From this it follows that government can only be legitimate in so far as it rests on the consent of the governed. It does not seem that this has dawned on the Swazi traditional authority.

¹⁵⁹ I Currie *et al* (eds) *The Bill of Rights handbook* (2005) 13.

Law, religion and human rights in Africa: Introduction

Johan D van der Vyver and M Christian Green

Center for the Study of Law and Religion, Emory University School of Law,
Atlanta, USA

1 Introduction

The Center for the Study of Law and Religion (CSLR) at the Emory University School of Law in Atlanta, USA, under the auspices of a project titled 'Law, religion and human rights in international perspective', funded by the Henry Luce Foundation, convened a conference on 'Law, religion and human rights in Africa' in Durban, South Africa, from 30 April to 3 May 2008. Participants in the conference included 13 leading religious liberty scholars and activists from nine African countries. The conference was the first of several regional conferences designed to identify ongoing and future problem areas relating to the relationships between church and state and the interaction of religion and law in countries of the world.

The 'Law, religion, and human rights project' is the latest in a series of CSLR projects focusing on law, religion and human rights in international, inter-religious and interdisciplinary perspective. Its projects have explored the contribution of Christianity, Judaism, Islam and other faith traditions to the cultivation — and abridgment — of human rights and democratic norms within international law and municipal constitutional law. They have probed some of the hardest issues of religious persecution and bigotry, religious proselytism and discrimination, women's and children's rights and their abridgment by religious groups, among other topics. Those projects have provided a common table and an open lectern for penetrating dialogue and debate among antagonists from multiple confessions and professions around the world. They have provided vital resources for scholars, activists, religious and political leaders, the media, and public policy experts working on issues of religion and human rights domestically and internationally.

The Durban Conference was designed to discover common ground in perceptions and practices pertinent to the relationship between church and state and the interaction of religion and law in countries of the world but, perhaps more importantly, to uncover areas relating to religious human rights that are distinctive to Africa and the developing world. The countries singled out for country-specific analyses were carefully selected with a view to their potential for serving as representative samples of the conference themes. For thematic and conceptual, as well as budgetary reasons, the inquiry focused on sub-Saharan African states. These included Botswana, Democratic Republic of the Congo, Liberia, Namibia, Nigeria, South Africa, Swaziland, Zambia and Zimbabwe. Each one of these countries represented a distinct dimension of the relationship between church and state and the interaction of religion and law.

Each representative from these countries was provided with the annual International Religious Freedom Reports of the US Department of State for the years 2000 to 2007 relating to the state represented by the concerned participant for their information and comments and to serve as a departure point for discussion.

2 The definition of religion

One of the confusing remnants of colonialism in Africa is the denotation of customary African institutions with a typical Western vocabulary under the assumption that the substance of the custom concerned corresponds with that of the Western concept. A recurring theme at the Durban Conference was the meaning to be attributed to 'religion' in African customary law and, more particularly, the relationship between 'religion' and 'culture'. Some participants noted that it is indeed impossible to distinguish between religion and culture, while others stated that culture is a broader concept than religion, since one can live without religion but not without culture. Religion in the African context is deeply rooted in cultural tradition. In a recent judgment, the South African Constitutional Court observed that 'religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community', but noted that religion and culture can overlap and that 'cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are to those more inclined to find meaning in a higher power than in a community of people'.¹ It is more generally accepted, though, that

¹ *MEC for Education: KwaZulu-Natal & Others v Pillay & Others* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) paras 47 & 53.

the protection of religious belief is to be taken more seriously than that of cultural tradition.

A similar (con)fusion of religion and culture appears with respect to the following traditional African institutions.

2.1 Ancestor ‘worship’

It is commonly said that traditional African customs include ancestor ‘worship’. This description of the concerned practice is misleading and indeed false. Calling upon the ancestors to ward off an evil, to protect a community from a threatening disaster, to bring happiness or prosperity and the like is in actual fact not a form of worship. It can more accurately be described as ‘homage to the forefathers’. One participant spoke of ‘the ritual of appealing to the ancestors’. It is perhaps important to note that ‘ancestors’ in this context is a generic and not an individualised concept (one is not calling upon a particular personified individual or individuals who have passed away, but ‘the ancestors’, whosoever they may have been). The ritual invariably requires some form of sacrifice.

Several participants referred to customary African rituals that include a belief in supra-natural forces and in that sense seemingly have a ‘religious’ connotation. For example, on 20 January 2007, a former whip of the South African governing party, Tony Yengeni, celebrated his early release from prison, after having been sentenced to imprisonment for four years, by slaughtering a bull at his father’s home in the Cape Town township of Gugulethu. Publicity of the ceremony caused an outcry from among animal rights activists and was defended by others mainly on the grounds of respect for ‘cultural liberty’. Professor Tom Bennett, in his presentation, raised the question whether the religious significance of the ritual to appease Yengeni’s family ancestors, rather than its mere cultural roots, ought to have received greater prominence.

2.2 Cultural practices with metaphysical components

2.2.1 Rastafarianism

The religious practice of Rastafarians claiming the right to smoke *cannabis* (the African equivalent of marijuana) as part of a religious ritual has led to litigation in two African states. In South Africa, a person qualified to become a lawyer was refused admission to the Bar because he had been convicted of smoking *cannabis* and indicated his intent to continue to do so as part of the concerned religious ritual.² The smoking of *cannabis* by Rastafarians has also been outlawed in Namibia, the Court holding that the common danger posed by dependence-

² *Prince v President, Cape Law Society* 2002 2 SA 794 (CC); 2002 3 BCLR 231 (CC).

producing drugs outweighs the right of a religious group to practise its religion.³

In Zimbabwe, the wearing of dreadlocks by a Rastafarian who qualified to become a lawyer was considered by the Law Society to be incompatible with the etiquette of legal practice, but the Law Society's decision to refuse admission to the Bar for that reason was held to be unconstitutional by the Zimbabwean Supreme Court.⁴ School regulations which prohibited a Rastafarian pupil from wearing dreadlocks, and a Hindu learner from wearing a nose stud, were declared unconstitutional in Zimbabwe and South Africa (respectively). The Zimbabwean Supreme Court based its decision on religious freedom grounds,⁵ while the South African Constitutional Court based its decision on the principle of non-discrimination on religious or cultural grounds, thereby avoiding having to decide whether the wearing of a nose stud by a Hindu learner was a matter of religion or culture.⁶

2.2.2 Witchcraft

The belief in witchcraft is widely entertained in traditional African communities. Legislation of different African countries dealing with witchcraft raises complicated issues, for example, should one prohibit the belief in witchcraft, the practising of witchcraft, the killing of persons believed to be witches or wizards, and accusing someone of witchcraft or of being a witch or a wizard? Again, is the belief in, or practising of, witchcraft a matter of religion or culture? Under the Zimbabwean Witchcraft Suppression Act, enacted in colonial times, a person accusing someone else of an act of witchcraft can be brought to trial and punished. Similar legislation exists in Botswana, Cameroon, Nigeria and South Africa. Witchcraft as such is condemned in some African countries based on the assumption that belief in witchcraft is a superstition and not a matter of religious belief.

A particular problem facing the judiciary when dealing with the killing of witches or wizards relates to the punishment to be imposed for such crimes: Does one take into account as a mitigating circumstance that the accused's action was prompted by an honest belief that he or she was warding off an evil, or does one punish such

³ *Sheehamba v The State* (unreported).

⁴ *In re Chikweche* 1995 4 SA 284 (ZSC).

⁵ *Dzvova v Minister of Education, Sports and Culture & Others* SC Case 26/07 (2007) ZNSC.

⁶ *Pillay* (n 1 above).

unbecoming acts severely to show once and for all that the killing or maiming of fellow human beings cannot be justified under any circumstances?

2.2.3 Ritual murder

The same problem arises in cases of ritual murders, which are not uncommon in certain tribal communities, for example among the Grebo and Krahn in the south-eastern parts of Liberia. In South Africa, parts of a human body (those of a child) were recently found above the entrance of a hairdresser's salon. The female owner of the salon explained that the body parts 'drew clients' and were therefore good for business. Courts of law are not inclined to show sympathy with persons who commit ritual murders and consume or display parts of the deceased's body for financial gain. In one South African case, many years ago, an accused who had killed and consumed parts of the body of a young girl he was baby-sitting received the death sentence, because the only reason he could offer for the act was for him 'to have luck with the dice' (for gambling purposes).

2.2.4 Female genital mutilation

There are laws in place in some African countries to prohibit practices such as female genital mutilation (FGM) (which some communities seek to justify on religious and others on cultural grounds). In Liberia, however, FGM is common practice and there are no laws in place, or action taken, to banish or discourage the practice. A new Children's Act has been enacted in South Africa recently, which addresses and seeks to regulate traditional African practices such as male circumcision (executed when a boy is more or less 16 years of age and which is often performed in circumstances that are highly unhygienic and annually causes the death of a number of young boys), proof of virginity (a procedure to which young girls are subjected in order to determine their dowry value) and corporal punishment within the family environment. The law attracted protests from several African communities which objected to state interference in their traditional customs. In consequence of such protests, the provisions dealing with corporal punishment were deleted from the Act.

2.2.5 Trial by ordeal

A participant from Liberia raised the question, in the context of witchcraft, as to 'traditional beliefs and practices versus the rule of law'. There are two methods, he explained, for identifying witches: severe torture or 'trial by ordeal', also known as 'sassywood', both designed to extract a confession from the victim that she is a witch. The sassywood method requires the person under investigation to drink a mixture from the toxic bark of the sassywood tree. Regurgitation of the drink (instead of

death) shows that the accused is not guilty. Refusal to take the drink is taken as an indication of guilt. Both torture and trial by ordeal are prohibited by law,⁷ but how does one install respect for the rule of law where the law prohibits deeply-rooted belief structures and traditional practices? The problem posed was of particular interest to organisers of the Durban Conference since the Carter Center is currently engaged in a project on promoting the rule of law in Liberia and is also confronted with the problem of how to go about its business in achieving its goal. Changing the hearts and minds of people cannot be imposed from the top down, but must be cultivated from the bottom up. How can we (or the Carter Center) from the outside create a community ethos that would in time eradicate inhuman practices such as the killing of persons earmarked as witches or wizards?

3 Varieties of religion in Africa

Religions most commonly practised in Africa can, broadly speaking, be subdivided into Muslim, Christian and African traditional religions. A distinct and influential Jewish community is mainly confined to the Republic of South Africa, though one should also mention the Jewish community in Ethiopia that has been there since ancient times. In countries with a significant Indian community, Hinduism and Buddhism also have noticeable support (though Buddhism is not confined to Indian adherents).

Christian religions include Roman Catholicism (dominant in, for example, the Democratic Republic of the Congo) and the widest possible variety of Protestant religions. Within the confines of Protestantism, one would find a distinct category commonly referred to as independent African churches. According to one estimate, there are approximately 3 000 varieties of independent African churches in South Africa alone. The most prominent of those is the Zion Church with headquarters at Zion City of Morea, east of Polokwane (formerly Pietersburg) in South Africa. Membership of the Zion Church probably runs into the millions, and the church has spread its wings well beyond the borders of South Africa into other African countries.

The traditional African forms of worship are rich in ceremonial rituals. For that reason, charismatic religions are particularly popular in African communities. The Roman Catholic Church is perhaps the only mainstream denomination that has remained relatively successful in maintaining support in African communities — mainly, one might

⁷ *Tenteah v Republic of Liberia* 7 LLR 63 (1940), holding that the sassywood method violated the rule against self-incrimination.

guess, because the Roman Catholic Church in Africa applies a policy of inculturation whereby the liturgy, and even sacraments, of the Church are adapted to traditional African rites. The revival of African traditional religions, and the growth of independent African churches, may also be attributed to the African flair for charismatic rituals. One analyst characterised the independent African churches as 'the mainline churches becoming Pentecostalist'.

Sam Nujoma, who took control of Namibia when that country became independent in 1990, was particularly hostile toward churches which did not actively contribute to the liberation struggle of the South West Africa People's Organisation (SWAPO). He encouraged his people to reject Christianity and to worship the ancestral cattle god, *Kalunga ya Nangombe*. However, the current head of state of Namibia, Hifikiupanye Pohamba, is known to be a dedicated Christian.

Islam is known to be the fastest growing religion in Africa. In some African countries, this has led to inter-religious tensions. In Liberia, for example, occasional appeals by members of the Muslim community for equal observance of their religious holidays, time off on Fridays in order to have congregational prayers, and the right to conduct business on Sundays, have provoked strong protests from the Christian community. Police Director Beatrice Munah Sieh on one occasion condemned Muslim women dressed in veils by comparing them to terrorists, and many evangelical and Pentecostal churches commonly include in their prayers an appeal to God to rid Liberia of all Islam. Several participants noted that Islam should not be identified with radical groups from within the Muslim community that have been responsible for acts of terrorism and which have attracted wide (negative) publicity in recent years. As one participant put it, 'Islam is not the devil it is made out to be.'

4 Church-state relations

African constitutions reflect almost all varieties of church-state relations to be found in contemporary constitutional arrangements and legal practices. The Durban Conference also revealed, though, that the theoretical constitutional provisions regulating the relationship between church and state are perhaps in most cases fiction rather than fact.

Although the 1996 Constitution of Botswana designated that country to be a secular state, statutory provisions proclaiming Ascension Day, Easter and Christmas public holidays — according to one analyst — 'makes the country unofficially a Christian country'. The Democratic Republic of the Congo is a religiously neutral state, but according to the testimony of the Reverend MN Banze, at the Durban Conference, Christianity, and in particular Roman Catholicism, is in practice a preferred religion in that country. The Constitution

of Liberia is almost a carbon copy of the one of the United States of America (judgments of the US Supreme Court may even be cited as authority in constitutional and other matters), but the country is for all ends and purposes a Christian state (religion is taught in public schools, Christian prayers in public schools are common place, and Christian religious days are celebrated as national holidays). Zimbabwe is constitutionally a secular state but, we were told, is in reality a Christian state. And the list goes on.

In evaluating the relationship between church and state in the African context, one should therefore not be misled by constitutional rhetoric. Perhaps African states realised, and tried to accommodate, the importance of religion as a moral force within the body politic. Decisions of the South African Constitutional Court may be cited here to illustrate that sensitivity to the role of religion in public life. In *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*,⁸ Sachs J stated in this regard:

Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life. Religious organisations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.

In *Christian Education South Africa v Minister of Education*,⁹ Sachs J had this to say:

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It

⁸ 2006 1 SA 524; 2006 3 BCLR 355 (CC) para 93.

⁹ 2000 4 SA 757; 2000 10 BCLR 1051 (CC) para 36.

expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

In upholding these principles, South Africa is not a secular state, but may more accurately be described as a religiously neutral state. While a secular state seeks to uphold a wall of separation between church and state and to compel political authorities (at least in their official capacity) and state-sponsored institutions to distance themselves from religious practices, a religiously neutral state does not preclude itself from participation in, or the sponsoring of, religion, but seeks to uphold equal treatment of all religions in, for example, religious education in state and state-aided educational institutions, religious services in state-sponsored radio and television broad- and telecasts, and the like. The South African Constitution indeed instructs the state to 'respect, protect and fulfill the rights in the Bill of Rights',¹⁰ including the provisions proclaiming 'freedom of conscience, religion, thought, belief and opinion'; and according to the testimony of Prof Lourens du Plessis, political authorities have applied their duty to respect, protect and fulfill in a spirit of a 'politics of difference' that goes 'beyond the confines of mere tolerance and even magnanimous recognition and acceptance of the Other'.

It is perhaps also worth pondering the Christian tenability of entrusting the repositories of political power with a competence to enforce the scruples of a particular religion (for example Sunday observance laws) upon an entire political community. If one upholds certain religious rites because the state compels one to do so, observance of those rites becomes a legal obligation and as such forfeits its faith-based (religious) significance.

A particular instance of counter-productive consequences of the well-intended efforts of a Christian community to uphold their confession in matters of law and politics appears from the provincial Constitution of the Western Cape Province of South Africa. The national Constitution of South Africa upholds the principle of religious neutrality (the only reference to God in the Constitution appears from the first line of the national anthem, 'God bless Africa', cited at the foot of the Preamble in several of the country's official languages). When the 1997 provincial Constitution of the Western Cape was drafted, a Christian lobby with good religious intentions insisted that the Constitution be proclaimed 'in humble submission to Almighty God'. The Constitutional Court upheld the constitutionality of this reference to 'God' on the basis that the 'god' referred to in the provincial Constitution is only a matter of ceremonial deism and has no religious relevance at all.¹¹ Degrading 'God' to merely a matter of

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996, sec 7(2).

¹¹ *Ex Parte Speaker of the Western Cape Provincial Legislature* 1997 4 SA 795 (CC); 1997 9 BCLR 1167 (CC).

ceremonial deism amounts to blasphemy of the worst kind and does not do the Christian religion proud!

In matters of church and state, the Constitution of Zambia requires special emphasis. There is a general trend in the world today to disestablish previously proclaimed state churches and to sever the commitment of political institutions to a particular religion or denominational institution. Proclaiming a state to be secular or religiously neutral exemplifies this trend — albeit, as noted above, that the laws and practices of many African countries belie the constitutional commitment to secularism or religious neutrality. Zambia in 1991 went against the trend of distancing political institutions from denominational loyalties by amending its constitutional Preamble to proclaim the Zambian people to be ‘a Christian nation’ (the Preamble does uphold the right of every person to enjoy freedom of conscience and religion). It has been said that, since the provision proclaiming the people of Zambia to be a Christian nation appears in the Preamble only, it is of no juridical significance. That assumption is not entirely correct, since a constitutional preamble can be taken into account when interpreting substantive provisions of the Constitution and other laws; and the provision is in any event offensive to, or at least marginalises, members of non-Christian religions.

State interference in matters of religion is exemplified by national laws requiring the registration of religious institutions and regulating internal matters of religious institutions through state-imposed legislation. In Botswana, for example, the Societies Act of 1972 requires all social institutions, including religious organisations, to be registered with state authorities, and registration is a pre-condition for such institutions to conduct business, enter into contracts, or open bank accounts in the country. In 1984, the Unification Church was denied registration in Botswana on public order grounds and because it was perceived by the government to be anti-Semitic.¹² The Unification Church (the Moonies) was also banned in Zimbabwe shortly after independence of that country in 1980, and in 2005 a South American Pentecostal Church, the Universal Church of the Kingdom, was banned in Zambia.

In Nigeria, registration is required by the Companies and Allied Matters Act.¹³ The Corporate Affairs Commission (CAC) is given an absolute discretion to determine compliance with the registration requirements. This, according to one analyst, has culminated in the CAC becoming ‘an important arbiter of the exercise of the formation of religious bodies’. It might be noted that in South Africa, legal subjectivity of ‘voluntary associations’ — those that are not designed to be profit-making enterprises and which include religious institutions — is not conditional upon registration with political authorities. Their legal

¹² See the US Department of State Report of 2002, cited by Emmanuel Kwabena Quansah, Botswana representative at the Durban Conference.

¹³ Ch C20 of the Laws of the Federation of Nigeria, 2004.

personality of voluntary organisations is determined by merely stating the fact in the charter of their creation.

5 Religious discrimination

Proclaiming a state or the nation to be religiously defined is in itself discriminatory. That, too, is the case if the state affords *de facto* protection to doctrinal or ceremonial preferences of a particular religion. Almost all African countries are guilty, if not in theory, then at least in practice, of such discriminatory contingencies.

In Botswana, for example, it is common practice to begin governmental functions with a Christian prayer, though members of other faith communions are not precluded from offering non-Christian prayers on such occasions. However, state-imposed legislation proclaims certain commemorative days of the Christian faith to be public holidays.¹⁴ In Liberia, religion is taught in schools and Christian holidays are officially celebrated, but even though Islam is the oldest religion in the country, Ramadan is not officially celebrated. The Koran is not taught in public schools and Muslim students are denied the option not to attend Bible classes. Muslims are furthermore not allowed to wear a distinctive veil in schools. In the 1990s, the Jehovah's Witnesses were accused in the Democratic Republic of the Congo of undermining the public order and subversion when they refused to sing the national anthem and to salute government authorities, but the decision to ban them was found to be unconstitutional by the Supreme Court of Justice.¹⁵

In June 2004, President Sam Nujoma of Namibia accused the 'non-traditional churches' of trying to mislead their followers and stated that the government only recognised the Catholic, Anglican and Lutheran Churches — which presumably only meant that the privilege of officiating at state functions was to be confined to representatives of those churches. In January 2005, the Namibian Broadcasting Corporation suspended all religious programmes on national radio and television. In March of that year, President Nujoma was succeeded by President Hifikipunye Pohamba, a devoted Christian. The Minister of Home Affairs of the new regime proclaimed that the government in doing its business would in future be guided by the Namibian Constitution and that 'anyone is free to choose the church of his or her own choice'.

A particular aspect of religious toleration in Africa that may cause the lifting of American eyebrows concerns the sensitivity in plural societies with a high degree of group polarisation to egalitarian principles

¹⁴ See, eg, the Shop Hours (Extended Hours) Order of 1990, as amended.

¹⁵ *L'Association sans but lucrative Les Témoins de Jéhovah v La République du Zaïre*, Judgment RA 266 of 8 January 1993.

and the protection of human dignity — in preference to, for example, freedom of speech and of the press. In Namibia, for example, a newspaper advertisement congratulating World War II German prisoner, Rudolph Hess (1894-1987), on his birthday was censored under the Racial Discrimination Prohibition Act 26 of 1971.¹⁶ Hess was a leading Nazi official and was appointed in 1932 as the Deputy *Führer* to Adolph Hitler. Prof Nico Horn has noted, in his analysis of the judgment, that the Court was unduly insensitive to the religious and cultural interests of the Jewish people as such and instead applied a law dealing in essence with racial discrimination as a remnant of the South African apartheid system in pre-independent Namibia (South-West Africa); which, as noted by Prof Horn, did not really apply since the Jewish community shared the privileged status of whites under that system (they were not victims of racial discrimination in South-West Africa). More accurately to the point was a recent decision of the South African Media Board prohibiting an advertisement of 'Jews for Jesus', since the advertisement was perceived to be offensive on religious grounds to members of the Jewish community. A South African court also banned the publication in South Africa of the infamous Danish cartoon depicting the Prophet Mohammed, because it was offensive to members of the Muslim community.

It must be emphasised that creating good human relations is a high priority in Africa and that achieving that objective requires a high degree of sensitivity to group-related prides and prejudices; and that if Africa is to avoid the xenophobic appendices of sectional affiliations, it simply cannot afford to freedom of speech the degree of permissive leeway as that sanctioned by the American constitutional system.

6 Politicisation of religion

Religion is perceived in many African communities as a Western concept and is associated by many analysts with colonialism. The so-called Pentecostal Revolution, with its messages of miraculous healing and faith-based prosperity, and the expansion of frontiers of Christianity in general and of Islam and other foreign religions, are seen to have been decidedly influential in the marginalisation of African traditional religions and are for that reason resented in many African circles dedicated to African customary institutions and traditions. It should be noted, though, that, although Liberia was never colonised, Gwendolyn Heaner has established that 'Pentecostalism, charismatic Christianity and non-mainline evangelical Christianity have been growing phenomenally since the 1980s'.

¹⁶ *S v Smith & Others* 1997 1 BCLR 70 (Nm).

In the Democratic Republic of the Congo, President Mobutu, who took control following a *coup d'état* of 24 November 1965, launched a policy of 'authenticity' in the 1970s to promote local culture, which included the banning of foreign and Christian names in exchange for names derived from 'authentic' Congolese culture. In Namibia, where before the date of independence 93% of the inhabitants were Christians, SWAPO, upon taking control of the country in 1990, promoted Marxist ideologies, including decidedly anti-religion sentiments.

Many political leaders in Africa have exploited religion for purposes of political gain. Amendment of the Constitution of Zambia in 1991 to insert a statement in the Preamble proclaiming the Zambian people to be a Christian nation was initiated by President Frederick Chiluba for the purpose of gaining political support and was in all probability not motivated by a genuine religious commitment. By the same token, religious institutions often get involved in politics for purposes of promoting their own sectional interests.

In many instances, religious institutions have turned a blind eye to atrocities committed for popular political purposes. Reference was made in support of this proposition to the churches' silence during the 1904 genocide of the Herero people in Namibia, and the insensitivity of churches to atrocities committed by SWAPO in the course of its liberation struggle. It has been stated in general that in Africa, the mainline churches cannot boast a sound human rights record.

7 Religion and human rights

Religion is a powerful weapon in promoting moral values and enhancing humane conditions within a political society. However, religion has often actively opposed principles associated with human rights and fundamental freedoms. Many such examples surfaced at the Durban Conference.

Islam and Christianity strongly oppose homosexuality and have consequently resisted legal reform measures prohibiting discrimination based on sexual orientation and the recognition of same-sex unions or marriages. The Anglican Province of Central Africa (comprising Botswana, Malawi, Zambia and Zimbabwe) endorsed Resolution 1.10 of the Lambeth Conference of Anglican Bishops of 1998, which rejected homosexual practices as being incompatible with Scripture, but called on the faithful to minister pastorally and sensitively to all persons irrespective of their sexual orientation. In November 2007, seven priests of the Anglican Church in Botswana were suspended from the diocese of Harare for having had a meeting with Bishop Kunonga of Harare who had been expelled by the Province of Central Africa following the unilateral withdrawal of Harare, at his instance, from the Province of Central Africa. Bishop Kunonga had maintained that fellow bishops had

made statements sympathetic to, and engaged in acts of, homosexuality, without appropriate action having been taken against them by the diocese. Legal action is currently pending contesting the suspension of the seven priests.

A decision of a Namibian High Court that afforded constitutional rights to same-sex partners living together was overturned on appeal by the Supreme Court on the basis that the reference to 'sex' in the non-discrimination provisions of the Namibian Constitution applied to male and female only and did not cover sexual orientation.¹⁷ South Africa became only the fourth country in the world to afford legality as a marriage to same-sex unions.¹⁸

Many church institutions have insisted on maintaining the traditional inferior status of women in society. Liberalisation of abortion laws has provoked strong resistance from the ranks of several mainline churches. Polygamy, the payment of *lobolo* or *bogadi* (dowry), and the inferior status of women in African customary unions have thus far not been seriously contested, or even questioned, by mainline religious institutions.

Conflicting human rights also appear from the rules of law applying to the withholding of medical treatment from persons objecting to such treatment on grounds of religious belief. In Nigeria, a court of law upheld the right of a Jehovah's Witness to object to a blood transfusion and denied the right of a medical doctor to override, on sound medical grounds, the religious wishes of the patient.¹⁹ But what if the patient is an infant? In South Africa, the right to life of a child outweighs the right of parents to withhold medical treatment of the child on religious grounds. Under South African law, the High Court is the upper guardian of all children and can override a decision of parents not to subject their child to medical treatment in cases where the life of the child is at stake.²⁰ In Botswana, refusal of a parent, on religious grounds as a member of the Church of God in Zion, to permit medical personnel to treat his two children who had contracted measles culminated, following the death of the children, in the parent being convicted of homicide and sentenced to three years' imprisonment and a fine of P600 (approximately \$101) or six months' imprisonment for default of paying the fine.²¹

¹⁷ *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another* 2001 NR 107 (SC).

¹⁸ Civil Union Act 17 of 2006.

¹⁹ *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* [2001] FWLR (Pt 44) 542.

²⁰ See eg *Hay v B & Others* 2003 3 SA 492 (W).

²¹ *State v Motlogelwa* Case KN17/1990 (unreported) confirmed by the High Court in Review Case 155/1990 (unreported).

8 The right to self-determination of religious communities

The right to self-determination of ethnic, religious and linguistic communities (the right to promote one's culture, practise one's religion and speak one's language without undue state interference or restriction) is of extreme importance in plural societies — which includes almost all countries on the African continent. Implementation of this salient right under the norms of international law has been, and is being, put to the test in several distinct eventualities of recent times.

African countries have not followed a uniform policy to deal with potent group alliances of ethnic (including tribal), religious and linguistic communities within their national population. The Constitution of Botswana, for example, does not afford protection to the right to self-determination as such. A matter relating to self-determination came before the courts when action was brought on behalf of the Wayeyi tribe, which promotes the Shiyeyi culture and language, contesting the constitutionality of certain provisions in the Constitution and other laws that excluded the tribe from representation in the House of Chiefs (part of the legislative system).²² The action was not successful, the court holding that it did not have the power to amend the Constitution. However, legislation was subsequently enacted to afford representation to the Wayeyi in the House of Chiefs.²³

Nigeria, again, embarked on its history of independence by attempting to eliminate ethnic varieties in its midst. Its Constitution charges the state with the rather peculiar responsibility of encouraging 'inter-marriage among persons from different places of origin, or of different religious, ethnic, or linguistic association or ties' with a view to promoting national integration.²⁴ This provision constitutes part of several strategies contemplated in the Constitution to counteract tribalism. The state must, for example, also promote or encourage the formation of associations that cut across religious barriers,²⁵ and, in order that 'national integration shall severely be encouraged', the Constitution prohibits discrimination based on 'place of origin, sex, religion, status, ethnic or linguistic association or ties'.²⁶ Other African countries striving toward national unity and seeking to create constitutional directives to that end include Uganda and Sierra Leone. Uganda does not deny the salience of diversities in the community. Its Constitution provides that every effort is to be made to integrate all the peoples of the country while at the same time recognising their ethnic, religious,

²² *Kamanakao 1 & Others v Attorney-General & Another* [2001] 2 BLR 654.

²³ Constitution (Amendment) Act 2005.

²⁴ Constitution of the Republic of Nigeria (1999), art 15(3)(c).

²⁵ Art 15(3)(d).

²⁶ Art 15(2).

ideological, political and cultural diversity.²⁷ Everything must be done to promote a culture of co-operation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs.²⁸ In Sierra Leone, the state must, with a view to promoting national integration and unity, 'discourage' discrimination based, *inter alia*, on several grounds listed in the Constitution.²⁹

National unity — a shared loyalty to the country of one's nationality — is indeed an important objective to be promoted in a divided society. But this ought not to occur at the expense of group alliances that constitute part of the identity of a person. Pride in one's ethnic, religious, linguistic and racial extraction is a fact of life that ought to be encouraged, provided one refrains from claiming political rights and powers founded on those salient group identities which add to the individuality of every person. Respect for the group identities of persons within plural societies can transform divided peoples — in the words of Archbishop Desmond Tutu — into a 'rainbow people'.

Respect for the right to self-determination of ethnic, religious and linguistic communities has attracted wide publicity in several recent cases. The first concerned the rights of the Khoi-San people of Southern Africa (the Bushmen, or Barsarwa), one of the oldest tribal communities living in Southern Africa and a nomad people who continuously move from place to place within and across national borders while 'following the rains' and the migration of wild animals to be hunted as a means of survival. The government of Botswana sought to resettle the Barsarwa from the Central Kalahari Game Reserve in order to preserve the wild life of and within the reserve. Human rights organisations intervened and brought suit on behalf of the Barsarwa. The court decided in favour of the Barsarwa remaining in the reserve.³⁰ It might be noted that, due to their nomad lifestyle, the numbers of Barsarwa are rapidly declining and their language, culture and way of life risk extinction. Yet, no positive measures have been adopted by the government of Botswana to secure their survival and protect their right to self-determination.

It is not uncommon for countries with a sizeable Muslim community to recognise and to enforce Islamic family law. In South Africa, for example, Muslim marriages are not recognised because of their *de facto* or potential polygamous nature; yet in recent years South African courts have enforced the consequences of Muslim marriages on the basis of the law of contract (holding parties to a Muslim marriage to their marital commitments because they consensually

²⁷ Art III(ii) of the Constitution of Republic of Uganda (1992).

²⁸ Art III(iii).

²⁹ Art 6(2) of the Constitution of Sierra Leone (1991).

³⁰ *Sesane & Others v Attorney-General* [2006] 2 BLR 633.

agreed to be bound by those commitments).³¹ A case is currently on trial before a High Court in South Africa to declare unconstitutional the prevailing non-recognition of Muslim marriages, as well as one contesting the constitutionality of not recognising Hindu marriages as a legal form of matrimony. In Botswana, Muslim, Hindu and other religiously-based marriages, polygamous or otherwise, are afforded legal validity.

A further special case implicating the right to self-determination of a religious community is centred upon a judgment of the Sokoto State Shari'a Court of Appeal in Nigeria of 25 March 2002. The Muslim faith predominates in the northern provinces of Nigeria. Twelve of those provinces, where Islam is the dominant religion, recently enacted laws sanctioning Islamic criminal law (applicable to Muslims only), including punishments prescribed by the Koran but perceived to be cruel and inhuman within the meaning of contemporary human rights standards.

In the Nigerian case, a young Muslim girl had fallen pregnant and was consequently sentenced by the Upper Area Court of Gwadabawa to be stoned to death for the offence of *zina* (adultery) as provided for by section 129(b) of the Sokoto State Shari'a Penal Code of 2000. The judgment received wide international publicity and provoked protests in many countries of the world. In Canada, for example, an arbitration law under advisement in the province of Ontario designed to afford recognition to the dissolution of Muslim marriages was defeated partly because of the Nigerian case (the celebrated Canadian novelist, Margaret Atwood, was seen carrying a poster in a protest march with an image of the Nigerian girl being stoned to death and a sub-title proclaiming 'This is what Ontario wants to bring to Canada'). Some Islamic protagonists maintained that the sentence should be set aside since the act of infidelity was not witnessed by seven persons who could testify to having seen the sexual act being committed, as required by Islamic law. In the case of *Safiyatu v Attorney-General of Sokoto State*, the Sokoto State Shari'a Court of Appeal reversed the judgment of the lower court on the basis of the rule against retroactivity (pregnancy of the accused occurred before the law of 2000 entered into force).

This case illustrates an ongoing conflict in Nigeria between the constitutional proscription of cruel and inhuman punishments and upholding Islamic criminal law (applicable to Muslims only) in provinces with a predominant Muslim population under auspices of the right to self-determination of religious communities. The participants from Nigeria at the Durban Conference expressed different opinions as to the constitutionality of Islamic criminal law in the

³¹ *Ryland v Edros* 1997 2 SA 690 (CC); 1997 1 BCLR 77 (CC); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC); 1997 10 BCLR 1348 (CC); *Amod v Multilateral Motor Vehicle Accident Fund* 1999 4 SA 1319 (SCA).

northern provinces, the one maintaining that it coincides with the right to self-determination of the (dominant) Muslim communities within those provinces, and the other expressing the opinion that those laws violate the constitutional proscription of cruel and inhuman punishments.

9 Freedom of religion or belief

There are, of course, many more facets to freedom of religion than those highlighted above. Many participants cited constitutional and other provisions sanctioning that freedom but focused on problem areas that attracted litigation and publicity in their respective countries. It is perhaps fair to say that the laws of Africa proclaiming freedom of religion comply on their face value with international standards.

Nor did the most vital problem attending international law standards of religious freedom — the right to change one's religion or belief — attract particular prominence at the Durban Conference, presumably because that problem is overshadowed in Africa by those embedded in typical African cultures. As far as international law is concerned, it is worth noting that the international community has yet to come to terms with a generally acceptable norm to designate that particular component of freedom of religion or belief.

Article 18 of the Universal Declaration of Human Rights (1948) included within the scope of the right of a person to freedom of religion or belief 'freedom to change his religion or belief'. The International Covenant on Civil and Political Rights (1966), in its article 18, transcribed the principle involved into 'the freedom to adopt a religion or belief' of one's own choice. Article 1 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1984) in turn redefined the norm concerned embodied in the right to freedom of thought, conscience and religion to become 'freedom to have a religion or whatever belief of his choice'. Freedom *to change* the religion or belief of one's choice thus became a freedom *to adopt* a religion or belief, and was again transformed into the freedom *to have* the religion or belief one prefers. To change, adopt or have a religion is in each instance qualified by one's personal choice. That is the crux of it; and that, too, is what flies in the face of the teachings of Islam, Christian orthodoxy, Judaism and many others.

It should be added that adjusting the verb denoting this component of freedom of religion or belief in order to accommodate sectarian religious concerns was in the end again undone by the provisions of article 8 of the 1984 Declaration, which proclaims that '[n]othing in the present Declaration shall be construed as restricting or derogating

from any rights defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights’.

It should also be noted that drafters of international instruments relevant to religion for good reasons preferred to place freedom of religion and freedom of belief in the same basket. Religion is almost impossible to define. By linking it inseparably to freedom of belief, international law avoids that dilemma: Since the same protections apply to both, it is not necessary to draw a line between belief structures that qualify as a religion and those that do not.

Not everything one might believe in should come within the confines of freedom of religion or belief. One ought to confine the belief prong of freedom of religion or belief to beliefs which at least have something in common with religion (*eiusdem generis*); perhaps an element of faith in a metaphysical reality, acceptance as the truth of something which one cannot observe through one’s senses or prove through scientific analyses or logical reasoning.

Secondly, since religion and belief are grouped together, limitations that may in terms of article 1(3) of the 1984 Declaration be imposed on manifestations of the one will most likely also apply to the other. This might be undesirable. There could well be circumstances in which, for example, public safety considerations would warrant limitations upon manifestations of a certain non-religious belief but not on the freedom to manifest a religious belief.

10 Conclusion

The Center for the Study of Law and Religion has dedicated itself to studying the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions, norms and practices. We believe that, at a fundamental level, religion gives law its spirit and inspires its adherence to ritual, tradition and justice. Law gives religion its structure and encourages its devotion to order, organisation and orthodoxy. Law and religion share such ideas as fault, obligation and covenant and such methods as ethics, rhetoric and textual interpretation. Law and religion balance one another by counter-posing justice and mercy, rule and equity, discipline and love. This dialectical interaction gives these two disciplines and two dimensions of life their vitality and their strength. Without law, religion slowly slides into shallow spiritualism. Without religion, law would forfeit an ethical foundation and gradually crumble into empty formalism.

The Durban Conference provided ample evidence of these enduring truths — with a distinctively African flavour. The interrelation of religion and culture and religion and politics continues to be alternately provocative and problematic. The concern for self-determination of groups must be weighed against the proclivities toward group

polarisation. The 'war for souls' between Christians and Muslims predominates in some locales, even as new African independent churches emerge. Religion benefits in some ways from the ongoing development of the law and allegiance to it, but in a region in which countries may be only a few decades old and constitutions only a few years old, the law shares its status as a source of authority with religion, culture and human rights norms of local, international and universal dimensions. We were particularly touched by a post-conference visit to the Durban Art Gallery, in which there were on display no fewer than three exhibits on human rights through art. Law, religion and culture continue to be in flux in Africa, but as the art exhibition went to show, human rights have an undeniable foothold in the hearts, minds and culture of Africa.

The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?

Jewel Amoah*

PhD Candidate, University of Cape Town, South Africa

Tom Bennett**

Professor of Public Law, University of Cape Town, South Africa

Summary

This article is concerned with traditional African religions, in particular the belief system of the Pondo people of the Eastern Cape Province in South Africa, in terms of the rights to equal treatment and freedom of religion under that country's 1996 Constitution. The authors begin by describing a ceremonial animal sacrifice performed by a former executive member of South Africa's ruling African National Congress in 2007. This ritual brought to light a strong tendency to confound traditional African religions with culture. Although it is apparent that religious beliefs are treated with greater respect than cultural practices, any supposition that culture is less important than religion is not only alien to traditional African societies, but also contrary to the equality provisions in the Constitution. The paper argues that, as a consequence of being consistently overshadowed by the main monotheistic religions in Africa, Christianity and Islam, traditional religions receive far from equal treatment. Hence, instead of being treated equally, as dictated by the Constitution, traditional religions are perceived as incidents of culture, and are subjected to an implicit value judgment: that they are somehow inferior to 'true' religions, which the West would characterise as monotheistic. Full realisation of the freedoms of religion and culture requires that one be distinguished from the other. In proposing a method to do so, it is argued that culture is broader than religion, for

* BA (McMaster), LLB (Ottawa), LLM (Cape Town); jewwel.amoah@hotmail.com

** BA, LLB (Rhodes), PhD (Cape Town); Thomas.Bennett@uct.ac.za

it embraces everything that marks humans as social beings, whereas religion is not a necessary requirement of social life. In framing the argument for equality in the context of culture, the authors argue that constitutional protection of religion is best attained through the symbiosis of community and culture. In this way, the right to culture and, by extension, faith, is exercised through the identity of the group.

1 Introduction

On Sunday 20 January 2007, Tony Yengeni, former Chief Whip of South Africa's governing party, the African National Congress (ANC), celebrated his early release from a four-year prison sentence by slaughtering a bull at his father's house in the Cape Town township of Gugulethu. This time-honoured African ritual was performed as a thank-offering to the Yengeni family ancestors. Animal rights activists, however, decried the sacrifice as an act of unnecessary cruelty, and a public outcry ensued. Leading figures in government circles, including the Minister of Arts and Culture, Pallo Jordan, entered the fray, calling for a proper understanding of African cultural practices. Jody Kollapen, the Chairperson of the South African Human Rights Commission, said that 'the slaughter of animals by cultures in South Africa was an issue that needed to be dealt with in context. Cultural liberty is an important right.'¹

That the sacrifice was defended on the ground of African culture was to be expected. More surprising was the way in which everyone involved in the affair ignored what could have been regarded as an event of religious significance. Admittedly, it is far from easy to separate the concepts of religion and culture and, in certain societies, notably those of pre-colonial Africa, this distinction was unknown. Today in South Africa, however, it is clearly necessary for human rights litigation, partly because the Constitution specifies two separate rights and partly because it seems that those working under the influence of modern human rights take religion more seriously than culture.

The fact that indigenous African belief systems are constantly being treated as incidents of African culture obviously says something about the way in which traditional religions are perceived by outsiders. In the case of Africa, the first outsiders were missionaries of Christianity and Islam, soon to be followed by European colonial powers. Although the conflation of religion and culture tends to devalue the former, the habit persists and, ironically, is shared by advocates of both indigenous religions and human rights. The Yengeni affair is a typical example.

The hierarchical relationship between religion and culture is evident in various situations. One is the judicial doctrine of 'non-entanglement' which, although derived from the United States, is becoming

¹ http://www.iol.co.za/general/news/newsprint.php?art_id=qw1169538120458B2 (accessed 1 January 2007.)

a prominent issue in South African jurisprudence on freedom of belief since the advent of the new Constitution. This doctrine obliges the state to remain neutral on matters of religion. It follows that the courts must refrain from involvement in matters of religious dogma² and, unless absolutely necessary, they may not impose secular laws on religious communities, nor should they attempt to interpret the tenets of religious doctrine.³ The same deference is not to be shown to systems of culture.

In another situation — a project to reform the African customary law of marriage — law-makers paid scant regard to traditional beliefs. The South African Law Reform Commission might have been expected to deal with religion (and its associated rituals which are considered to be fundamental to Christian, Islamic, Hindu and Jewish marriages) but, in the Commission's preparatory works, African religion was hardly mentioned.⁴ Instead, nearly all of the parties involved in the legislative process assumed that recognition of customary marriages rested exclusively on the right to culture.⁵

Such an approach to African traditional religions is an odd exception to the norm. In most societies, important rites of passage, such as circumcision, marriage and burial, are surrounded by rituals that serve to separate the sacred from the profane and to call down the gods' blessings. And yet, while Islam and Judaism recognise circumcision as a religious rite to be performed shortly after the birth of a male child, it is described as a cultural event in the African context. The same applies to marriage: Although seen by Christianity as a religious ceremony, an African marriage is considered to be a cultural event.

Yet another example is supplied by a leading South African case, *Christian Education, South Africa v Minister of Education*,⁶ which was concerned with the freedoms of religion and culture. Here the applicants began by arguing that a right to use corporal punishment in schools was based on both these rights. Although neither argument ultimately succeeded, it is interesting to note that the applicants abandoned their claim to culture. The case proceeded on the sole ground of religion, presumably on an intuitive assumption that it was the weightier right.

² *Mankatshu v Old Apostolic Church of Africa & Others* 1994 2 SA 458 (TkAD); *Allan & Others NNO v Gibbs & Others* 1997 3 SA 21 (SECLD); *Ryland v Edros* 1997 2 SA 690 (C) 703; *Taylor v Kurtstag NO & Others* 2005 1 SA 362 (W) 39; *Singh v Ramparsad* 2007 JDR 0019 (D) para 50.

³ *Worcester Muslim Jamaa v Nazeem Valley & Others* 2001 JDR 0733 (C) para 109.

⁴ South African Law Commission *Report on Customary Marriages* (1998) Project 90, Government Printer, Pretoria paras 4.4.5ff.

⁵ In this respect, the Commission was following a pattern of thinking already well established in the courts: The 'religious element' of marriage was mere custom, of no greater consequence than 'music, singing or a wedding reception'. See *Sila & Another v Masuku* 1937 NAC (N&T) 121 123 and HJ Simons 'Customary unions in a changing society' (1958) *Acta Juridica* 320 322-5.

⁶ 2000 4 SA 757 (CC).

In none of the above situations was it clear who had decided that religion had priority over culture, or why this priority had been introduced. These questions, however, together with the broader issue of how religion and culture are to be balanced, lie at the heart of this article. The framework for the discussion is South Africa's widely acclaimed Constitution of 1996, the centrepiece of which is a fully justiciable Bill of Rights protecting, *inter alia*, the freedom to pursue cultures and religions of choice. We argue that, in spite of these guarantees, traditional religions receive far from equal treatment. This state of affairs is quite at odds with the constitutional commitment to equality and the country's policy of promoting religious and cultural diversity.⁷

2 A traditional African religion: The Pondo

Since colonial times, a major problem with foreign perceptions of African religions has been a tendency to over-generalise, and, in the process, to reduce all the indigenous beliefs to little more than animism and ancestor worship. Any generalisation about a matter as complex as religion, however, especially in a continent as diverse as Africa, is clearly a bold undertaking. We have therefore chosen the religious beliefs of one people, not as representative of all those in South Africa, but rather to assist in understanding the overall nature of this topic.

The Pondo are a people living in the eastern portion of what used to be Transkei (now part of the Eastern Cape Province of South Africa). They were the last nation in the area to surrender sovereignty to British rule, which they did in 1894. Colonial historians and ethnographers included the Pondo in an ethnic category described as 'Southern Nguni', a term denoting various cultural and linguistic similarities⁸ that were considered important enough to distinguish them from the Northern Nguni, a much larger group that is spread over KwaZulu-Natal, Swaziland and as far afield as East and Central Africa. Pondo life has been well documented by two distinguished anthropologists, Monica Hunter⁹ and Fr Heinz Kuckertz.¹⁰

⁷ The Constitutional Court, in *Christian Education, South Africa v Minister of Education* 2000 4 SA 757 (CC) para 24, eg, held that the Constitution gives people the right 'to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlights the importance of individuals and communities being able to enjoy what has been called the "right to be different"'.

⁸ The Pondo speak a dialect associated with a cluster of closely-related languages further south, termed generally 'isiXhosa'.

⁹ M Hunter *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* (1936).

¹⁰ Fr H Kuckertz *Creating order: The image of the homestead in Mpondo social life* (1990). Both Hunter and Kuckertz worked in the functionalist tradition, but they took careful note of the effects of colonisation and labour migration on contemporary Pondo society.

Contrary to the preconceptions of outsiders, the Pondo — and the Southern Nguni generally — believe in the existence of a single, supreme being, who is called *uThixo*. This name seems to have been borrowed from the Khoekhoe. An equivalent Xhosa word is *uDali uThixo* which is a *deus otiosus*, since it¹¹ is too remote from everyday life to be concerned with the immediate welfare of individuals.¹² Hence, the living do not call upon it to intervene in their lives, nor do they have rituals dedicated to its worship.¹³

Missionary influences, however, and the need to identify indigenous beliefs with the Christian message found in *uThixo* a ready Xhosa translation for Jehovah. Thus Soga, a prominent Christian figure in Transkei, could write that this being 'is the creator of all things, controls and governs all, and as such is the rewarder of good and the punisher of evil'.¹⁴ Hunter, on the other hand, was more sceptical. She said that there was¹⁵

no proof that the Pondo before contact with Europeans believed in the existence of any supreme being, or beings, other than the *amathongo* (ancestor spirits). They had two words, *umdali* (creator) and *umenzi* (maker), which might suggest a belief in a creator, but there is no system of rites or complex of beliefs connected with these words.

Various free spirits associated with particular animals and places play a lively part in the beliefs of most peoples in South Africa. With the Pondo, however, such beings are of little relevance. The most important are the *abantu base mlanjeni* (people of the river) who seem to have an association with clan ancestors.¹⁶ Even so, Hunter said that they were seldom referred to as *amathongo* (ancestral spirits), but were rather seen as evil manifestations of those spirits.¹⁷

As with all the other indigenous belief systems in South Africa, the Pondo acknowledge the malign force of witchcraft. They believe that practitioners of this art can be detected through physical stigmata, aberrant social behaviour and association with animal familiars. In some

¹¹ Linguistically it is impossible to determine the gender of the supreme being, since the prefix *-u-* in Xhosa denotes both male and female. The masculine attributes of the being could well have been acquired through the influence of Christianity.

¹² Although some peoples in South Africa accord the supreme being power to determine the workings of nature, especially rain, drought and flood, it plays no particular role in governing people's lives. See WD Hammond-Tooke 'World View I: A system of beliefs' in WD Hammond-Tooke (ed) *The Bantu-speaking peoples of Southern Africa* (1974) 320-321.

¹³ Hammond-Tooke (n 12 above) 319.

¹⁴ JH Soga *The Ama-Xosa: Life and customs* (1932) 133.

¹⁵ Hunter (n 9 above) 269. The idea of the creator survives in a widely held myth that the supreme being broke off nations from reed beds. See F Brownlee (ed) *The Transkeian native territories: Historical records* (1923) 116 for the Mpondomise.

¹⁶ EJ de Jager & VZ Gitywa 'A Xhosa *umhlwayelelo* ceremony in the Ciskei' (1963) 22 *African Studies* 109-110.

¹⁷ Hunter (n 9 above) 263.

systems, individuals are thought to have the power actively to attract and exploit dark forces. In others, they are thought to be born with it. In either event, witches are seen as a prime source of evil, whether in the social or the natural world.¹⁸

For all the Pondo, the spirits of *amathongo* are the most immediate influence on daily life. They are sources of wisdom, security and authority, and their presence is most strongly felt when they visit retribution on those who infringe rules of good conduct.¹⁹ While the ancestors may be the shades of people recently or long departed, not all deceased become *amathongo*. The spiritual destiny of children and young persons, for instance, is vague,²⁰ and some of the departed, especially those who enjoyed positions of authority, exercise special powers.

Veneration of the ancestors involves acceptance of a form of life after death, together with a notion of spirit or *ithongo* (soul) or *umphefumlo* (breath).²¹ Although there is no clear hiatus between the states of life and spirit,²² death is obviously necessary for the emergence of an *ithongo*. The *ukubuyisa* ceremony, which occurs sometime after burial, is a time for settling a deceased person's estate and laying his spirit to rest. The spirit can then join all the others who constitute the agnatic clan.

All the living and the dead are thus believed to be linked together in an enduring relationship. Some of the spirits, however, exert a special influence, and they continue to communicate regularly with the living. The power to intercede with them vests principally in the family head, who combines ritual and temporal powers in one office, and provides a channel of communication with the ancestors through notionally unbroken ties of blood.²³ In order to maintain this relationship, the living are obliged to perform certain rituals.²⁴

Although the major rituals coincide with the principal rites of passage — birth, initiation, marriage and death — intervention by the ancestors is also invoked when the family wants to give thanks for an escape from death or ill-fortune. All these occasions are celebrated by

¹⁸ Hunter (n 9 above) 275ff.

¹⁹ See Hammond-Tooke (n 12 above) ch 10.

²⁰ Hunter (n 9 above) 231.

²¹ Hunter (n 9 above) 232.

²² As above.

²³ See, generally, A Shorter 'African Christian theology' in JR Hinnells (ed) *A handbook of living religions* (1991) 431 and, for another example, I Schapera *A handbook of Tswana law and custom* (1955) 61-62.

²⁴ See, generally, Shorter (n 23 above) 434 and VW Turner *The ritual process* (1969) ch 1 on the Ndembu of Zambia.

the ritual killing of cattle or goats.²⁵ The family then gathers, sometimes with neighbours, to share a feast or a fresh brew of beer.²⁶

Ritual is the key to understanding veneration of the ancestors. Communication demands the performance of certain rites according to predetermined customs. Thus the Pondo religion — like all traditional African religions — is characterised by ‘right action, not right belief — orthopraxis rather than orthodoxy’.²⁷ This distinguishing feature has contributed, in no small measure, to the outsider’s tendency to con-found traditional religion with culture.

3 The devaluing of traditional African religions

Because traditional African religions are perceived as mere incidents of culture, they have been subjected to an implicit value judgment, that they are somehow inferior to the monotheistic faiths.²⁸ The reasons for thinking in this way are, of course, complex, but it is nevertheless clear that colonialism laid the foundation. In the European measure of things, neither African religion nor African culture amounted to much. This view of Africa was endorsed by evolutionist theory, according to which religion progressed from animism, through to ancestor worship, polytheism and, finally, to the pinnacle of development: monotheism.²⁹ African religions were thought to be situated at the lower end of this scale, and were therefore expected to be replaced by beliefs of a higher order.

²⁵ The ceremonies are hedged around with various rituals, such as the method for slaughtering particular types of animal and the belief that the bellowing summons the ancestors. See Hunter (n 9 above) 240ff.

²⁶ Beer, although a lesser offering than a beast, is another significant feature in the ceremonies associated with veneration of the ancestors. It may either be consumed or offered as a libation. In the former case, it is difficult to distinguish its use as ritual from a general social lubricant. See Hunter (n 9 above) 253ff.

²⁷ W Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2006) 414–415. The determination of ‘rightness’ or ‘correctness’ is established by the religion concerned. There can be no external or even universal scale against which religious practice and/or belief is deemed to be correct or appropriate. Instead, this is determined internally. The right to engage in this internal determination is something that must also be protected in the name of culture.

²⁸ From the perspective of the particular believer, of course, other religions must necessarily be ranked. Thus, typically, within the major monotheistic religions, different beliefs may be stigmatised as ‘schismatic’, ‘sects’, ‘cults’ or (even worse) ‘heresies’.

²⁹ This scale of development derives from EB Tylor *Primitive culture; researches into the development of mythology, philosophy, religion, language, art and custom* (1920) 1. Despite the practical use of this scale of development, the legitimacy of this scale should be accepted with caution, as it is premised upon evaluating one culture by the standards of another. Such an exercise leads one to wonder how well Western cultures would fare if judged against a standard derived from African cultures. The point is that ‘the other’ cannot be faulted for being different, when that is the very nature of their character. See also n 82 below, and the discussion of essentialism.

It was hardly surprising that traditional religions compared unfavourably with the monotheistic faiths. They had no clearly differentiated system of morality on a par with Christianity and Islam.³⁰ They laid no claim to universal validity; rather, they were localised and specific to particular communities. Nor did they pose, as ultimate issues, the contest between sin and virtue, or justification in a final judgment and the possibility of eternal salvation.

African religions were found wanting, not only in matters of content, but also in matters of form.³¹ In the first place, they operated, at least in pre-colonial times, in oral cultures and, for the rapidly secularising colonial powers, orality was a mark of the primitive. Canonical texts were considered an essential component of a proper religion. In the second place, the traditional religions, of Southern Africa at least, lacked system and institution and, what is even more to the point, a sense of different, specific forms of knowledge. In other words, Africans did not separate religion from everyday life. There was no theology,³² and few African languages had a special term for religion.³³ Given the holistic nature of this world view, the norms and standards — which Westerners would regard as religious, legal or social — operated in harmony, not in conflict. Thus, Africans did not consider it necessary to distinguish the sacred from the secular.³⁴

When a society does not differentiate belief from knowledge, it has no need of a professional class to analyse and interpret a specialist subject. Rather, religion (like law) lies within the reach of everyone.³⁵ Admittedly, the conduct of rituals might require particular skills, and might also entail privileged access to supernatural powers. Indeed, the practice of many African religions involves diviners, spirit mediums, herbalists (who understand not only the physical but also the mystical powers of plants) and 'witchdoctors' (who specialise in the detection of malevolent forces). Notwithstanding these expert groups, however, there was no authoritative body specifically qualified to pronounce on matters of faith and orthodoxy.

The stage was set for Islam or Christianity to take over. These, the two principal missionary faiths in Africa, denied indigenous religions their

³⁰ See, in this regard, G Obeyesekere *Medusa's hair: An essay on personal symbols and religious experience* (1981) 82-83. Thus, pre-literate religions did not construct systematic theories of sin, virtue, judgment and salvation (a rite of passage whereby the individual attains an ultimate status beyond suffering).

³¹ The issues enumerated here are derived from F von Benda-Beckmann 'Who's afraid of legal pluralism' (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37 49-50, with reference to systems of customary law.

³² Hammond-Tooke (n 12 above) 319.

³³ Menski (n 27 above) 413.

³⁴ Menski (n 27 above) 419.

³⁵ AN Allott 'African law' in JDM Derrett (ed) *Introduction to legal systems* (1968) 131 135-6.

'own wisdom, insights and values' to inform the lives of believers.³⁶ Muslims and Christians were driven to proselytise a 'true' belief on the understanding that potential converts were either depraved or lacking a proper faith. For their part, African religions were predisposed to succumb. Being syncretistic in outlook, they had no sense of a need to proselytise, but, instead, were open to external influence.

In South Africa, colonial policy and Christian evangelism generally worked in harmony with one another, since the moral justification for conquest was the need to persuade the 'natives' to accept the virtues of Christian belief. Evolutionist theory complemented this policy: When suitably educated, Africans would naturally abandon their institutions in favour of superior European counterparts. Even in the post-colonial age, this thinking persists. Because African culture appears to have an 'arrested' development,³⁷ 'good culture ... is defined by the distance of traditional cultures and proximity to Western values'.³⁸

Thus it can be said that the largely undifferentiated, unstructured nature of African religion provided the soil in which seeds of prejudice grew rank.³⁹ The colonial period established a set of preconceptions about Africa, and these have been perpetuated into modern times: Whatever is produced in the West must be superior to the African counterpart.⁴⁰ This thinking, however, involves more than a simple hierarchy of inferiority and superiority, however. It involves, according to Mutua, a complete destruction of the inferior, something 'akin to cultural genocide'.⁴¹ Hence,⁴²

[f]or those Africans who choose not to be Christians or Muslims, [traditional religion] is not really an option: it was so effectively destroyed and delegitimised that it is practically impossible to retrieve.

Not only are traditional religions burdened by the legacy of colonial and evolutionist thinking, but they are also threatened by physical forces.

³⁶ B Tlhagale 'Inculturation: Bringing the African culture into the church' (2000) 14 *Emory International Law Review* 1249.

³⁷ M Mutua 'Limitations on religious rights: Problematising religious freedom in the African context' (1999) 5 *Buffalo Human Rights Law Review* 75 96-97.

³⁸ As above.

³⁹ TJ Gunn 'The complexity of religion and the definition of "religion" in international law' (2003) 16 *Harvard Human Rights Journal* 189 200ff gives three key reasons why religions experience discrimination, and he draws attention to the fact that the reason chosen depends upon what *the group discriminating* considers definitive of its own religion.

⁴⁰ E Bonthuys 'Accommodating gender, race, culture and religion: Outside legal subjectivity' (2002) 18 *South African Journal on Human Rights* 41 52 describes the 'mainstream legal subject' as one steeped in Western culture and beliefs. This person is 'represented as innocent of cultural, religious and racial content. He exists outside of a religious or cultural community as an isolated, atomic, epistemic subject.' 'In order to qualify as a legal subject, outsiders have to take on or appear to take on these qualities, norms and behaviours.'

⁴¹ Mutua (n 37 above) 75.

⁴² Mutua (n 37 above) 105.

While certain academics and traditional rulers might try to recover a sense of respect for African beliefs,⁴³ there is every indication that they are in danger of disappearing. Four principal causes can be isolated.

First, traditional religions are, by nature, syncretistic, and, as a result, they are always liable to give way to proselytising faiths.⁴⁴ Nearly all South Africans hold religious beliefs, but by far the largest majority now professes some form of Christianity: 86% of the population (38,5 million people) belong to a Christian denomination of one kind or another.⁴⁵ Traditional African religions (in a pure form) are now an insignificant factor. They are professed by a mere 0,3% of the population. Notwithstanding these figures, many South Africans are both traditionalists and members of established Christian churches, and most belong to one of the independent African churches. This group accounts for 11,1% of the population.⁴⁶

The second cause can be traced to the fact that veneration of ancestors is poorly adapted to survive urban conditions.⁴⁷ Municipal regulations prohibiting the keeping and slaughter of livestock make performance of the necessary rituals difficult to perform.⁴⁸ (The Yengeni affair is a striking example.) What is more, communication with the ancestors requires constant reference to the objects and places they inhabit, whereas the anonymity and transience of modern urban life cuts people off from their past.⁴⁹

The third, and more general, cause is an increasingly secular attitude in society at large. In pre-colonial times, societies were tightly knit; people had shared interests and expectations; and everyone worked with the same set of meanings. The experiences of work, education and religion were therefore integrated within a family context. By contrast, modern, industrialised societies are highly differentiated. Thus,

⁴³ RB Mqeke 'Myth, religion and the rule of law in the pre-colonial Eastern Cape' (2001) 34 *De Jure* 81.

⁴⁴ Thus BA Pauw 'Ancestor beliefs and rituals among urban Africans' (1974) 33 *African Studies* 99 103 and BA Pauw 'The influence of Christianity' in Hammond-Tooke (n 12 above) 415ff say that many African Christians combine 'regular prayer to God the Father of Jesus Christ, with a sense of dependence on their ancestors, believing that "God and the ancestors work together"'.

⁴⁵ See Statistics South Africa *Census 2001: Primary tables* <http://www.statssa.gov.za>: 8,2% of the population is Pentecostal/Charismatic, 24,4% belong to established churches and 36% to 'other Christian' denominations; 1,5% of the population professes Islam and smaller minorities profess such religions as Hinduism and Judaism.

⁴⁶ A Gouws & LM du Plessis 'The relationship between political tolerance and religion: The case of South Africa' (2000) 14 *Emory International Law Review* 657 660.

⁴⁷ Magic and traditional medicines, however, seem to be more easily adapted to urban settings. See E Hellmann 'The native in the towns' in I Schapera (ed) *The Bantu-speaking tribes of South Africa. An ethnographical survey* (1937) 426 and Hunter (n 9 above) 455-458 487 488-496; Pauw (1974) (n 44 above) (n 44 above) 9ff.

⁴⁸ Hunter (n 9 above) 537 547-548.

⁴⁹ See I Hofmeyr 'We spend our years as a tale that is told.' *Oral historical narrative in a South African chiefdom* (1993) 159-160.

when an individual offers his or her different experiences and often contradictory interpretations of life, religion has difficulty integrating them into a single, plausible framework of meaning. Plurality of this nature leads to uncertainty, and uncertainty inevitably threatens a religion's claim to authority.⁵⁰

African religions are not alone, of course, in experiencing the trend towards secularism. Their fate is shared by religions in the liberal democracies. The thinking behind these regimes is dedicated to rationalism and, as such, is not disposed to listen to or understand *any* religious beliefs. The South African Constitution itself would encourage such a tendency. Whereas the value of rationality is unstated and implicit in most other constitutions,⁵¹ in South Africa it is explicit. Section 31(1) of the Constitution expressly subjects the practice of all religions to the Bill of Rights, and the limitation clause (section 36(1)) is filled with the language of rationalism.⁵²

4 The freedoms of religion and culture

The freedom of religion, implying a state's duty to refrain from interfering in an individual or community's pursuit of a chosen belief, was one of the earliest human rights to be given legal force.⁵³ It made its appearance in Europe during the seventeenth and eighteenth centuries in response to persecutions suffered by dissenting groups.⁵⁴

The right to culture, on the other hand, emerged only much later, during the twentieth century. In its original sense, culture denoted something quite different from what is now contemplated in instruments such as section 31 of the South African Constitution.⁵⁵ In the eighteenth and nineteenth centuries, it was taken to mean intellectual

⁵⁰ This general thesis can be attributed to PL Berger *et al* *The homeless mind: Modernisation and consciousness* (1974).

⁵¹ See the argument by P Horwitz 'The sources of limits of freedom of religion in a liberal democracy: Section 2(a) and beyond' (1996) 54 *University of Toronto Faculty of Law Review* 1 22ff, who says that, in liberal democracies, there is a 'tendency to treat rationalism and liberalism as a bedrock epistemology, a mode of thinking that tolerates other modes of experience but ultimately asserts its superiority over them'. He cites, in this regard, S Fish 'Liberalism doesn't exist' (1987) 1 *Duke Law Journal* 997.

⁵² See, too, Horwitz (n 51 above) 33.

⁵³ And it is now preserved in all international human rights conventions. See, eg, art 18 of the Universal Declaration of Human Rights, art 18 of the International Covenant of Civil and Political Rights and art 8 of the African Charter of Human and Peoples' Rights (1981).

⁵⁴ It featured in the Declaration of the Rights of Man and the Citizen (cl 10) which was proclaimed during the French Revolution.

⁵⁵ TW Bennett *Human rights and African customary law* (1999) 23-25.

or artistic endeavour, and so implied a freedom, akin to the freedom of expression, to perform or practise the arts and sciences.⁵⁶

A later meaning — one that is the concern of this article — developed largely in response to the politics of nationalism in Europe.⁵⁷ This conception of culture denoted a people's store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of society.⁵⁸ Through these means, one group could distinguish itself from other groups.⁵⁹

Culture in the latter sense often develops a close and symbiotic relationship with religion,⁶⁰ and in practice it is far from easy to disentangle the two concepts.⁶¹ Hence religion may function as a marker of culture and *vice versa*.⁶² Nevertheless, for purposes of human rights litigation, the two concepts must be kept separate, partly because they signify different rights and partly because religion has a privileged status. As we have seen, however, when a system of belief is treated as an incident of culture, it will not enjoy this status.

In South Africa, before the 1996 Constitution, the freedom to practise a culture of choice enjoyed no protection, but then it posed no particular problems.⁶³ Religion, too, was seldom an issue, mainly

⁵⁶ See arts 15(1)(a) and (c) of the International Covenant on Civil and Political Rights. See P Sieghart *International law of human rights* (1983) 339 para 23.5.3.

⁵⁷ Thus, culture was linked to self-determination. See art 1(1) of the International Covenant on Civil and Political Rights, which provides that, by virtue of the right to self-determination, all peoples are entitled to pursue their own cultural development.

⁵⁸ This definition is derived from the founder of cultural anthropology, EB Tylor *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom* (1920) 1, and continues to be taken as a core concept of this discipline. See HA Strydom 'The international and public law debate on cultural relativism and cultural identity: origin and implication' (1996) 21 *SA Yearbook of International Law* 1 4ff.

⁵⁹ Hence, culture is inherently oppositional, and consciousness of culture arises only through close interaction between two or more social groups. EE Roosens *Creating ethnicity: The process of ethnogenesis* (1989) 12.

⁶⁰ Culture in this sense is protected by art 27 of the International Covenant of Civil and Political Rights, which provides that: 'peoples belonging to ... minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

⁶¹ Progress towards definition is not, of course, assisted by the fact that lawyers, theologians and social scientists tend to work independently. See JM Donovan 'God is as God does: Law, anthropology, and the definition of "religion"' (1995) 6 *Seton Hall Constitutional Law Journal* 23 70ff regarding the legal and anthropological approaches.

⁶² This process of blending is familiar to Christian missionaries, since African culture has long been used as a medium for communicating the gospel message. See B Tlhagale 'Inculturation: Bringing the African culture into the church' (2000) 14 *Emory International Law Review* 1249.

⁶³ Indeed, the apartheid regime had used culture as the basis for restructuring the South African state. Bennett (n 55 above) 7.

because it was usually taken to be a matter of personal conscience, and the state had little interest in regulating private affairs.⁶⁴ Occasionally, when religious beliefs manifested themselves as practices offensive to the common weal — notably breaches of the Sunday observance laws⁶⁵ and conscientious objection to military service⁶⁶ — the courts ruled that individual freedom had to give way to broader public interests.⁶⁷

Traditional African beliefs attracted even less attention. They became a legal issue only in criminal trials, when accused persons invoked belief in the power of spirits or witches as defences to criminal charges or as mitigating factors in sentencing.⁶⁸ Even then, the courts tended to treat the claims as superstitions,⁶⁹ or some other form of aberration, not as part of an acceptable religious system.

The 1996 Constitution, however, elevated both culture and religion to the Bill of Rights. Two separate sections are devoted to religion. Section 15(1) provides that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'. Section 31(1) continues:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Although the content of the rights protected in these sections may be similar, the two provisions have significant differences. Section 15 protects an individual's freedom to hold whatever faith or belief he or she has chosen, while section 31 embraces a community's freedom to practise a religion of choice, which suggests an outward manifestation of an inner belief. The courts have elaborated this difference by breaking down the freedom of religion into the following components: the rights (a) to have a belief; (b) to express that belief publicly;

⁶⁴ The same was true of other states. See Horwitz (n 51 above) 5.

⁶⁵ Eg *S v Lawrence* 1997 4 SA 1176 (CC) challenged a contravention of sec 90(1) of the Liquor Act 27 of 1987, which restricts the hours and days on which liquor may be sold.

⁶⁶ *S v Abrahams* 1982 3 SA 272 (C) and *Hartman v Chairman, Board for Religious Objection & Others* 1987 1 SA 922 (O).

⁶⁷ *Lawrence* (n 65 above) paras 90-98.

⁶⁸ See J Burchell *Principles of criminal law* (2005) 535 536 and TW Bennett & WM Scholtz 'Witchcraft: A problem of fault and causation' (1979) 12 *Comparative and International Law of Southern Africa* 288.

⁶⁹ See *R v Mbombela* 1933 AD 269 which held that 'a genuinely held superstitious belief' might have deprived the accused of the 'capacity to appreciate the wrongfulness of his conduct'.

and (c) to manifest that belief by worship and practice, teaching and dissemination.⁷⁰

For obvious reasons, the first component is not readily amenable to legal regulation.⁷¹ The second and third components, however, which are protected in conjunction with culture under section 31(1), are easier to assess and control. Indeed, although all the rights in the Constitution are subject to a general limitation clause,⁷² section 31(2) provides explicitly that: '[t]he rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.⁷³ It is worth noting, then, that the South African courts have tended to refrain from using the limitation clause when analysing rights under section 15, since it involves the imponderable task of weighing faith against reason, not to mention distinguishing the religious from the secular.⁷⁴ Instead, they have restricted the scope of the right.⁷⁵

From another perspective, the difference between sections 15 and 31 can be couched in terms of absolute versus relative rights,⁷⁶ where section 15 represents the absolute right to religious freedom that has become one of the hallmarks of the Western human rights culture. The

⁷⁰ I Currie *et al* *The Bill of Rights handbook* (2005) 339. This formulation was taken from the Canadian case, *R v Big M Drug Mart* [1985] 1 SCR 295 336, by Chaskalson J in *S v Lawrence* 1997 4 SA 1176 (CC) para 92. It was followed in *Prince v President, Cape Town Law Society* 2002 2 SA 794 (CC) para 38 and *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 19.

⁷¹ See Currie *et al* (n 70 above) 344 citing D Meyerson *Rights limited* (1997) 2. This difficulty accounts for the courts' reluctance to question an individual's sincerity of belief as a requirement for upholding sec 15. The judgment of the court *a quo* in *Christian Education SA v Minister of Education of the Government of the RSA* 1999 9 BCLR 951 (SE) 957-958 is the exception to the rule. See Currie *et al* (n 70 above) 341.

⁷² Sec 36(1) provides: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...'

⁷³ Currie *et al* (n 70 above) 344-346.

⁷⁴ Meyerson (n 71 above) 34.

⁷⁵ Currie *et al* (n 70 above) 341-342.

⁷⁶ The basis for this distinction is whether obligations are imposed on everyone or only on certain persons or groups. The distinction applies to rights other than human rights; eg, copyrights are absolute, and contractual rights are relative, although neither of them is a fundamental human right. For purposes of human rights, however, the absolute rights always include the state, while relative rights exclude all other obligors but the state. OS Ioffe 'Human rights' (1983) 15 *Connecticut Law Review* 687 736-7 explains that, when dealing with a human right of an absolute nature, the state must behave at least as well as other obligors, unless contrary regulations are introduced. As for human rights of a relative character, the situation changes, so that the only actions that can be demanded of the state are those which it has agreed to accomplish under concrete circumstances according to publicly adopted legal regulations. Ioffe says that 'without such a prerequisite, relative human rights risk being transformed into hollow propagandistic declarations'. Based on this definition, the right to religion is absolute. But why is the right to culture instinctively considered to be relative and not absolute?

relative right provided for in section 31, on the other hand, represents a physical practice that is characteristic of a particular group. In other words, where absolute rights protect the concept of belief in general, relative rights are associated with the manifestation of that belief in behaviour.

Nevertheless, when it comes to religious freedom, there can be no definite hierarchy between absolute and relative rights, because some religions emphasise practice and others belief. Protection must surely exist for both aspects. The interesting twist occurs in cases such as the Yengeni incident, however, where the physical expression of belief becomes the focal point of a debate between culture and religious rights.

How, then, are we to distinguish religion and culture? For a start, it would seem that culture is broader than religion, for it embraces everything that marks humans as social beings,⁷⁷ whereas religion is not a necessary requirement of social life. Thereafter, the process of differentiation generally depends upon determining whether a particular belief fits within an accepted definition of religion.⁷⁸ In this regard, certain faiths have proved to be paradigmatic in setting the criteria. Thus, the essence of a true religion is often taken to be: monotheism, belief in a supreme being, the proclamation of everlasting truth, an explanation of the plight of the human condition.⁷⁹ Perhaps most important is a sense of the sacred.⁸⁰ Religion is regarded as a matter of the spiritual and (apparently) irrational, demanding faith (or obedience to authority), while culture is a matter of the mundane, the world of empirically demonstrable cause and effect.

When the adherents of paradigmatic faiths see no similarities between the forms and structures of their own belief systems and the exotic, they tend to exclude the exotic from the concept of religion. But, as criteria for distinguishing religion from culture, spirituality, fixed creeds and the division between the sacred and profane are more suited to the monotheistic faiths. The religions indigenous to South Africa, however, have no established canons of belief (with the result that questions of

⁷⁷ See nn 58 and 59 and the text above.

⁷⁸ According to some scholars, however, the process of definition is a futile exercise, since religion cannot be defined. See GC Freeman 'The misguided search for the constitutional definition of "religion"' (1983) 71 *Georgetown Law Journal* 1519ff and TJ Gunn 'The complexity of religion and the definition of 'religion' in international law' (2003) 16 *Harvard Human Rights Journal* 189 191. Donovan (n 61 above) 28 goes so far as to say that the exercise is unconstitutional.

⁷⁹ See Freeman (n 78 above) 1553 and Donovan (n 78 above) 60-61, who cite the list of features prepared by the United States' IRS.

⁸⁰ This distinction determines E Durkheim's *The elementary forms of the religious life* (1912). See Donovan (n 61 above) 73.

creed, and the counterpart heresy, do not arise), nor do they maintain a strict distinction between the sacred and profane.⁸¹

It should, in addition, be noted that the problem of definition is generally complicated by a tendency to think in essentialist terms.⁸² Once religion is taken to be predetermined, an idea that existed before human society, there is a tendency to demand a single definitive answer to the problem of deciding what constitutes religion.⁸³ Such thinking precludes the possibility of history and human agency.

A more straightforward approach to distinguishing religion and culture is to ask what function the respective rights perform. In the former case, the answer is complex, but, in the latter, it is relatively simple. Arguing a right to culture implies the right to be different, namely, to deviate from a (notionally national) norm of behaviour. Such an approach contributes to the broader goal of securing equal treatment for traditional religions and, potentially even, their ultimate revival.

5 Conclusion

Currently, the traditional African religions of South Africa are undervalued, threatened by forces of secularism and in danger of being eclipsed by Christianity and Islam. In his lament about this state of affairs,⁸⁴ Mutua calls on Africans to embrace their religions which, before the onset of colonialism, were at the core of their lives. He recommends outlawing proselytising, when it seeks to impose dominant cultures, and he advocates special protection for traditional religions, together with mechanisms for redress.⁸⁵

Less extreme options, however, are available. In the first place, the syncretistic nature of traditional religions will in itself help to secure their survival, albeit in changed forms. Evidence of their resilience is apparent in the rapid development of African Independent churches.

⁸¹ Nor for that matter do such other religions as Buddhism. See M Southwold 'Buddhism and the definition of religion' (1978) 13 *Man* 362. See, too, J Goody 'Religion and ritual: The definitional problem' (1961) 12 *The British Journal of Sociology* 142.

⁸² Essentialism is used here to refer to the assumption that religion and culture have universally valid definitions. Thus, an essentialist critique of religion and religious rights would tend to assume that western religions could speak for all religions or, at the very least, that the frame of reference for judging different them should be the western frame. In consequence, religions that do not conform to western-specifications may not be recognised and valued as religions.

⁸³ See the distinction made by Gunn (n 39 above) 194 between essentialist definitions (identifying a set of elements before something can be said to qualify as a 'religion') and polythetic definitions (conceding that there is no single feature common to all religions, but accepting some shared features).

⁸⁴ Mutua (n 37 above) 97.

⁸⁵ See Mutua (n 37 above) 105. He is nevertheless aware of the danger that his proposal to promote African religion may ultimately succeed in establishing a new orthodoxy, thereby destroying diversity (Mutua (n 37 above) 79).

(The Zionist Church, for instance, which was founded in 1895, is now the largest denomination in South Africa.)⁸⁶ These churches, which have synthesised elements of both Christianity and traditional religions, feature faith-healing, revelation through dreams, baptism in rivers and the wearing of white garments. What sets them apart from their Western counterparts, however, is an indigenous origin through the activities of Africans to cater for particular African needs.

Allied to this point is the way in which the established Western churches have absorbed elements of African culture. Indeed, local culture has been used explicitly as a medium through which the gospel message may be more effectively communicated.⁸⁷ Proselytising in this manner is not a creature of Western domination; rather, it is a means for promoting and sustaining all that is African on the understanding that it deserves equal respect. Thus, inculturation becomes an indirect method for protecting traditional African life and beliefs.⁸⁸

In the second place, the right to equal treatment, which is enshrined in section 9 of the Constitution,⁸⁹ provides a legal basis for ensuring the survival of traditional religions. While this right clearly seeks to protect individuals, groups also benefit, and so, of course, do the religions and cultures associated with those groups.⁹⁰ On this understanding, the Cape High Court, in *Ryland v Edros*,⁹¹ held that Islamic marriages were entitled to recognition on the ground that the state was obliged to promote diversity, and thereby accord equal treatment to all the country's cultures and faiths.⁹²

To date, however, the guarantee of equality has received scant mention in relation to religious rights. As Du Plessis puts it, rather than demand that religions be treated equally, '[t]he tendency thus far has been to put all the eggs of judicial argumentation in support of the

⁸⁶ See the figures given by Statistics South Africa (n 46 above) where members of the Zionist Christian Church account for 11,1% of the country's population.

⁸⁷ The policy of inculturation has long been associated with Christian teaching but, more recently, with Pope John Paul II's encyclical *Redemptoris Missio* (1990). See Tlhagale (n 36 above) 1249.

⁸⁸ As E P Antonio 'The politics of proselytisation in Southern Africa' (2000) 14 *Emory International Law Review* 523 says: 'There is a sense in which the moment of opposition to culture gives way to the need to negotiate the new message of Christianity in terms of the symbols, values and idioms of an already familiar framework.'

⁸⁹ Sec 9(1) provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' Subsec (3) continues: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

⁹⁰ Moreover, according to *Taylor v Kurtstag NO* [2004] 4 All SA 317 (W) para 45, the right to equal treatment of religions is horizontally applicable.

⁹¹ 1997 2 SA 690 (C).

⁹² However, O'Regan J (in *Lawrence* (n 65 above, para 122)) said that requiring the government to act even-handedly did not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality.

protection of religious rights in the freedom basket instead'.⁹³ Nevertheless, it is clear that non-discrimination is essential to ensure diversity, and, until equal rights are fully mobilised, diversity will not be attained, nor will traditional religions be revived to compete on their own terms in the free market place of faith.⁹⁴

In the third place, we should be aware that in some societies (as in Southern Africa), it appears not to matter whether we conflate religion and culture (or have no definite way of separating the two). In human rights discourse, however, it does matter, because religion is taken more seriously and is treated with greater respect. Nevertheless, certain peoples have no tradition of thinking about religion and culture as different forms of behaviour.

Admittedly, of course, personal belief or the working of the individual mind is of little consequence in religious rights litigation, but a true realisation of religious freedom should encompass the right to engage in both the practice and the belief of one's faith in a manner that is prescribed by the religion itself. Freedom should not prescribe a manner that is dictated by outsiders based on their understanding of what constitutes a proper religion. Hence, to apply the freedom to traditional religions will bring culture out from under the shadow of religion, and allow culture to shine in its own right.

If the heart of traditional faiths has any hope of beating again, however, then drastic resuscitation efforts will be necessary. The most effective solution to the fall from (Western) grace of traditional faiths requires a frank recognition of the inherent differences that separate African religions from monotheistic models. The former do not fit comfortably into the model of religion contemplated for human rights advocacy. In fact, the blanket protection offered under a universal definition of religious rights serves, in practice, to prioritise some religions over others. Hence, constitutional protection may have the effect of itself discriminating against religions that do not conform to a certain type.

To suggest changes to the form and content of traditional African religions is to attempt to have them conform to something they are not. But they can remain intact and enjoy a fair degree of protection, if that protection comes under the rubric of culture, because, by its

⁹³ LM du Plessis 'Freedom of religion or freedom from religion? An overview of issues pertinent to the constitutional protection of religious rights and freedom in "the new South Africa"' (2001) *Brigham Young University Law Review* 439 450-1. This tendency was evident in the leading case of *Lawrence* (n 65 above), where a majority of the Constitutional Court judges chose to deal with a prohibition on the sale of liquor on Sundays primarily in terms of the freedom of religion. The equal treatment of all religions appeared in only a minority of the judgments, and then, arguably, only as an *obiter dictum*. See *Currie et al* (n 70 above) 350.

⁹⁴ *Mutua* (n 37 above) 79, however, is skeptical: 'How does a body of principles that promotes diversity and difference protect the establishment and manifestation of religious ordering that seeks to destroy difference and forcibly impose an orthodoxy in Africa — as both Christianity and Islam ... in many cases successfully did?'

very nature, culture implies the right to be different. This approach will entail a better awareness of the relationship between religion and culture. Although separation of these concepts may be necessary for forensic purposes — it is, after all, clear that culture does not mean religion, and religion does not mean culture — the two are never completely separate. Thus, the loss of one will affect the existence of the other.

In the long run, we will find that a capacity to adapt is characteristic of the dynamics of community — and of culture. As such, it deserves protection, for it is through this means that the culture of religion has acquired its uniquely African identity. In summary, then, it is the symbiosis of community and culture which warrants the constitutional protection that has come to be associated with faith. It was Yengeni's commitment to his traditional faith that led to the controversy about his sacrifice of the bull early in 2007; and it is a universal adherence to faith (and culture, whichever it may be) which necessitates that protection of religion be extended to culture.

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

Lourens du Plessis*

Professor of Law, Department of Public Law, University of Stellenbosch, South Africa

Summary

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

* Blur et Comm, LLB, BPhil, LLD (Potchefstroom), BA (Hons) (Stellenbosch); lmdp@sun.ac.za

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

1 Introduction

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

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

These *dicta* from two different judgments of the South African Constitutional Court confirm what is generally accepted: Religious rights are, no doubt, 'brilliantly blue' *freedom rights*³ — internationally, domestically (at least in 'open and democratic societies'), and historically thus respected — and the South African Constitution,⁴ enjoining (in section 7(2)) the state to *respect* the rights in the Bill of Rights, can thus rightly be understood to ward off strong-arm interference with the autonomous individual's rights to freedom of conscience, religion, thought, belief and opinion⁵ ('religious and related rights' for short).⁶

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

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

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

⁴ Constitution of the Republic of South Africa 1996.

⁵ Eg sec 15(1).

⁶ Sachs J in *Christian Education SA* (n 1 above) para 36 elaborated on the first of the two *dicta* above, with remarks applicable also to the second of the two *dicta* above. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual

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

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

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

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

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

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

⁸ See sec 4 below.

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

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

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

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

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

2 The context for the protection of religious and related rights

2.1 Religious demography¹³

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

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

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

¹³ Based on 2001 census statistics.

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

2.2 Relevant constitutional provisions

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

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

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

¹⁴ Sec 15(2)(a).

¹⁵ Sec 15(2)(b).

¹⁶ Sec 15(2)(c).

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

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

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

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

¹⁷ n 12 above; see sec 3.6 below.

¹⁸ Sec 185 of the Constitution.

¹⁹ Sec 16(2)(a).

²⁰ Sec 16(2)(b).

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

²² Sec 18.

²³ Sec 21(1).

²⁴ Sec 17.

²⁵ Secs 33(1) & (2).

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

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

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

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

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

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

²⁶ Sec 32(1).

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

²⁸ See sec 1 above.

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

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

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

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

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

3 Judicial engagement with the religious Other

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

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

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

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

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

³¹ Secs 4 & 5 below.

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

³³ 27 of 1989.

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

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

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

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.³⁷

Chaskalson P elaborated as follows:³⁸

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

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

³⁵ Sec 8(2) of the interim Constitution.

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

³⁷ 13 CRR 64 97.

³⁸ *Lawrence* (n 36 above) para 92.

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

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

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

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

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

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

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

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

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

⁴² *Lawrence* (n 36 above) para 128.

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

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

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

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

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

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

⁴⁵ Sec 33.

⁴⁶ n 1 above.

⁴⁷ 84 of 1996.

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

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

⁵⁰ Sec 36.

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

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

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

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

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

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

⁵² And in n 6 above.

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

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

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

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

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

⁵⁴ *Prince* (1998) (n 53 above).

⁵⁵ *Prince* (2000) (n 53 above).

⁵⁶ *Prince* (2002) (n 53 above).

⁵⁷ *Prince* (n 2 above).

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

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

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

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

3.4 Othering the Other: The Bührmann-Nkosi saga⁶⁰

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

⁵⁹ *Prince* (2002) (n 53 above).

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

⁶¹ 62 of 1997.

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

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

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

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

⁶² Sec 6(1) of the Act.

⁶³ Sec 6(2)(d).

⁶⁴ Sec 5(d).

⁶⁵ Sec 6(4).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁹ Sec 6(2)(dA).

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

⁷¹ [2004] 3 All SA 436 (T).

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

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

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

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

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

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

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

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

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

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

⁷⁴ *Crossley* (n 72 above) para 18.

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

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

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

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

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

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

⁷⁸ n 12 above.

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

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

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

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

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

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

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

⁸¹ *Pillay* (n 12 above) para 7.

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

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

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

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

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

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

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

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

⁸³ *Pillay* (n 12 above) para 50.

⁸⁴ *Pillay* (n 12 above) para 47.

⁸⁵ *Pillay* (n 12 above) para 53.

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

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

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

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

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

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

⁸⁶ *Pillay* (n 12 above) paras 63-64.

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

⁸⁸ See sec 1 above.

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

⁹⁰ *Pillay* (n 12 above) para 1.

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

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

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

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

4 The evaluative model: Pillay and memorial constitutionalism

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

⁹¹ *Bührmann v Nkosi* (n 60 above).

⁹² See sec 3.4 above.

⁹³ *Pillay* (n 12 above) para 107.

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

⁹⁵ Young (n 7 above) 173.

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

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

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

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

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

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

⁹⁷ Sec 1 above.

⁹⁸ *Pillay* (n 12 above) para 65.

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

¹⁰⁰ Sec 1 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹¹ Sec 3.1 above.

¹¹² Sec 3.6 above.

¹¹³ Sec 4 above.

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

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

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

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

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

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

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

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

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

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

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

¹¹⁹ Sec 3.2 above.

¹²⁰ Sec 3.3 above.

¹²¹ Sec 3.4 above.

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

6 Conclusion

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

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

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

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

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

¹²² Sec 3.6 above.

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

¹²⁴ *Fourie* (n 109 above) para 60.

¹²⁵ *Fourie* (n 109 above) para 95.

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

¹²⁶ *Pillay* (n 12 above) para 92.

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

¹²⁸ *Pillay* (n 12 above) para 103.

Religion and human rights in Namibia

Nico Horn*

Dean of the Faculty of Law, University of Namibia, Windhoek, Namibia

Summary

Namibia is one of the most Christianised countries in Africa. Its Christian roots date back to the early nineteenth century, when the first German and Scandinavian missionaries arrived in the country. Before independence, the churches were radically divided between supporters of the struggle for independence (predominantly mainline black churches), so-called apolitical mainline white English-speaking churches and multi-racial charismatic churches and white Reformed and Pentecostal supporters of the apartheid system. After independence, the state did not interfere with the business of the churches. The threat that a SWAPO government would not honour Christian public holidays in an independent Namibia came to naught. The affluent white churches and new Pentecostal churches remained influential and played a strong role in the rejection of a pro-choice Abortion Act. Many churches also supported the government's (and the Supreme Court's) stance against protecting same-sex relationships. The churches also ignored the fate of the small Jewish community. Christians and other religious communities have experienced privileges not always associated with a secular state. However, in the last two years of President Nujoma's term as President, he declared the government's preferential treatment of the historical churches that supported the struggle (Lutheran, Anglican, Catholic and AME churches). While President Pohamba took a more reconciliatory stance, evangelicals and charismatics lost the privilege to preach on national radio. The churches remain sectarian in their interaction with other vulnerable communities.

* Blur (Johannesburg), BTh (Hons) (UNISA), MA (Port Elizabeth), LLM (UNISA), PhD (Western Cape); nhorn@unam.na

1 The composition of the church in Namibia

Namibia is one of the most Christianised countries in Africa. Its Christian roots date back to the early nineteenth century, when the first German and Scandinavian missionaries arrived in the country. The London Missionary Society established the first foreign mission in Blydeverwacht in the south of Namibia in 1805.¹ They were followed by the Wesleyan Missionary Society in 1820. From 1840 on, the Rhenish Mission took over the work of the London Missionary Society. The Rhenish missionaries were soon followed by Finnish Lutheran missionaries in the north.

The Catholic and Anglican Churches also started their missions among the Oshiwambo people in the second half of the nineteenth century. Klaus Dierks, a German who moved to Namibia and became a minister in the first Namibian cabinet, published an extensive history of Namibia on the internet. His description of the early Namibian history is a story of the settlement of Nama tribes in the south, the movement of the Ovahereros in central Namibia and their relationships with the Rhenish missionaries.²

The three Afrikaans Reformed Churches played an important role in pre-independent Namibia. The adherents of the Reformed Church (Gereformeerde Kerk) were the first organised white group from South Africa, and they settled in Namibia for a while on their way to Angola. The Dorslandtrekkers were conservative Calvinists who left the Zuid-Afrikaansche Republiek in the 1870s in search of a new frontier when they became disillusioned with the liberal excommunicated reformed minister-turned-president and his secularisation programmes. They initially requested the later war president Paul Kruger to lead them, but he declined and opted for ZAR politics in an attempt to make the Boer republic a Christian state. The Dorslandtrekkers stayed for a while in Rietfontein in the north of Namibia, before settling in Angola.³ Although small in number, the Reformed churches became very influential after the occupation of South Africa during World War I and the eventual period of South African rule.

In the 1990s, Namibia was the African country with the highest percentage of Christians. More than 90% of the population identified themselves as Christians.⁴ Namibia is the only African country with a Lutheran majority.⁵ At the time of independence, only 2,5% of the

¹ K Dierks 200 Namibian Library of Dr Klaus Dierks <http://www.klausdierks.com/FrontpageMain.html> (accessed 10 April 2008).

² As above.

³ See H Giliomee *The Afrikaners. Biography of a people* (2003) 188.

⁴ P Johnstone *Operation world* (1993) 403.

⁵ As above.

population were Pentecostal and 8,9% Evangelical.⁶ The position has not changed dramatically in the last 15 years, and although there are no official figures available,⁷ it is possible that the church grew since independence. Many missionaries arrived in Namibia after independence, especially Pentecostals and charismatics, but not exclusively. Unlike the first wave of missionaries, the group of the late 1990s and early twenty-first century are predominantly from Africa, and most of them are black. They come from Nigeria, Ghana,⁸ Zimbabwe, Zambia⁹ and South Africa.¹⁰ The Universal Church of the Kingdom, a South American group, built a mega-church in the heart of Windhoek.¹¹

The north also sent their missionaries (or church planters, as they are now called) to Namibia. Several United States-based Pentecostal/charismatic denominations started churches, including the Potter's House, a radical conservative movement,¹² and the Church of God in Christ, one of the oldest and biggest African-American Pentecostal Churches in the United States. Bishop Wahl Abrahams¹³ worked for a period under the leadership of an African-American group, the Full Gospel Church, which is not to be confused with the South African Full Gospel Church. After independence, the Namibian census forms no longer include sections on church affiliation. Consequently, many observers concentrate on the mainline churches and small, yet well-resourced, new missionary groups. The growth in the Pentecostal/charismatic movement is often ignored. A case in point is the US State Department's *International Report on Religious Freedom*. It does not even mention the Pentecostals as a significant group, while giving special attention to the small Church of Jesus Christ of Latter Day Saints (Mormons).¹⁴

⁶ Johnstone (n 4 above) 401. I use the word Evangelical in the North American sense to refer to the so-called born-again movement (Christians who believe that a conversion experience is essential for becoming a believer).

⁷ Religious and church affiliation is no longer listed in the national census forms.

⁸ Missionaries from West Africa include the Gorro family and Dr Elizabeth Arowalo with her Christ Love Ministries. The controversial healing evangelist, Prophet Joshua, has a big following in Namibia, especially amongst while Pentecostals and charismatics, but he does not have a church in Namibia.

⁹ Former Deputy-President of Zambia, Neves Mumba, has planted a Victory Ministries in Namibia under the leadership of Denzel Shipaza.

¹⁰ South African black church planters include Bishop Wahl Abrahams of the New Covenant Church and Pastor M Shapley, a former ANC cadre in the Eastern Cape.

¹¹ The Universal Church is a Brazilian Pentecostal Church. They are led by Brazilian bishops and do not fellowship with other Pentecostals.

¹² The church broke away from the move mainline Pentecostal Church, Foursquare Gospel Church in the 1970s because they did not agree with the growing emphasis on theological education.

¹³ n 11 above.

¹⁴ US Department of State (2007) *International Religious Freedom Report (2007)* <http://www.state.gov/g/drl/rls/irf/2007/90112.htm> (accessed 2 April 2008).

Most of the non-Christian religions organised only after independence, when adherents of the faith moved to Windhoek for diplomatic and business reasons. The exception is the Jewish community, who settled in the country at the beginning of the nineteenth century. Although the numbers declined after World War II, the synagogue is still in weekly use and the community is served by a lay leader. Muslims represent less than 1% of the population.¹⁵ With foreign assistance, they were able to build two mosques in the capital. The majority of the adherents are foreign diplomatic staff, but there are also nationals who converted to Islam in exile and Cape Malayan Muslims who settled in Namibia from the Cape as teachers and public servants. The Baha'i Faith came to Namibia as an evangelistic endeavour. They are few in number, but represent some influential business people and academicians.

2 Protection of religion under the Namibian Constitution

Shortly before the United Nations (UN)-supervised independence elections in Namibia in 1989, someone distributed a decision of the Politburo of the major liberation movement, SWAPO of Namibia, making it clear that a SWAPO government would not honour Christian public holidays in an independent Namibia if it came to power.¹⁶ This radical SWAPO statement was consistent with several pro-socialist statements by the movement while in exile. SWAPO won the elections comfortably, although it did not get the expected two-thirds majority. The Constitution was drafted in a short time. It includes an article declaring Namibia a secular state. Article 1(1) of the Constitution reads as follows: 'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.'

The Constitution was accepted unopposed by 71 of the 72 members of the Constituent Assembly. Only Mr Kosie Pretorius, representing Aksie Christen Nasionaal, (Action Christian National), an alliance between the old National Party and the Deutsche Aktion, abstained. Mr Pretorius later claimed that he abstained because, among other issues, he was against the idea of a secular state in a country where the majority of the citizens are Christians.¹⁷ However, the government was never

¹⁵ As above.

¹⁶ The document was distributed before the United Nations supervised elections in 1989 in the form of a leaflet by someone opposing SWAPO, claiming to be a copy of an official SWAPO document. The leaflet was later published by several newspapers. SWAPO never denied that the document originated from them. Copy in possession of author.

¹⁷ Interview with Jan Pretorius, 2005 (permission obtained on 3 August 2008).

neutral in its dealings with religion. In the application form for religious workers who want to be appointed as marriage officers by the state,¹⁸ applicants are asked if their church belongs to the Council of Churches. I shall return to the bias of government below.

The first Deputy-Speaker of the National Assembly, Dr Rev Z Kameeta, opened the first session of parliament with prayer. This practice continued while Dr Kameeta was a Member of Parliament. Nevertheless, the Constitution guarantees the right to culture, language and religion, freedom of conscience and belief and freedom to practise any religion and to manifest such practice.¹⁹ Religion is one of the categories listed in the non-discrimination clause.²⁰

3 Churches in pre-independent Namibia

Pre-independent Namibian churches can roughly be divided into four groups:

- the members of the Council of Churches in Namibia (CCN), who supported the struggle for liberation. The Dutch Reformed Mission Church and the Evangelical Reformed Church in Africa (EGKA), sister churches of the white Dutch Reformed Church (NGK), were both members of the CCN. Fred Joseph and his Khomasdal congregation of the Apostolic Faith Mission actively supported the mission of the CCN, but the church was never a member, (possibly because the denominational structure of the AFM still gave the white leadership some power over the black churches).²¹
- the so-called multi-racial Evangelical and Pentecostal/charismatic churches and some mainline English-speaking churches opposed to what was known as petty apartheid, specifically the

¹⁸ This is another contradiction in the state/church relationship that the state can appoint marriage officers to conduct religious marriages recognised by the secular state. The appointment of marriage officers gives the state some power over the religious organisations. In apartheid South Africa, marriage officers were expected to make a sworn statement to uphold the laws, including the prohibition of marriages over the colour line.

¹⁹ See arts 19 & 21: '19. Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.' '21(1) All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media; (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning; (c) freedom to practise any religion and to manifest such practice; (d) assemble peaceably and without arms; (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;'

²⁰ See art 10(2).

²¹ The so-called coloured, Indian and black sections of the AFM operated reasonably independent in the colonial period, but it had only one legal personality.

idea of separate places of worship for different ethnic groups. However, despite their multi-racial approach, they were, nevertheless, conservative and many of them opposed the liberation struggle vigorously. Many of the multi-racial Pentecostal churches actively supported the transitional government of national unity, instituted by South Africa in an attempt to create an international acceptable settlement in Namibia without involving the liberation movements, SWAPO and the South West Africa National Union (SWANU).²²

- the black Evangelical and Pentecostal churches who believe in the spiritual mission of the church. For them a political agenda for the church is unthinkable. The non-political church in apartheid Namibia was clearly a pipe-dream.²³ This, however, does not mean that these churches were active supporters of apartheid. Mulondo has pointed out that many of the strong black-led Pentecostal churches in Namibia (Ebenaeser, Morewaak, etc) left the traditional white bodies, such as the Apostolic Faith Mission and the Latter Rain Movement, because of the apartheid structures of the church.²⁴
- the Afrikaans-speaking churches, specifically the three Reformed churches, the NGK, the Hervormde Kerk and the Gereformeerde Kerk and the prominent Pentecostal denominations, the AFM, the Full Gospel Church of God and the Pentecostal Protestant Church, who all supported the apartheid policies of the South African administration and the principle of separate ethnic churches.

The churches supported the *status quo* on many levels. At the beginning of the final negotiations for a peaceful settlement in Namibia, the white AFM District Council passed a resolution and wrote a letter to the Administrator-General stating that all the sections of the AFM opposed independence for Namibia.²⁵ The resolution was, however, only the position of the white section, since the other two sections never discussed the issue. The coloured section, under the leadership of Pastor Fred Joseph, actively supported the independence process.²⁶

²² Several Pentecostal pastors actively participated in transitional politics. A case in point is Gospel Outreach/Gospel Mission pastor, Harry Booysen, who was a minister in the transitional government.

²³ The Kairos document points to the fact that this non-participatory model is just concealed support for the *status quo*.

²⁴ A Mulondo 'A history of the Namibian Black Pentecostal Churches' unpublished BA dissertation, Vision International University, Ramona, California, 2000.

²⁵ Minute book of the AFM South West Africa, minutes of the District Council meeting. The AFM of South West Africa no longer exists and the author could not trace the minute book. However, it was in the author's possession when he was Chairperson of the church in 1990.

²⁶ Personal interview with Pastor Joseph, Windhoek, 14 February 2008.

The NGK was, among other things, deeply involved in the founding of a theological institution, Windhoek Theological Seminary, to counter the progressive pro-independence Department of Religious Studies at the Windhoek Academy.²⁷ All these churches maintained a whites-only membership. The Hervormde Kerk 'Kerkorde' declared that it was a church for white Afrikaners, while the AFM Constitution referred to *white members* and *black, coloured and Indian adherents*.²⁸

Observers expected the new government to be anti-religion, faithful to its Marxist past. However, the fall of communism shortly before independence, the realities in the country (the vast majority of Namibians see themselves as Christians) and the support that SWAPO received from the CCN during the struggle gave SWAPO second thoughts. The radical decision of SWAPO in exile to abolish religious holidays came to naught. All the religious holidays were maintained. Even when South Africa later abolished Ascension Day as a public holiday, it was maintained in Namibia. Dr Zephania Kameeta, theologian, pastor and poet, became the Deputy-Speaker of the first National Assembly and the sessions of parliament were frequently opened with prayer.

4 The survival of the Dutch Reformed Church and the rise of the Pentecostals

If the people expected a sudden change in the corridors of the new transformed Namibian Broadcasting Corporation (NBC), they were in for a surprise. In the religious department of the NBC, all the staff members of the old Southwest Africa Broadcasting Corporation were retained and nothing significantly changed. A Dutch Reformed Church (DRC) dominee, Rev Kobus Venter, remained the head of religious broadcasting, with a full-time religious broadcaster for television, and at least seven religious radio broadcasters, including some DRC dominees. With the assistance of Pastor Fred Joseph, who was appointed by government to serve on the first NBC board, Rev Venter created an advisory body for religious broadcasting at the NBC.

Rev Venter (no relation to Mr Piet Venter, the last Director-General of the South West African Broadcasting Corporation (SWABC)), was a staunch Evangelical and broadcasted sermons of controversial Pentecostal televangelist Jimmy Swaggart on national television to the dismay of his reformed colleagues. The vast majority of the advisory board members were representatives of Evangelical and Pentecostal/

²⁷ Rumours of government and SA Defence Force funds going to WTS were widespread after independence.

²⁸ Art 4 of the Private Act of 1961 (my emphasis).

charismatic churches. The African Independent Churches, the Zionists and the Oruuanu Church²⁹ were not invited.³⁰

By the time Kobus Venter left the NBC to become the pastor of the DRC in Okahandja, the influence and power of the DRC were firmly established. Granted, the basis for the power was no longer the government or some unwritten official ideology. But the precedents were created: The face of Afrikaans religious broadcasting was to be Dutch Reformed. Venter was succeeded by Nathan Kapofi, a Lutheran pastor, but several white DRC dominees remained prominent over the ethers of the Afrikaans service of national radio.³¹ Venter was less successful in bringing Evangelicals and Pentecostals to prominent positions in radio broadcasting. But his successor at the religious section of the influential religious television, John van Heerden, was a Pentecostal. Pentecostals and Evangelicals, although less prominent on the Afrikaans religious programmes, were well represented in the other language stations and on the NBC Religious Advisory Board.

The first five years of independence was a time of euphoria. National reconciliation was the buzz word. The government was not going to intervene in the internal affairs of the national broadcaster, especially not in a subject as sensitive as religion. But there were also signs that the government was not too comfortable with the strong DRC/Evangelical power base at the NBC. In the early 1990s, the Ministry of Broadcasting and Information gave directives to the religious department of the NBC to include other religions, including Islam, in their broadcasts. The issue was discussed by the advisory board. They came up with a broadcasting policy that excluded most new movements, such as the Church of the Latter Day Saints (Mormons), who came into Namibia in big numbers after independence, the Worldwide Church of God and Islam by playing the numbers card. Only movements with more than 500 members were allowed to broadcast.³² The policy guidelines were

²⁹ The Oruuanu Church, also known as the Protestant Unity Church. It broke away from the Lutheran Church after a dispute over the place of African customs in the church.

³⁰ Copies of minutes of the Religious Advisory Board of the NBC between 1990 and 1995 in the possession of the author, who was a member of the committee until 1995.

³¹ Some of the prominent dominees on radio were more of the traditional Reformed school rather than the Evangelical type Kobus Venter preferred. After Venter left the NBC, he joined forces with Media for Christ, an Evangelical organisation specialising in Christian media productions. Venter became the Chairperson of the board and played a prominent role in setting up a Christian radio station, Channel 7. Since 1993, Channel 7 was seen by many Evangelical Christians as the flagship of Evangelical broadcasting in Namibia. The more reformed dominees seized the moment and filled the gap at the NBC.

³² The numbers game could have been detrimental for many of the members of the Board. In the 1990s there were several Evangelical and Pentecostal Churches with less than 500 members. And to speak of a Pentecostal or Evangelical movement was presumptuous since there was no structure organising or co-co-ordinating the churches. The Namibia Evangelical Fellowship was a fellowship of people rather than churches without official church membership.

accepted by the NBC board. The idea of incorporating other religions died a natural death after that.

Rev Joseph was not re-appointed to the NBC board after serving one term, possibly because government wanted change in the religious department. However, the new team at the NBC did not change much in terms of religious broadcasting. All the religious programmes remained on radio, including broadcasts of services from local churches and a long three-hour television broadcast on Sunday mornings.

5 The confrontation of state and religion in the constitutional era

5.1 Christian schools

The old church schools, mainly Anglican, Catholic and African Methodist Episcopal Churches, received subsidies from government after independence.³³ However, government made it clear that they would not subsidise new private church schools. Their problem was not so much church control, but rather a fear that the old segregated white churches were using the Christian (or Reformed) tag to keep black children out of these schools. The suspicion was not without foundation. Shortly before independence, several white churches convinced the South African Administrator-General to privatise some of the prestigious white schools and hand them over to a consortium of churches. The plan failed when it was leaked to the press before the Administrator-General could privatise the schools.

The majority of the private Christian schools that came into being after independence came from the Reformed and Pentecostal ranks. The crisis in Namibian education (more than 40% of the grade 10 students failed in 2008) helps to keep private schools in business. Despite allegations that Christian schools are elitist or vestiges of the old unequal apartheid education, the schools will grow if segments of the population are not happy with government schools.

One cannot, however, help to be sceptical about the real motives behind Christian education in Namibia. In an investigation at Swapo-
mund Primary School, a former German-speaking government school,³⁴ and the Christian Academy, a fundamentalist Christian school using the controversial American Accelerated Christian Education curriculum, it was found that a student in the former pays N\$1 800 per

³³ The government did not introduce new subsidies, but maintained the *status quo* of subsidies to approved private schools.

³⁴ Since English is the language of instruction in all Namibian schools from grade 1, one can no longer theoretically speak of German or Afrikaans schools. In practice, however, the schools maintain a strong German-speaking character.

year³⁵ and a student at the latter N\$ 1 000 per month.³⁶ At the new Windhoek Gymnasium, a parent of a primary school student pays N\$18 000 per year. Under the heading 'Values of the School,' its website stated that '(t)he school is consecrated to Jesus Christ and based on Biblical values'.³⁷ The private church schools are only accessible the higher middle class and they make no attempt to take quality education to a broader section of Namibian students, or to assist the 10 000 grade 10 failures to get a place where they can repeat.

Government was never comfortable with the new post-independent Christian schools. The Constitution makes special provision for individuals or groups to establish private schools.³⁸ Consequently, the government has no remedy to limit the number of private schools or to manage their racial composition. Founding President Sam Nujoma and other cabinet ministers have criticised the predominantly white Christian schools on several occasions, calling them racist. The attack was never on Christian schools *per se* and President Nujoma has always made it clear that he has respect for the contribution of the Lutheran, Anglican and Catholic schools. A case in point is a speech by the president on 23 June 2000. In the speech, President Nujoma made a clear distinction between the Anglican and Lutheran schools in the north, which he claimed are real Christian schools, and white private schools, which he said were racist and not Christian.³⁹ Yet the church schools have never clashed with government and at no stage did government attempt to close them, mainly because the Constitution explicitly allows the right of every person to establish and maintain private schools.⁴⁰

³⁵ Although the Constitution guarantees free primary education, the Ministry sidestepped the provision by making contributions to the development fund compulsory.

³⁶ Investigation done by author.

³⁷ Windhoek Gymnasium Private School <http://www.windhoekgymnasium.com/general.htm> (accessed 14 February 2008).

³⁸ Art 20(4).

³⁹ *The Namibian* 3 July 2000 <http://www.namibian.com.na/Netstories/2000/June/News/008C4BA3E8.html> (accessed 12 February 2008).

⁴⁰ The full text of art 20(4) reads: '(4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that: (a) such schools, colleges or institutions of tertiary education are registered with a government department in accordance with any law authorising and regulating such registration; (b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the state; (c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed; (d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.'

5.2 The abortion issue

When Namibia became independent, the South African Abortion and Sterilisation Act (1975) dealt with legal issues of abortion. The Act outlawed abortion, allowing specified exceptions. Exceptions were strictly monitored and limited to the following circumstances:

- (i) when a pregnancy endangers a mother's life or constitutes a permanent threat to her physical health;
- (ii) when the continued pregnancy constitutes a serious threat to the mother's mental health;
- (iii) when there exists a serious risk that the child will be born irreparably seriously handicapped (physically or mentally);
- (iv) when the pregnancy is the result of rape or incest;
- (v) when the mother suffers from a permanent mental handicap that makes her unable to comprehend the implications of the pregnancy or bear the parental responsibility.

In 1996, government released a draft Abortion and Sterilisation Bill for discussion. The Minister of Health and Social Services, Dr Libertine Amathila, and the Permanent Secretary of the Ministry, Dr Kalumbi Shangula, campaigned for three years to convince the Namibian people that the Bill — following a strong liberal, pro-choice approach — was the way forward for Namibia.⁴¹

The churches reacted immediately. The opposition to the Bill was overwhelming across denominational and confessional lines. In the north, the respected pro-SWAPO Bishop Kleopas Dumeni of the Evangelical Lutheran Church in Namibia supported the opposition, as did Former Secretary-General for the Council of Churches of Namibia and respected Lutheran pastor, Dr Ngeno Nakamhela.⁴² In April 1999, the Minister set out on a country-wide tour to address public meetings on the Bill. She only visited Otjiwarongo. The opposition was so strong that she cancelled her tour and declared that the Bill has been dropped because 99% of the population was against it.⁴³ Women's groups objected to the tabulation of 99%, which was possibly an overestimation of the numbers of the pro-life group. The opposition to the Bill was nevertheless overwhelming.

In an editorial, the editors of *The Namibian* admitted that the vast majority of the population opposed the Bill, but blamed middle-aged male church leaders for the populist campaign against the legislation. The newspaper suggested that the abortion issue can be compared

⁴¹ *The Namibian* 20 April 1999, published on the website Euthanasia.com, 'Namibia drops move to legalise abortion' <http://www.euthanasia.com/nambia.html> (accessed 10 February 2008).

⁴² As above.

⁴³ As above.

with the South African Constitutional Court case of *S v Makwanyane*,⁴⁴ where the Court abolished the death penalty despite strong public support for it.⁴⁵ In November 2002, the Minister stated again that abortion will not be legalised in Namibia for at least the next ten years, because of the strong opposition against it.⁴⁶

The abortion issue was the first serious clash between government and the churches. In this instance, the churches who supported the struggle and those who were in cahoots with the South African occupational forces stood together. It was clear from the outset that the Catholic Church would not go against the Vatican's opposition to abortion. However, government hoped for the support of the leaders of the black Lutheran churches and the Anglican Church. Had they supported the Bill, government would in all possibility have pushed the legislation through.

5.3 New battlegrounds: Nujoma and the 'other' churches

The churches who did not support the struggle (which, in President Nujoma's mind, included all churches except the Anglican, Lutheran, Catholic and the AME Church), were, like the church schools, a bone of contention for the founding President. During a meeting with farmers in Northern Namibia in 2001, the President said that, while the Constitution recognises freedom of religion, he does not have to embrace Christianity since it is 'artificial' and a 'foreign philosophy'. President Nujoma then encouraged them to dump Christianity and worship the ancestral cattle God, *Kalunga ya Nangombe*.⁴⁷ This was one of the few instances where Nujoma attacked Christianity without excluding the mainline denominations who supported the struggle. In this instance he addressed communal farmers in the heartland of the Lutheran Church. Yet, the President was only expressing a personal view, and he made sure everyone understood it as such when he also stated that the Constitution guarantees freedom of religion.

In June 2004, President Nujoma attacked the 'non-traditional churches' in Tsumeb, stating that they tried to mislead their followers. The President stated that the government only recognised the Catholic,

⁴⁴ *S v Makwanyane & Another* 1994 3 SA 868 (A).

⁴⁵ 'Choice is the better option', Editorial, *The Namibian* 23 April 1999 <http://www.namibian.com.na/Netstories/Cols4-99/edit230499.html> (accessed 10 February 2008).

⁴⁶ C Maletsky 'Abortion ruled out' *The Namibian* 28 November 2002 <http://www.namibian.com.na/2002/November/national/029C6A15DC.html> (accessed 10 February 2008).

⁴⁷ C Maletsky 'Nujoma should be clear on 'misleading churches' *The Namibian* 17 June 2004 http://www.unipeak.com/gethtml.php?_u_r_l_=aHR0cDovL3d3dy5uYW-1pYmIhbi5jb20ubmEvMjAwNC9kdW5lL25hdGlvbmFsLzA0NEI5MzZGRtIuaHRtbA (accessed 9 March 2008).

Anglican and Lutheran churches.⁴⁸ The Council of Churches reacted to the statement. Secretary-General Nangula Kathindi agreed that there may be some churches that are misleading the people. However, there are several churches affiliated to the CCN who do not fall in this category, Kathindi said and continued:⁴⁹

CCN has received numerous complaints from our member churches who feel hurt because of not being recognised, while they are also of good standing in preaching the Christian gospel and are involved in nation building.

The CCN membership includes the likes of the Anglican Diocese of Namibia, the Dutch Reformed Church in Namibia, the Protestant Unity Church (Oruuanano), the Rhenish Church in Namibia, the United Congregational Church of Southern Africa, the United Methodist Church in Namibia, the Uniting Reformed Church in Southern Africa and the Methodist Church of Southern Africa. The Reformed Churches in South Africa (Gereformeerde Kerke) and the Apostolic Faith Mission in Namibia have observer status, while the Coptic Orthodox Church in Namibia is an associate member. The Pentecostal Protestant Church, the Ecumenical Institute of Namibia and the Young Women's Christian Association were all organisations affiliated to the CCN.

It is not clear what the President meant when he stated that only certain churches were recognised. One thing is sure: It cannot mean that these 'recognised' churches are state churches or enjoy any official status denied to other denominations. The Namibian Constitution not only guarantees freedom of religion; it also declares the Republic a secular state. It is possible that the President referred to some executive decision that the government would only invite pastors from the 'recognised' churches to officiate at government functions, such as the opening of parliament, state funerals, etc.

It is not clear what sparked the President's fury. Rumours had it that the President was annoyed by the new Evangelical and Pentecostal/charismatic churches that entered the country after independence. Some of these churches were not only growing at a tremendous rate, but the leaders also executed power over their followers. This is especially true of the Nigerian apostles and the South American bishops. Rev Kathindi's reference to the Dutch Reformed Church, the Apostolic Faith Mission and the Pentecostal Protestant Church did not help either. All these churches were staunch supporters of the apartheid system and practised it in their churches. The AFM and Pentecostal Protestant Church only unified shortly before the President's statement, and the

⁴⁸ A Craig 'NBC bans religious devotions — Claims a need to 're-visit guidelines' 7 January 2005 http://www.unipeak.com/gethtml.php?_u_r_l=aHR0cDovL3d3d-y5uYW1pYmhhbi5jb20ubmEvMjAwNS9KYW51YXJ5L25hdGlvbmFsLzA1OEFERkFFMzQuaHRtbA (accessed 20 March 2008).

⁴⁹ C Maletsky 'Nujoma should be clear on misleading churches' *The Namibian* 17 June 2005 <http://www.namibian.com.na/2004/june/national/044B936FE2.html> (accessed 11 April 2008).

Dutch Reformed Church is still separated from its black sister church in Namibia. While the CCN was willing to forgive and forget, the President was possibly not there yet.⁵⁰ Later in 2004, the President aimed a second blow at the non-mainline churches. Some churches, he stated, spread HIV/AIDS by operating throughout the night. The target was the Pentecostal churches and their well-known 12-hour tarry meetings.⁵¹

In January 2005, shortly before President Nujoma stepped down, the NBC Director-General, Gerry Munyama, suspended all religious programmes on national radio and television. He stated that he was concerned 'about the way some devotions are conducted and wanted to revisit its guidelines to that effect'. He also said that it was his own decision and not influenced by any politician.⁵² The Director-General added that 'the situation was getting out of hand and that religion was getting out of the traditional way we know it'.⁵³ It seems strange that the Director-General of the national broadcaster concerned himself with the content of the message presented by some churches, forgetting that Namibia was a secular state guaranteeing the right of its citizens to practise the religion of their choice.

The mainline churches were quick to agree that some control was necessary. From their responses, it seems as if the Pentecostals and charismatics were seen as the Jonas that caused the storm. Several church leaders and even some traditional Pentecostals supported Munyama's insistence on new guidelines. Dutch Reformed spokesperson Rev Clem Marais hinted in an interview with opinion magazine *Signpost* that the problem of the national broadcaster lay with the dangerous prosperity message of the Pentecostals and charismatics.⁵⁴ In the same edition, some unnamed critics claimed that the real problem was with the fact that Pentecostals did not support the struggle for independence. Others claimed that the government was looking for an opportunity to follow Zambia's example and ban the Universal Church of the Kingdom.⁵⁵

If the government under President Nujoma had plans to act against some churches, it was overtaken by history. In March 2005, President Hifikipunye Pohamba succeeded President Nujoma as the second president of the Republic of Namibia. President Pohamba immediately opened his doors for the churches and even attended a morning service in the white Dutch Reformed Church. At the same time, the Ministry

⁵⁰ The Moderator of the Dutch Reformed Church, Rev Schalk Pienaar, was the President of the CCN at the time.

⁵¹ The so-called tarry meetings are an old Pentecostal practice, especially in black churches. The congregation come together on a week night and pray throughout the night, most of the time for a 'new baptism of the Spirit'.

⁵² n 41 above.

⁵³ As above.

⁵⁴ *Signpost* March 2005.

⁵⁵ As above.

of Home Affairs issued a statement that Namibia had no intention of acting against the Universal Church of the Kingdom:⁵⁶

We are a government doing our business guided by our Constitution, which strongly emphasises the freedom of our people towards their choice of religion. Hence, anyone is free to choose the church of his or her own choice.

President Pohamba, a confessing Christian, laid the issue to rest and the NBC's criticism faded away. The religious programmes went back on television and radio, although live church broadcast and televised church services were stopped and most Pentecostals and Evangelicals were no longer invited to take part in religious programmes. Not that it harmed the Pentecostals too much. The American religious broadcaster Paul Crouch brought his 24/7 television station, Trinity Broadcasting Network, to Namibia. Local representative Coenie Botha adds some local content (often Pentecostal church services) to its American Pentecostal/charismatic programmes and broadcasts on a free channel in Namibia.

5.4 The Rastafarian question: Illegal action and freedom of religion

Namibia has a small, but active Rastafarian community. The freedom of Rastafarians, who smoke *cannabis*, a prohibited substance in Namibia, as part of their religious liturgy, was raised in a criminal case.⁵⁷ Rastafarians compare their use of the *ganja* plant with the Christian use of wine at the Eucharist. To criminalise their sacraments is a direct attack on their religion, and their freedom to worship God according to ancient cultic practices.

Sheehama, a well-known Namibian artist, was convicted in a magistrate's court of possession of *cannabis*. He admitted that he was in possession, but claimed that he was entitled to do so as part of the religious rituals of the Rastafarians in terms of his cultural and religious rights protected by the Constitution. He was nevertheless convicted.

The High Court had decided previously⁵⁸ that the jurisdiction of the magistrate's courts did not extend to a claim brought in terms of article 25(2) of the Constitution.⁵⁹ Unfortunately, the Court dismissed

⁵⁶ Statement by Kauku Hengari, spokesperson for the Ministry of Home Affairs <http://blogs.salon.com/0003494/2005/12/14.html> (accessed 12 April 2006).

⁵⁷ *Sheehama v S* 2001 NR 281 (HC).

⁵⁸ *S v Heidenreich* 1995 NR 234 (HC).

⁵⁹ Art 25(2) reads as follows: 'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'

the appeal of Sheehama on technical grounds. Consequently, the conflict between constitutionally-guaranteed religious and cultural rights on the one hand and the legal system on the other has not been addressed.

5.5 Christian culture

Several old South African Acts made applicable in Namibia were based on Calvinist moral teaching. A case in point is the Publications Act of 1974. In terms of section 1 of the Act, the Publications Board, in applying the Act, 'the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognised'. In a case that dealt with the sale of erotic and pornographic material, Justice Maritz made the following comment:⁶⁰

I doubt whether such a consideration in a secular constitutional dispensation, provided for in article 1(1) of the Namibian Constitution, is permissible. Secondly, in a society as heterogeneous as Namibian society with a variety of religions, cultures, languages, traditions, it is difficult to imagine that bodies constituted under the Publications Act can adequately reflect those values and whether in those circumstances it is permissible for parliament under article 21(2) to leave it to administrative bodies to determine the parameters of a person's freedom.

In the same judgment, the Court looked at the extremely broad wording of two Acts: section 2(1) of the Indecent and Obscene Photographic Matter Act 37 of 1967 and section 17(1) of the Combating of Immoral Practices Act 21 of 1980. The first gave an extremely broad definition of both publication and the words 'indecent and obscene', while the latter worked with a broad interpretation of the phrase unnatural sex. While the Court did not look at the religious foundation of the two Acts, it made it clear that in setting legal standards to uphold standards of decency and morality in society, the basic constitutional principles, such as freedom of speech or their freedom to carry on any trade or business, cannot be ignored. The Court made it clear that, in determining the scope of decency and morality, the values of the conservative Christian community were not the benchmark, but the Constitution:⁶¹

It seems to me that in the context of these applications, the constitutionality of section 2(1) more appropriately falls to be decided on the basis of whether that section infringes or derogates from the applicants' right to freedom of speech and expression or their freedom to carry on any trade or business and, if so, whether it was done in a constitutionally permissible manner.

⁶⁰ *Fantasy Enterprises cc t/a Hustler the Shop v Minister of Home Affairs & Another; Nasilowski & Others v Minister of Justice & Others* 1998 NR 96 (HC).

⁶¹ *Fantasy Enterprises* (n 60 above) 100.

5.6 The homosexual issue

Until the mid-1990s there was no indication that the Namibian government differed from the South African approach to the protection of sexual orientation. In one of the first Acts after independence, the Labour Act 6 of 1992, sexual orientation was listed as one of the non-discriminatory categories.⁶² The general expectation was that sodomy would soon be declared unconstitutional and that the past discrimination against homosexuals and lesbians would be declared unconstitutional in due course. However, in the middle of the 1990s, the President and some senior ministers verbally attacked homosexuals in public:⁶³

Namibian President Sam Nujoma has urged regional leaders to identify gays and lesbians in their communities so that they can be arrested. Speaking at Okahao in the Omusati region yesterday, Nujoma re-emphasised the message he gave at the University of Namibia nearly two weeks ago when he told students that homosexuals should be arrested, imprisoned and deported.

The attacks were unexpectedly nasty and could even be seen as instigations to use violence against homosexuals.

The High Supreme Courts were confronted with the issue in March in the now-famous case of Elizabeth Frank, a German citizen and a SWAPO co-worker in Bremen, Germany during the struggle for independence.⁶⁴ The High Court reviewed and set aside a decision of the Immigration Selection Board, refusing a permanent residence permit to Ms Frank, whose application for permanent residence was turned down twice. She alleged that her sexual orientation was lesbian and that she lived in a permanent relationship with another woman. If it was legally possible to marry, they would have done so. She felt that her lesbian relationship might have been the reason why her application for a permanent residence permit had been rejected. However, if her relationship with a Namibian citizen was a heterosexual one, she could have married and would have been able to reside in Namibia or to apply for citizenship in terms of article 4(3)(a) of the Namibian Constitution, she alleged. She said that the Board did not take this factor into account and therefore violated her right to equality and freedom from discrimination guaranteed by article 10, her right to privacy guaranteed by article 13(1) and protection of the family guaranteed by article 14 of the Constitution.

⁶² Act 6 of 1992.

⁶³ *The Namibian* 2 April 2002.

⁶⁴ *Frank v The Chairperson of the Immigration Selection Board* 1999 NR 257 (HC). The case was later heard by the Supreme Court on appeal: *The Chairperson of the Immigration Selection Board and Erna Elizabeth Frank & Another* 2001 NR 107 (SCA).

As far as the relationship between Frank and her partner had a bearing on the review application, the High Court⁶⁵ concluded that the respondent was wrong in his assumption that the respondent's long-term relationship was 'not one recognised in a court of law and was therefore not able to assist the first applicant's application'. This, the Court stated, is an incorrect statement of the law. The Court relied on *Isaacs v Isaacs*,⁶⁶ where the learned judge found that a relationship where parties put all their assets, both present and any they may acquire in future, in a pool from which they pay expenses incurred by both, was a relationship acknowledged and protected by the common law. Such an agreement is known as a universal partnership and can be entered into by verbal undertaking, in writing, or even tacitly. The High Court further pointed out that such a partnership was a common practice recognised by the courts between a man and woman living together as husband and wife, but not married legally. Referring to article 10 of the Namibian Constitution,⁶⁷ the Court concluded that if a man and woman could enter into such a relationship, and since the partnership was so strong that a court of law would divide the assets when it dissolved, in terms of the constitutional equality principle of article 10(2), two lesbian women should also be able to enter into such a partnership.

Consequently, the Court found that a relationship between the applicants are indeed protected by law and should have been considered by the respondent. In a rather long shot, the Court did not refer the case back to the Board, but instructed the Board to grant the first applicant permanent residence. However, the Immigration Board appealed to the Supreme Court. The Supreme Court, *per* Justice O'Linn, found in its judgment that the Court *a quo* erred in its conclusion that law protects a lesbian relationship.⁶⁸

- (I) It is only unfair discrimination which is constitutionally impermissible, and which will infringe Art 10 of the Namibian Constitution;⁶⁹
- (II) A homosexual relationship does not have the same status and protection of a heterosexual marriage:

A court requiring a 'homosexual relationship' to be read into the provisions of the Constitution and/or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted 'purposively'.

The Court then did an egg dance and stated: 'Nothing in this judgment justifies discrimination against homosexuals as individuals, or

⁶⁵ *Frank* (n 64 above).

⁶⁶ 1949 1 SA 952(C).

⁶⁷ '1. All persons shall be equal before the law. 2. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

⁶⁸ *Frank* (n 64 above) 115.

⁶⁹ *Frank* (n 64 above) majority judgment 114.

deprived them of the protection of other provisions of the Namibian Constitution.⁷⁰ In short, the Court, following Zimbabwean jurisprudence in the *Banana* case, concluded that the list of categories against whom discrimination is prohibited is closed, and the word 'sex' only means male/female and not sexual orientation. Consequently, the Namibian Constitution and Namibian law did not protect the partnership emanating from same-sex relationships. The categories of protected entities in article 10(2) of the Constitution did not include sexual orientation.

While the Court did not elaborate on the foundation of the Namibian values, or any religious connotation to homophobia, it took judicial knowledge of the President's and other politicians' opposition to homosexuality, 'because that would be against the traditions and values of the Namibian people and would undermine those traditions and values'.⁷¹ The Court also pointed out that when these homophobic statements were made in parliament, 'nobody on the government benches, which represent 77% of the Namibian electorate, made any comment to the contrary'.⁷² While religion is not mentioned as the foundation of the homophobia or the judgment, the reference to African culture and African tradition has a ring of a religious pretext. The vast majority of churches support the government's anti-homosexual attitude and concur with the judgment of the Supreme Court. The Namibian leaders often refer to homosexuality as a European import to Namibia and anti-Christian.⁷³

5.7 Jewish identity as a source of protection

One of the first cases of racial discrimination dealt with an advertisement in a newspaper congratulating the World War II German prisoner, Rudolph Hess, on his birthday.⁷⁴ Although the case did not deal directly with a religious issue, being Jewish encompassed both the cultural and religious identities of a people. Consequently, discrimination against Jewish people can almost always be seen as religious oppression. In this case, however, the court evaluated the offence in the light of the historical understanding of oppression in Namibia as acts of the white minority against the black majority. The Act (Racial Discrimination Prohibition Act 26 of 1991) was meant to transform the discriminatory society of South African occupation. Since the Jewish community did not suffer under the apartheid system, the Act was not created to protect them.

⁷⁰ Frank (n 64 above) 119.

⁷¹ Frank (n 64 above) 151.

⁷² As above.

⁷³ R Goering 'Africa's gays persecuted as cause of ills' *Chicago Tribune* 9 June 2004, Chicago. The article is based on interviews with Namibian gay activist, Ian Swartz.

⁷⁴ *S v Smith & Others* 1997 1 BCLR 70 (Nm).

The argument of the Honourable Justice Frank (as he then was) does not make much sense. While the monetary power of the whites may still put them in a position to discriminate against blacks, the state now has the power to act against such offenders. The possibility that the oppressed can turn to become the oppressor can never be excluded. The objectives of the Act are possibly to rid Namibia of its historical past, while at the same time to create a framework for a discrimination-free future Namibia, and a small minority like the Namibian Jewish community will always be vulnerable.

The *Smith* case, like the *Frank* case,⁷⁵ creates the impression that certain categories of vulnerable people are not protected against discrimination by the Namibian Constitution.

Christians, especially Evangelicals, are a vulnerable community. Despite their growing numbers, the SWAPO-led government has been openly negative (President Nujoma) or cautiously neutral (President Pohamba). One would expect Evangelicals to be more aware of the rights of other vulnerable communities. However, they have proved themselves to be extremely sectarian and biased when it came to the rights of others. They ignored the Jewish debate, openly supported the *Frank* judgment in the Supreme Court and vigorously opposed the application of two Muslim communities to build mosques.

5.8 The perceived threat of Evangelicals and other non-traditional churches

Christians and other religious communities have experienced privileges not always associated with a secular state. The threats of former President Nujoma was never more than just an expression of dismay. Although the former head of state did not fully forgive the churches who opposed the liberation struggle, his anger was often directed against the wrong people — the black Pentecostal/charismatic churches.

The idea of introducing a system to register churches is still debated in the SWAPO party. At a SWAPO Youth League central committee meeting, the secretary, Elijah Ngurare, suggested a Ministry of Religion to support the churches in its combat of poverty. However, only traditional churches should be allowed to register. The secretary did not say what would happen to the non-registered churches.⁷⁶ It seems as if non-mainline churches themselves fear that they will be harmed by the proposed registration. In a letter to the party ombudsman, the president of the Association of Charismatic and Pentecostal Churches of Namibia suggested that the association will be the best body to regulate Pentecostal churches. He also asked the ombudsman to recommend to government that the association be appointed to approve

⁷⁵ n 64 above.

⁷⁶ C Maletsky 'Swapo youth gets religion' *The Namibian* 14 July 2008 <http://www.namibian.com.na/2008/July/national/0815BB6198.html> (accessed 14 July 2008).

or reject new churches.⁷⁷ Neither the SWAPO Youth League nor other proponents of limiting the rights of Evangelicals and other minority religions gave reasons for their proposals. President Nujoma seemed to be troubled that they did not support the struggle for independence. The argument, however, is not convincing.

Let us first look at the Pentecostal/charismatic scene before independence. There were a few big white Pentecostal churches, the AFM, Full Gospel, the Latter Rain and the Pentecostal Protestant Church. However, the total white membership of these churches was less than 1 000. They opposed independence and supported the apartheid regime. That, however, was not exceptional for white churches. The three Reformed churches were much more vocal in their support of apartheid, and some of them are now members of the CCN — the *shibboleth* of respectability. Why target only the small churches? The apartheid system was after all the result of the reformed Kuyprian theology of the Dutch Reformed Church. Ironically enough, two big white-dominated Pentecostal denominations joined the CCN after independence.

The black Pentecostals like Filadelfia and Eben-Ezer left the white mother churches in protest against apartheid, as Mulondo clearly pointed out in his BA dissertation.⁷⁸ They were part of the oppressed people and even if they were not political activists or very vocal, their existence alone was an act of protest against apartheid. Were they against the struggle? I have not seen one piece of evidence to convince me of that. On the contrary, many of the black pastors had children in exile. In South Africa, Joseph Kgobo, a former MK cadre and father of children who were either in MK or studied abroad, became a leader in the Back to God Group — a movement prominent in pre-independent Namibia. In Khomasdal, the AFM, under the leadership of Fred Joseph, were vocal supporters of the struggle and fiercely against apartheid. Several young blacks and browns learned about God's preferential choice for the poor and about the sinfulness of apartheid at the feet of the Khomasdal leadership. The South African Pentecostal leader, Frank Chikane, was so deeply involved in the struggle for independence that the transitional government refused him entrance into Namibia.⁷⁹ The young people of the Pentecostal churches in the north went into exile like all other young people at the time. I know of at least two sons of AFM pastors who became Plan fighters.

In a country where we sing the African anthem at official occasions and where the founding President is the patron of Pacon, a Pan-Africanist think-tank, how can anyone have problems with Nigerian and Zimbabwean pastors, especially since almost all white churches call their pastors from either South Africa or Germany? A concern for the

⁷⁷ Letter to the Ombudsman dated 28 March 2007.

⁷⁸ n 20 above.

⁷⁹ See *Chikane v Cabinet for the Territory of South West Africa* 1990 1 SA 349 (A).

well-being of the members of independent charismatic churches is also not the issue at stake. The journalist who wrote the *Insight* article revealed his or her suspicion when he or she asked Bishop Abrahams if charismatics would become a political force opposing SWAPO. This is also possibly the concern of President Nujoma.⁸⁰

The independent charismatics are exactly what their opponents call them: *independent*, and they are springing up everywhere: in houses in suburban Windhoek, in informal corrugated iron buildings in Greenwell Matongo, but also in big churches all over the city. But they are religiously and politically as diverse as their names and as independent as their tag. Even the apostles, prophets and bishops have limited authority. Forget about an apostolic council or a new denomination for all of them. Not even the denominations speak on behalf of all their churches.

In a secular state that guarantees freedom of religion, pureness of doctrine can never be a criterion for including or excluding churches for any official purpose. Namibia has proved that good theology, even if it is substantiated by theologians trained under great academicians in Europe, can never be a guarantee for correct actions. And while churches have the right and obligation to criticise poor theology, it is never possible for the national broadcaster in a secular state to bar churches from the air because 'the situation was getting out of hand and that religion is getting out of the traditional way we know it', as NBC Director-General Gerry Munyama is reported to have said. The theology is sometimes horrible and some practices and some teachings may indeed be unhealthy. But government should not see them as a threat and the national broadcaster should not concern itself with the pureness of their theology.

6 Concluding remarks

Post-independence Namibia did not follow the example of Zimbabwe⁸¹ or Zambia⁸² by banning religious movements. They created the space for non-Christian religions, such as Islam and the Baha'i Faith, and controversial Christian movements, such as the Mormons and so-called Apostolic charismatic churches from West Africa, to settle in Namibia. While the founding President often targeted the Pentecostal/charismatic churches and non-mainline Evangelicals for criticism, there was never a real threat to their freedom to express and practise their faith

⁸⁰ n 48 above.

⁸¹ Shortly after independence, Zimbabwe banned the so-called Moonies, a notorious Messianic group under the leadership of a Korean, Dr Moon, who declared himself Jesus Christ incarnate.

⁸² In 2005, Zambia banned the South American Pentecostal Church, the Universal Church of the Kingdom.

without government intervention or regulation. Some of the allies of the South African policies were even allowed the space to play a leading role in religious broadcasting after independence (the Dutch Reformed and some Pentecostal churches, for instance the AFM). Government is also willing to listen to the voice of the religious community, as was shown in the abortion debate. In test cases such as the *Smith* case, both the courts and government seem to be insensitive to the threat and needs of small minority religious groups such as the Jewish community. While Evangelicals are eager for government to acknowledge their rights, they proved to have little concern for the rights of other minorities.

Comments on the constitutional protection of religion in Swaziland

Christa Rautenbach*

Professor of Law, North-West University (Potchefstroom Campus), South Africa

Summary

Comparable to the South African legal system, the Swazi legal system has the characteristics of a dual legal system. Though the common law of Swaziland is Roman-Dutch law, Swazi customary law has a firm hold in the Swazi legal system. With a population in the region of 1,2 million, made up of different religious denominations, religion in Swaziland is an important matter. Although Christianity is the majority religion in Swaziland, there has generally been freedom of religion from an early stage. This was recently confirmed in the Constitution of the Kingdom of Swaziland Act 1 of 2005, which came into operation on 8 February 2006. The focus of this presentation is on the fairly new constitutional provisions dealing with freedom of religion in Swaziland. The first part of this contribution consists of a general discussion dealing with the commonalities of and interaction between the South African and Swazi legal systems, as well as certain key elements in the making of the Swazi Constitution. The second part deals with specific constitutional provisions pertaining to religion in general and freedom of religion in particular. The contribution concludes with a few comments on the role the South African constitutional jurisprudence has to play in future Swazi constitutional adjudication.

1 Introduction

Nestled in between South Africa and Mozambique, Swaziland is the smallest African country south of the Sahara, covering an area of just

* Blur, LLB, LLM, LLD (North West); Christa.Rautenbach@nwu.ac.za. I am greatly indebted to Prof Gerrit Ferreira for his helpful comments on an earlier draft.

over 17 000 square kilometres.¹ Keeping Swaziland's geographical position in mind, it probably comes as no surprise that South Africa and Swaziland share more than just borders. Swaziland was a protectorate of the South African Republic (ZAR) for a brief period stretching from 1894 to 1899, but after the Anglo-Boer War in 1902, Swaziland became a British protectorate until its full independence on 6 September 1968.²

Comparable to the South African legal system, the Swazi legal system has the characteristics of a dual³ legal system.⁴ Surprisingly, it is not the English common law, but the Roman-Dutch common law (also the common law of South Africa) which is the common law of Swaziland. In addition, Swazi customary law also has a firm hold in the Swazi legal system.⁵ This situation was recently affirmed by the Constitution of the Kingdom of Swaziland Act 1 of 2005 (Swazi Constitution), which came into operation on 8 February 2006. Section 252 of the Swazi Constitution determines that Roman-Dutch law is the common law of Swaziland,⁶ and also recognises Swazi customary law as part of the

¹ G Collard (ed) *Swaziland review* (2006 Swazi Review of Commerce and Industry Swaziland) 4; JB Mzizi 'Challenges of proselytization in contemporary Swaziland' (2000) 14 *Emory International Law Review* 912.

² Mzizi (n 1 above) 914.

³ It is not only the Swazi legal system which is dual in character, but also the Swazi governmental system. The government consists of the traditional monarchy and western government structures. See the discussion of LG Dhlamini 'Socio-economic and political constraints on constitutional reform in Swaziland' unpublished LLM dissertation, University of the Western Cape, 2005 16-32. He is of opinion that the dual system of government ridicules constitutional reform in Swaziland (77).

⁴ Mzizi (n 1 above) 914; T Nhlapo *Marriage and divorce in Swazi law and custom* (1992) 17. He points out that this classification is not without problems. According to him, 'duality' implies the existence of two legal systems on par with each other, whilst the co-existence of customary law and the general law are mostly an unequal relationship where the first is seen as inferior to the latter (6). However, a discussion of these issues falls beyond the scope of this discussion. Also, finding legal information on Swaziland, such as legislation, royal decrees, court decisions and textbooks, is no easy matter. A research report written by B Dube & A Magagula *The law and legal research in Swaziland* <http://www.nyulawglobal.org/Globalex/Swaziland.htm> (accessed 13 April 2008) provides valuable background information as a starting point to discover more about the Swazi legal system. Some of the latest decisions of the higher courts of Swaziland can be found at <http://www.saflii.org/sz/> (accessed 13 April 2008).

⁵ Nhlapo (n 4 above) 7-16 explains how this progressed in Swaziland from 1907 onwards. In South Africa, it is no secret that colonialism has had a considerable impact on the existence and development of law. Modern South African law comprises a conglomeration of so-called transplanted laws made up of a mixture of Roman-Dutch law and English common law, as well as indigenous laws, referred to as customary law.

⁶ Sec 252(1) reads: 'Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute.'

law of Swaziland, subject to a repugnancy provision that prohibits the application of Swazi customary law if it is 'inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity'.⁷

The Swazi repugnancy provision bears a remarkable resemblance to the controversial South African repugnancy provision,⁸ which provides that South African customary rules may not be applied if they are 'opposed to the principles of public policy or natural justice'. Though this provision has not yet been repealed, it is generally accepted that the validity of customary law no longer depends on its consistency with the common law, but its consistency with the Constitution of the Republic of South Africa Act 108 of 1996 (South African Constitution) and, more specifically, the Bill of Rights.⁹

⁷ Sec 252(2) reads: 'Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi law and custom) are hereby recognised and adopted and shall be applied and enforced as part of the law of Swaziland.' Sec 252(3) reads: 'The provisions of subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity.'

⁸ See sec 1 of the Law of Evidence Amendment Act 45 of 1988. This provision resembles the Swazi repugnancy clause in the Swazi Courts Act 80 of 1950 which lays down that Swazi customary law prevails in Swaziland 'so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland' (see sec 11(a) of the Act).

⁹ The South African Constitution compels the courts to apply customary law when that law is applicable. However, such application is subject to the Constitution and any legislation that specifically deals with customary law; see secs 31(2) and 211. Although section 1(1) of the Law of Evidence Amendment Act is still in operation, it can safely be accepted that the South African Constitution removed any doubt as to the status of customary law in the South African legal system; it is part of modern South African law on a par with (and not subordinate to) the common law (Roman-Dutch law). In *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51 it was stated: 'While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law, it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.' See also *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) paras 40 & 148; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; and *Mabuza v Mbatha* 2003 4 SA 218 (C) para 32. However, the question as to when customary law is applicable and when not, is not always easy to answer. For one, there is always the question whether the general law of South Africa (Roman-Dutch law) is to be applied or the customary law and, in addition to this, the question which customary laws must be applied, because South Africa does not have a unified system of customary laws. For a discussion of the choice of law rules in South Africa, see TW Bennett 'The conflict of laws' in JC Bekker *et al* (eds) *Introduction to legal pluralism in South Africa* (2006) 18-27.

With a population in the region of 1,2 million, made up of different religious denominations, religion¹⁰ in Swaziland is no small matter. Succumbing to the temptation of generalisation in order to provide a brief overview of the historical development of religion, especially the Christian faith in Swaziland, it can be noted that Swazi traditional religion¹¹ slowly, but surely, made way for other religions since Christian missionaries were allowed into Swaziland during the nineteenth century.¹² Their presence was tolerated, mainly because of a vision King Somhlolo had about a strange man with long hair who would bring two things: *umculu* (Bible)¹³ in the one hand and *indilinga* (money)¹⁴ in the other. A voice directed the King to choose the *umculu*, that is, the Bible. This vision paved the way for Christian missionaries to settle in Swaziland and they began with their labours to proselytise the entire

¹⁰ It is not easy to try to define religion. Over the years, many scholars have attempted to explain what they think the definition should be. In *Wittmann v Deutscher Schülverein*, Pretoria 1998 4 SA 423 (T) 449, the court held that the concept 'religion' is not neutral and declared as follows: 'It is loaded with subjectivity. It is a particular system of faith and worship. It is the human recognition of superhuman controlling power and especially of a personal God or gods entitled to obedience and worship It cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section.' For purposes of this presentation, the definition of RL Johnstone *Religion and society in interaction* (1975) 20 is satisfactory, namely that it is 'a system of beliefs and practices by which a group of people interprets and responds to what they feel is supernatural and sacred'.

¹¹ Swazi traditional religion is a religion which was handed down from generation to generation. It has neither a founder nor a time of revelation and can only be explained through the historical development of the Swazi nation. In this context, the Swazi traditional religion is an amalgamation of the religious traditions of the various traditional communities who merged over the years to form the Swazi nation. See P Kasenene *Religion in Swaziland* (1993) 9-41 for a discussion of the development and characteristics of Swazi traditional religion. The relationship between Swazi traditional religion and Christianity is not always an easy one. Every now and then the courts do express their dissatisfaction with traditional beliefs. Eg, in *Rex v Sibusiso Shongwe & Others* (17/1998) [2000] SZHC 6 (8 February 2000), Judge Maphalala made the following comment during sentence: 'There is also an uncanny aspect to this case, that is you are all proclaimed Christians, and that you believe in the teachings of Jesus Christ. You went further to produce a cassette which is now popular in the Zion circles, but you still have such a dark sinister belief in witchcraft. These two are two different ways of life. Christianity is a way of life or witchcraft practice is another way of life. These two do not come together; in fact the one fights the other; it is a contradiction for one to believe in both of them.'

¹² See MHY Kaniki 'Christianity and the ideological base of the Swazi monarchy' in AM Kanduza & ST Mkhonza (eds) *Issues in the economy and politics of Swaziland since 1968* (2003) 68-82 for an overview of the historical development of Christianity in Swaziland.

¹³ Literally meaning something rolled up in a bundle. The term was interpreted to mean a book, and in this context the Bible.

¹⁴ Literally meaning a round, disc-like object. The term was interpreted to mean money.

Swazi population during the 1880s.¹⁵ They have been so successful in their endeavours that the majority of the Swazi population nowadays practise some form of Christianity.¹⁶ About 35% of the population practise Protestantism, 30% Zionism,¹⁷ 25% Roman Catholicism and 1% Islam,¹⁸ whilst the remaining 9% various other religions, such as Anglicanism, Baha'ism,¹⁹ Methodism, Mormonism and Judaism.²⁰ Attempts by Christian clergy in 1996 to elevate the status of the Christian faith to that of the official religion of Swaziland failed when King Mswati III confirmed the equal status of all religions in Swaziland.²¹ Their endeavours to establish the Christian faith as the official faith of Swaziland failed again when the King rejected the constitutional clause pronouncing the Christian faith as the official faith of Swaziland. The government's policy to respect freedom of religion in practice is embodied in the Swazi Constitution.²² Apart from the provisions in the Swazi Constitution, there are no other statutes or royal decrees protecting religious freedom and/or the violation thereof.

Before now, much has been said about the development and history of religion (especially the Christian faith) in Swaziland²³ and, for that reason, the focus of this contribution is on the fairly new constitutional provisions dealing with freedom of religion in Swaziland. The first section consists of a general discussion dealing with the commonalities of and interaction between the South African and Swazi legal systems, as well as certain key elements in the making of the Swazi Constitu-

¹⁵ Much has been written about the vision of King Somhlolo and not all the authors are convinced of the authenticity and meaning of the vision. See, *inter alia*, Mzizi (n 1 above) 917-918; Kaniki (n 12 above); JB Mzizi 'Is Somhlolo's dream a scandal for Swazi hegemony? The Christian clause debate re-examined in the context of prospects for religious accommodation' (unpublished paper); Vilakati, JN 'Revisiting divine providence in a monetary economy' in AM Kanduza & S DuPont Mkhonza (eds) *Poverty in Swaziland: Historical and contemporary forms* (2003) 163-164; Kasenene (n 11 above) 43-45.

¹⁶ See Kasenene (n 11 above) 63-68 for a discussion of the impact of Christianity on Swazi society.

¹⁷ A blend of Christianity and indigenous ancestral worship. See <https://www.cia.gov/library/publications/the-world-factbook/geos/wz.html> (accessed 17 March 2008). See Mzizi (n 1 above) 923-928 for a general exposition on Zionism in Swaziland. See also JB Mzizi 'Voices of the voiceless: Toward a theology of liberation for post-colonial Swaziland' unpublished LLD thesis, Vanderbilt University, Nashville, 1995 227-232.

¹⁸ For a discussion of Islam in Swaziland, see Kasenene (n 11 above) 69-97.

¹⁹ Kasenene (n 11 above) 99-129.

²⁰ See United States Department of State, *2007 Report on International Religious Freedom — Swaziland*, 14 September 2007 <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46ee676ac> (accessed 12 March 2008).

²¹ See Mzizi (n 1 above) 928-930 936 for his discussion of Christian diversity in Swaziland. See also CAB Zigira 'From Christian exclusion to religious pluralism' in Kanduza & Mkhinza (n 12 above) 83-88.

²² See sec 2 below.

²³ Eg, Mzizi (n 1 above) 909-936; Kaniki (n 12 above) 68-82.

tion. The second section deals with specific constitutional provisions pertaining to religion in general and freedom of religion in particular. The conclusion offers a few comments on the role South African constitutional jurisprudence has to play in future Swazi constitutional adjudication.

2 Constitutional protection of religion in Swaziland

2.1 Background²⁴

Before commenting on issues pertaining to constitutional protection of religion in Swaziland, it is perhaps appropriate to make a few observations on the application of South African legal principles in the Swazi courts. The highest courts of Swaziland²⁵ apply Roman-Dutch law (also the common law of South Africa) in their decisions and subsequently refer to South African authors,²⁶ case law²⁷ and legislation²⁸ during the course of their interpretation and application of the law. A recent court case illustrating this phenomenon is *Dlamini v Attorney-General*,²⁹ where the court had to decide who bears the onus to prove that there had been malicious prosecution. Although the court referred to the commonalities between malicious prosecution in English law and Roman-Dutch law, Judge Tebbutt's use of South African authorities to support his arguments is notable. He confirmed that Roman-Dutch law, 'as it has been applied in South Africa, for over a hundred years',

²⁴ For a detailed discussion of the making of the Swazi Constitution, see Dhlamini (n 3 above) 33-62.

²⁵ High Court and Supreme Court (formerly Court of Appeal).

²⁶ See eg *Malambe Solomon Petros v Rex* (59/1999) [2003] SZCA 5 (24 April 2003), where the court referred to some of the well-known South African criminal law authors such as Hoffmann & Zeffert, Gardiner & Lansdowne and Hunt.

²⁷ Eg, in the Swazi case, *Mike Mamba v Fidelis De Sousa* (28/2002) [2002] SZCA 40 (22 November 2002), the court referred to the South African cases *Sewmungal NNO v Regent Cinema* 1977 1 SA 814 (N); *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T); *Trust Bank van Afrika Bpk v Western Bank Bpk* NNO 1978 4 SA 281 (AD) and *Administrator Transvaal v Theletsane* 1991 2 SA 192 (AD). Other examples of recent Swazi cases referring to South African cases include *Dlamini Themba v Rex* (25/2002) [2002] SZCA 36 (15 November 2002); *Mabuza Roy Ndabazabantu v King* (35/2002) [2002] SZCA 23 (1 November 2002); *Gwebu Ray v Rex* (19/2002; 20/2002) [2002] SZCA 22 (1 November 2002); *Councilor Mandla Dlamini and Manzini City Council v Musa Nxumalo* (10/2002) [2002] SZCA 16 (1 November 2002); *Dlamini v Editor of the Nation* (2534/2007) [2008] SZHC 16 (1 February 2008) and *R v Oparaocha* (193/2007) [2008] SZHC 17 (14 February 2008).

²⁸ See eg *Gwebu George Rex; Bhembe Lucky Nhlanhla David v King* (11/2002; 20/2002) [2003] SZCA 2 (4 February 2003) where the court compared the Swazi Interpretation Act 21 of 1970 with the South African Interpretation Act 33 of 1957, as well as the writings of South African authors.

²⁹ Civil Appeal 27/07 [2007] SZSC 1 (6 November 2007). See also *Stapley v Dobson* (2240/07) [2008] SZHC 11 (1 February 2008).

is also the law of Swaziland and referred to South African case law³⁰ to illustrate his point.

But it is not only on the terrain of Roman-Dutch law that South African law is referred to. Recent developments in the Swazi courts indicate that South Africa's constitutional jurisprudence will also be playing a major role in the constitutional law of Swaziland. Given the fact that the Swazi Constitution is fairly new, it is almost a matter of course that the case law in this regard would be sparse. In the recent case of *Jan Sithole NO (in his capacity as a Trustee of the National Constitutional Assembly (NCA) Trust) v Prime Minister of the Kingdom of Swaziland*,³¹ the Swazi High Court had to adjudicate on matters concerning the newly-enacted Swazi Constitution. In an application to obtain certain classified documents of the Constitutional Review Commission (CRC) and the Constitutional Drafting Commission (CDC), the applicants contended that the Swazi Constitution was null and void and thus of no force and effect.³² However, before the Court could decide on the merits of the application, it had to decide on a preliminary issue which concerned the question as to whether the applicants had *locus standi* to bring the application.³³ In dealing with this question, the Court preferred to apply South African case law³⁴ and the relevant provisions of the South African Constitution dealing with *locus standi* in constitutional matters,³⁵ thereby illustrating the persuasive character of the influence of South African jurisprudence on the Swazi legal system.

In some instances, it seems that even South African jurisprudence has authoritative value, for example, the Court referred to the South African certification case, *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*³⁶ as authority to define the powers of the court to review political processes preceding the drafting of legislation. The Court comments as follows:³⁷

It is important to observe that the Constitutional Court of South Africa found that the Constitutional Assembly's function in drafting the new Constitution for South Africa was a political function on which they, as a court, would not comment because it was not their function. It is the Constitutional

³⁰ *Beckenstrater v Rottcher & Theunissen* 1955 1 SA 129 (A).

³¹ Civil Case 2792/2006 [2007] SZHC 1 (6 November 2007).

³² In the alternative, they contended that sec 25 of the Swazi Constitution afforded them the right to free and fair elections. The court's comment on this contradiction is quite entertaining: 'It is curious to observe that section 25 on which the applicants rely for the alternative relief is part of the very Constitution they seek to have declared null and void with no force and effect. It is a curious contradiction!' (See para 11.)

³³ Sec 35 of the Swazi Constitution provides for so-called 'bill of rights' litigation. See para 21.

³⁴ See paras 15-16, 21 & 25-28.

³⁵ See paras 21-31.

³⁶ 1996 4 SA 744 (CC).

³⁷ See para 31.

Drafting Commission (CDC) in Swaziland which drafted the Constitution of Swaziland and on the authority of the Constitutional Case of South Africa this Court would have no power to comment on the constitutional model which was adopted for Swaziland.

With reference to the South African position, the Court found that the functions of the CRV and the CDC are political and, therefore, in light of the South African *Certification* case, the applicants have no *locus standi* to bring an application for a declaration of nullity of the Swazi Constitution.³⁸

The Court's comments and finding clearly illustrate the persuasive value of South African judgments, which will in all probability dominate future constitutional decisions in Swaziland.

2.2 Status of religion in the making of the Swazi Constitution

As already explained, the Christian religion initially came to Swaziland by way of royal tolerance. As Christianity grew stronger, so did the endeavours of its followers to 'crown' it as the official religion of Swaziland.³⁹ In reaction to the aspirations of the members of the Swaziland Christian Churches United in Christ (SCCUC) to enshrine the Christian religion as the official religion of Swaziland, the following clause was inserted into the Constitution of the Kingdom of Swaziland (Draft) (draft Swazi Constitution):⁴⁰ 'The official religion of Swaziland is Christianity.'⁴¹

This clause proclaiming Christianity as the official religion of Swaziland sparked a public debate on the question as to whether or not such a provision should be in the final Constitution.⁴² Eventually, the clause was adapted in the Constitution of the Kingdom of Swaziland Bill of 2004 (Swazi Constitution Bill)⁴³ to read: 'Swaziland practises freedom of religion.' And finally, after the Swazi Constitution Bill had been returned to parliament to attend to the changes the King had suggested, this particular clause was removed in its totality. What remained were the other constitutional provisions dealing with freedom of religion and religious equality.⁴⁴

³⁸ See paras 42-46.

³⁹ Mzizi (n 1 above) 910.

⁴⁰ See also Mzizi (n 15 above) 18-24.

⁴¹ See sec 4(1) of the draft Swazi Constitution. Although it proclaimed Christianity as the official religion of Swaziland, it did provide for the co-existence or practice of other religions (see sec 4(2) of the draft Swazi Constitution).

⁴² The 1968 Swazi Constitution did indeed contain a general clause protecting freedom of religion; albeit subject to public interest (see sec 11). However, this Constitution was in essence replaced by the King's Proclamation to the Nation of 12 April 1973 and subsequent royal decrees. C Maroleng 'Swaziland: The King's Constitution' *African Security Analysis Programme Situation Report*, 26 June 2003 Institute for Security Studies <http://www.iss.co.za/af/current/swazijun03.pdf> (accessed 12 March 2008) 1-3.

⁴³ See clause 4 of the Swazi Constitution Bill.

⁴⁴ See sec 2.3 below.

During the Somhlolo Festival of Praise on 22 July 2005, the King finally put an end to the debate by emphasising that Christianity comes from God and earthly protection thereof is thus not required. He also cautioned religious observers not to enter the arena of politics.⁴⁵ With these words he squashed all aspirations to endorse Christianity as the official religion of Swaziland but, on the other hand, his recognition of the divinity of the Christian God and the equality of all religions in Swaziland should negate all fears of royal discrimination against religion.⁴⁶ Perhaps something can be said for the viewpoint of Mzizi,⁴⁷ namely, that it should be the goal of all religions 'to create community, not at the expense of individuality, but for the common good'.⁴⁸

On the other hand, a point of concern is the fact that constitutional protection of religion can be restricted where the King or *iNgwenyama*⁴⁹ is involved. Although the Swazi Constitution compels all the citizens of Swaziland, including the King and *iNgwenyama*, to uphold and defend the Constitution, this constitutional imperative lies fallow of a potential constitutional tug-of-war between the constitutional provisions protecting human rights and freedoms on the one hand and those protecting the immunity of the King and *iNgwenyama* on the other. The origins of the immunity provision⁵⁰ contained in the Swazi Constitution lie in the maxim 'the King can do no wrong'.⁵¹ The result is that the public and private actions of the King or *iNgwenyama* could not be scrutinised for human rights violations.

⁴⁵ Mzizi (n 15 above) 24.

⁴⁶ The Swazi King and government's commitment to freedom of religion is also evident from the annual United States Reports on International Freedom of Religion which illustrates that there are relatively few incidents relating to religion. For the latest report, see United States Department of State (n 20 above).

⁴⁷ Mzizi (n 15 above) 25-26.

⁴⁸ This viewpoint is in accordance with the South African principle of *ubuntu* — a concept of customary law that refers to the key values of group solidarity, namely compassion, respect, human dignity and conformity to the basic norms of the collectivity. See C Rautenbach 'Therapeutic jurisprudence in the customary courts of South Africa: Traditional authority courts as therapeutic agents' (2005) 21 *South African Journal on Human Rights* 330-331 and the additional sources referred to in the notes.

⁴⁹ Traditionally, the mother of the King. See sec 7(1) of the Swazi Constitution.

⁵⁰ Sec 11 of the Swazi Constitution reads: 'The King and *iNgwenyama* shall be immune from (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and (b) being summoned to appear as a witness in any civil or criminal proceeding.' The immunity of the *iNgwenyama* is reiterated in sec 7(5) which reads: 'Civil proceedings shall not be instituted or continued in respect of which relief is claimed against the Queen Regent for anything done or omitted to be done by the Queen Regent in her private capacity and shall not be summoned to appear as a witness in any civil or criminal proceedings.'

⁵¹ Swaziland acquired independence on 6 September 1968 under a Westminster style Constitution and, although the Constitution was repealed in 1973, its influence is still evident today in certain areas of law. JH Proctor 'Traditionalism and parliamentary government in Swaziland' (1973) 72 *African Affairs* 273-287; *Prime Minister of Swaziland v MPD Marketing & Supplies (Pty) Ltd* (Appeal Case 18/2007) [2007] SZSC 11 (15 November 2007)).

Furthermore, the Swazi Constitution limits the powers of the Commission on Human Rights and Public Administration,⁵² charged with the responsibility to investigate and eliminate human rights violations where a royal prerogative has been exercised.⁵³ Section 165(3)(c) reads as follows: 'The Commission shall not investigate ... a matter relating to the exercise of any royal prerogative by the Crown.' Although the exercise of royal prerogatives might not necessarily infringe upon religious freedoms or rights, it is envisaged that there might be circumstances where it can happen — for example, when the King pardons a criminal adhering to a particular faith, but refuses to do so where a follower of another faith committed a similar offence.

The concept of prerogatives is a remnant of the English Westminster system and refers to the executive powers of a head of state.⁵⁴ Traditionally the King and *iNgwenyama* had royal prerogatives similar to those of the British royal family in terms of English law,⁵⁵ but in the Swazi Constitution the term 'prerogative' has been replaced by the term 'power' in chapter VI of the Swazi Constitution.⁵⁶ The question whether or not this name change also effects a change in the nature of the royal prerogatives was soon resolved in *Prime Minister of Swaziland v MPD Marketing and Supplies (Pty) Ltd*,⁵⁷ where the Supreme Court held that the eight powers preserved in the Swazi Constitution⁵⁸ are nothing but 'royal prerogatives'.⁵⁹ The Court agreed with the South African case, *President of the Republic of South Africa v Hugo*,⁶⁰ where it was decided that presidential powers are derived from the Constitution, but differed from the latter where the Court held that the traditional prerogatives in South Africa had not outlived the enactment of the interim and final Constitutions. In *President of the Republic of*

⁵² Secs 163-171 of the Swazi Constitution deal with the doings of the Commission.

⁵³ Sec 4(4) of the Swazi Constitution confirms that the King and *iNgwenyama* have all the prerogatives conferred upon him or her by the Swazi Constitution or any other law, including Swazi traditional law, and that these prerogatives must be exercised in the spirit of the Constitution. This is confirmed in sec 276 of the Swazi Constitution.

⁵⁴ Secs 78 and 275 of the Swazi Constitution are the only two sections specifically referring to a prerogative, namely that of mercy.

⁵⁵ *Prime Minister of Swaziland v MPD Marketing & Supplies (Pty) Ltd* (n 51 above) para 27.

⁵⁶ Ch VI sets out the powers of the King in his capacity as head of state and as head of the executive authority.

⁵⁷ n 51 above.

⁵⁸ Sec 4(4) reads: 'The King in his capacity as Head of State has authority, in accordance with this Constitution or any other law, among other things to (a) assent to and sign bills; (b) summon and dissolve Parliament; (c) receive foreign envoys and appoint diplomats; (d) issue pardons, reprieves or commute sentences; (e) declare a state of emergency; (f) confer honours; (g) establish any commission or *vusela*; and (h) order a referendum.'

⁵⁹ See para 27. The Court did find that there can be no other unspecified prerogatives than the eight prerogatives specified in the Constitution.

⁶⁰ 1997 4 SA 1 (CC).

South Africa v Hugo, the Constitutional Court held that the replacement of the term 'prerogative' by the term 'power' in the interim and final Constitutions⁶¹ meant that South African courts nowadays have the power to review the constitutional powers of the President. In this case the Court had to consider the constitutionality of a presidential pardon granting imprisoned mothers with children under the age of 12 a remission of sentence.⁶² The Court pointed out that the presidential power to pardon prisoners was traditionally a natural prerogative power vested in the head of state,⁶³ and not dependent on legislative enactment. However, nowadays the powers of the President are derived from the Constitution and, as a result, the actions of the President (as head of state or the executive) are bound to the Bill of Rights and thus subject to review by the courts.⁶⁴ On the other hand, the viewpoint of the Swazi court is that the traditional royal prerogatives remain the source of the prerogatives mentioned in the Swazi Constitution and not *vice versa*. It is doubtful, in the light of the immunity provision and the limited investigative powers of the Commission, whether a Swazi court would be able to review the constitutionality of any public or private royal actions.⁶⁵

To add to this, the Commission's investigative powers are also restricted in the case of governmental policy decisions. Section 169 lays down:

The Commission shall not, in investigating any matter leading to, resulting from or connected with the decision of a Minister, inquire into or question the policy of the government in accordance with which the decision was made.

Given the fact that human rights violations may occur under royal prerogative and other governmental actions, one could question the effectiveness of the religious freedom provisions⁶⁶ in the Swazi Constitution. Also, the preferential treatment of the King when it comes to the protection of human rights and freedoms, may be seen as a negation of the equality provision affording all persons equal protection by the law.⁶⁷

⁶¹ See sec 84 of the South African Constitution (and sec 82 of the interim Constitution). For a discussion of prerogative powers in South Africa, see C Hoexter *Administrative law in South Africa* (2007) 32-34.

⁶² An imprisoned father argued that the pardon unfairly discriminated against fathers with children under the age of 12.

⁶³ See para 5.

⁶⁴ See para 13.

⁶⁵ This is one point of difference between the South African and Swazi situation. The maxim 'the King can do no wrong' does not apply to the President and the actions of the latter could be reviewed for human rights violations, as was illustrated in *President of the Republic of South Africa v Hugo* (n 60 above).

⁶⁶ See sec 2.3 below.

⁶⁷ See sec 20 of the Swazi Constitution. See also the concerns raised by Maroleng *African Security Analysis Programme Situation Report*, 26 June 2003 4-5.

2.3 Constitutional provisions pertaining to religion⁶⁸

2.3.1 Preamble

The Preamble to the Swazi Constitution is not religiously neutral. It reads:

Whereas we, the People of the Kingdom of Swaziland, do hereby undertake in humble submission to Almighty God to start afresh under a new framework of constitutional dispensation ...

Agnostics (those who hold that knowledge of a supreme being is impossible) and atheists (those who reject belief in a supreme being) might find the reference to God problematic, especially since the provisions pertaining to religious equality in the Swazi Constitution are not exactly clear as to what precisely is meant with religion in terms of the Swazi equality provision.⁶⁹

Although the Swazi Constitution's Preamble has not yet been interpreted by the Swazi courts, it can be assumed that the opinions of the South African judiciary in this regard will have persuasive value. They increasingly refer to the value of preambles for interpretive purposes.⁷⁰ The words of late Justice Mahomed in *S v Mhlungu*⁷¹ are more or less indicative of the Constitutional Court's attitude towards the Preamble to the South African Constitution:⁷²

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate [*sic*] its fundamental purposes ... This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole.

Does this mean that the reference to God should be used to infer that the other religious provisions in the South African Constitution refer to the Christian God? The answer is in all probability in the negative. Although the interpretive value of the Preamble has been confirmed by the South African courts on numerous occasions, it is questionable whether the reference to 'God' in the Preamble can be used in relation to other constitutional provisions protecting religion to infer that

⁶⁸ A number of provisions in the Swazi Constitution deal with religion. These provisions will be dealt with in the following paragraphs.

⁶⁹ See sec 2.3.3 below.

⁷⁰ See L du Plessis *Re-interpretation of statutes* (2002) 239-244 for a discussion of these cases and other viewpoints. See also GE Devenish *A commentary on the South African Constitution* (1998) 29-32.

⁷¹ 1995 7 BCLR 793 (CC) para 112.

⁷² Although he expressed his views on the Preamble to the interim Constitution, these viewpoints have been followed with regard to the final Constitution as well. See the cases referred to in Du Plessis (n 70 above) 241 n 135.

religion necessarily refers to the Christian God.⁷³ In *In re: Certification of the Constitution of the Western Cape, 1997*,⁷⁴ the Constitutional Court had to decide whether the words 'in humble submission to Almighty God' in the Preamble of the Western Cape Constitution was in conflict with the religious freedom provision contained in the South African Constitution.⁷⁵ The Court did not think so and held as follows:

The invocation of a deity in these prefatory words to the Preamble to the [Constitution of the Western Cape, 1997] has no particular constitutional significance and echoes the peroration to the Preamble to the [South African Constitution]. It is a time-honoured means of adding solemnity used in many cultures and in a variety of contexts.

In imitation of United States jurisprudence, the Court found the words to be nothing more than 'ceremonial deism' that have no 'operative constitutional effect' and are not 'fundamentally hostile to the spirit and objects' of the South African Constitution. As a result, the words could neither be used to interpret the provisions of the freedom of religion provision in the South African Constitution restrictively, nor could they affect the rights of believers or non-believers. And, in the circumstances, the Court found no inconsistency between the Preamble to the Constitution of the Western Cape and the South African Constitution.⁷⁶

Against this background, the reference to 'God' in the Preamble to the Swazi Constitution is in all likelihood nothing more than 'ceremonial deism' which does not necessarily imply the Swazi government's commitment to a particular religion, nor could it be used to construe the reference to religion in other provisions of the Swazi Constitution to mean the Christian religion.

2.3.2 Individual fundamental religious rights and freedoms

Section 14(1) of the Swazi Constitution is a declaration of individual fundamental rights and freedoms.⁷⁷ It commences with the words '[t]he fundamental human rights and freedoms of the individual enshrined in this chapter are hereby declared and guaranteed ...'⁷⁸ and then contin-

⁷³ The Preamble in the South African Constitution reads: 'May God protect our people.'

⁷⁴ 1997 9 BCLR 1167 (CC) para 28.

⁷⁵ See sec 15 of the South African Constitution and the discussion in sec 2.3.4 below.

⁷⁶ See para 28. In accordance with sec 144, the Constitutional Court has to certify that all provincial constitutions comply with sec 143 of the of the South African Constitution, thus guaranteeing its consistency with the South African Constitution. The right of a provincial legislature to enact a constitution is derived from sec 142 of the Constitution.

⁷⁷ The equal status of persons is again emphasised by reference to a person's 'gender, race, place of origin, political opinion, colour, religion, creed, age or disability' (my emphasis). See sec 14(3).

⁷⁸ Sec 14(1). This section resembles secs 7 and 8 of the South African Constitution.

ues by providing a list of these rights and freedoms, including religion.⁷⁹ In terms of section 14(2), the state⁸⁰ and other individuals⁸¹ have a positive duty to respect⁸² and uphold⁸³ these rights and freedoms, whilst the courts are responsible for ensuring the fulfilment thereof.⁸⁴ To determine the precise scope and extent of the duty on the state could present a problem. Does it imply that the state has a responsibility to advance a religion in need of financial aid in order to ensure that its follower's freedom of religion is upheld? On the one hand, an individual follower may argue that his free exercise of religion must be upheld by the state by providing him with the financial means to exercise his freedom of religion (for example to provide aid to establish a religion) and, on the other hand, the state may argue that such aid would boil down to it favouring that particular religion over another. The problem of undue favouring of one religion above another could be resolved by applying the equality provision which prohibits different treatment to different people on the basis of religion.⁸⁵

Section 14(3) is unique in the sense that it clearly states that an individual's entitlement to these rights and freedoms is subject to respect for the rights and freedoms of others and for the public interest. A right or freedom could thus be limited to the extent that it infringes the rights and freedoms of others and the public interest. This qualification is about the closest one could get to the general limitation provision contained in the South African Constitution,⁸⁶ and could be

⁷⁹ Sec 14(1) promotes (a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association and of movement; (c) protection of the privacy of the home and other property rights of the individual; (d) protection from deprivation of property without compensation; (e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and (f) respect for rights of the family, women, children, workers and persons with disabilities.

⁸⁰ Including the executive, legislature and judiciary and other organs of state (see sec 14(2)).

⁸¹ The Constitution uses the phrase 'where applicable to them', but is silent on the circumstances when this duty will be applicable to other individuals. Sec 14(3) might provide a clue as to the applicability, namely that an individual must respect the religious freedom of another individual.

⁸² The term is derived from the Latin term *respicere*, which means to 'look back' or 'pay attention to'. Nowadays, it has a variety of meanings, including 'an attitude of deference, admiration, or esteem; regard', 'to pay proper attention to; not violate' and 'to show consideration for; treat courteously or kindly'; Reverso Dictionary <http://dictionary.reverso.net/english-definitions/respect> (accessed 21 April 2008).

⁸³ The term 'uphold' means 'to maintain, affirm, or defend against opposition or challenge', 'to give moral support or inspiration to' and 'to support physically'; Reverso Dictionary <http://dictionary.reverso.net/english-definitions/uphold> (accessed 21 April 2008).

⁸⁴ Sec 14(2).

⁸⁵ See sec 2.3.3 below. This is also the viewpoint of I Currie *et al* *The Bill of Rights handbook* (2005) 350 pertaining to the South African situation.

⁸⁶ See sec 36.

used to justify the infringement of religious rights or freedoms where the exercise of such rights or freedoms would disrespect the exercise of other individual rights and freedoms and the public interest.⁸⁷ There are examples of religious practices, such as the traditional Hindu custom of burning widows at their husbands' funerals, which would be intolerable for obvious reasons and for that reason its practice would be limited in most societies.

The operational significance of sections 14(2) and (3) is textually clear: Not only does it impose a negative duty on the state not to infringe the rights and freedoms of individuals, but also a positive duty on the state and other individuals to respect, uphold and protect these rights and freedoms.⁸⁸ However, the exact scope of these provisions is murky. A positive duty to respect, uphold and protect religious freedom implies some form of active involvement contrary to a mere tolerance. For now the Swazi government neither restricts nor formally promotes inter-faith dialogue, and it does not provide formal mechanisms for religions to reconcile differences.⁸⁹ It does, however, provide for a system of registration of religious groups, which could create the impression that registered religions are favoured above non-registered religions.⁹⁰

One last remark could be made regarding individual fundamental religious rights and freedoms. The South African constitutional jurisprudence has come to qualify equality and other rights in terms of the human dignity provision.⁹¹ If the infringement of a particular right, say for example freedom of religion, leads to human indignity, such an infringement would be unconstitutional and consequently not tolerated.⁹² The Swazi Constitution has a similar general human dignity provision⁹³ and the human dignity theme is central through-

⁸⁷ The fact that the Swazi Constitution does not contain a general limitation clause is not problematic, since most of the rights and freedoms contained in the Bill of Rights are textually qualified, thus providing the limitations of those rights and freedoms. This phenomenon can be referred to as internal limitations.

⁸⁸ This is also in accordance with the comments made regarding sec 7 of the South African Constitution. See L du Plessis & A Gouws 'The gender implications of the final Constitution (with particular reference to the Bill of Rights)' (1996) 11 *SA Public Law* 473-475.

⁸⁹ United States Department of State (n 20 above).

⁹⁰ See also the discussion in sec 2.3.7 below.

⁹¹ Sec 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

⁹² See eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 17, where the Constitutional Court indicated that the right to equality is closely connected to other rights and values such as human dignity. If differentiation results in the impairment of human dignity, such differentiation is unfair and should not be tolerated. The Court applied this factor to the facts of the case and emphasised that the discrimination against gay men had gravely affected their fundamental dignity (para 26).

⁹³ Sec 18 reads: '(1) The dignity of every person is inviolable. (2) A person shall not be subjected to torture or to inhuman or degrading treatment or punishment.'

out it.⁹⁴ It is against this background that the Swazi High Courts will have to develop a jurisprudence on the exact scope and content of the duty on the state in religious affairs.

2.3.3 Equal treatment of religions

Similar to the South African Constitution, the Swazi Constitution confirms the equality of religions⁹⁵ and forbids discrimination on the basis of religion.⁹⁶ Although the wording of the Swazi provision is not as broad as that of the South African provision, which includes the terms 'religion', 'conscience', 'thought', 'belief' and 'opinion', it does include the term 'creed', which is not found in the South African Constitution. No Swazi court has yet defined creed. There are, however, many indications that creed is broad enough to include all the concepts normally associated with religion or belief. Firstly, the term 'creed' is derived from the Latin term *credo*, which means 'I believe'. Secondly, its dictionary meaning includes terms such as 'a system of belief', 'principles' or 'opinions'⁹⁷ and, thirdly, the wording of other sections of the Swazi Constitution uses the terms 'religion',⁹⁸ 'creed',⁹⁹ 'thought',¹⁰⁰ 'conscience'¹⁰¹ and 'belief'¹⁰² interchangeably.¹⁰³ In addition, some definitions of religion are broad enough to include them all. For example, the preferred definition of Johnstone,¹⁰⁴ namely that religion is 'a system of beliefs and practices by which a group of people interprets

⁹⁴ The concept dignity appears in the following provisions of the Swazi Constitution: See secs 18 (inhuman or degrading treatment); 30 (disabled persons); 57(2) (law enforcement); 58(3) (political objectives); 60(6) (social objectives); and 141(3) (judiciary).

⁹⁵ Sec 9 of the South African Constitution and sec 20 of the Swazi Constitution. Sec 20(1) of the Swazi Constitution reads: 'All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.'

⁹⁶ Sec 20(2) reads: 'For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.' Sec 20(3) reads: 'For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.'

⁹⁷ *The free dictionary* Farlex <http://www.thefreedictionary.com/creed> (accessed 13 April 2008); *Collins dictionary* Reverso <http://dictionary.reverso.net/english-definitions/creed> (accessed 13 April 2008).

⁹⁸ See secs 14(3), 20(2) & (3), 23(1) & (2) & 23(4)(b).

⁹⁹ See secs 14(3), 20(2) & 20(3).

¹⁰⁰ See secs 23(1) & (2).

¹⁰¹ See secs 14(1)(b), 23(1) & (2) & 28(3).

¹⁰² See secs 23(2) & 23(4)(b).

¹⁰³ See also the discussion of RC Blake & L Litchfield 'Religious freedom in Southern Africa: The developing jurisprudence' (1998) *Brigham Young University Law Review* 532-534.

¹⁰⁴ Johnstone (n 10 above) 20.

and responds to what they feel is supernatural and sacred', is inclusive of all the aforesaid concepts, which would also include agnosticism and atheism.

There are a few important differences between the Swazi and South African equality provisions. Firstly, the latter compels the South African legislature to enact national legislation which prevents or prohibits unfair discrimination. In fulfilment of this command, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act)¹⁰⁵ was enacted. It is generally accepted that a complainant must now rely on the provisions of the Equality Act and no longer on the equality provision in the Constitution in cases where there are allegations of discrimination.¹⁰⁶ Nevertheless, the case law that deals with constitutional interpretation of the equality provision in the South African Constitution is even now important and authoritative.¹⁰⁷

A second important difference is the meaning and scope of the term 'discrimination'. As a legal concept, the South African Constitution formulates equality as a directive for equal treatment¹⁰⁸ and a prohibition on unfair discrimination.¹⁰⁹ It lays down that discrimination on certain grounds, including religion, conscience and belief, would be unfair unless it is proven that it is fair.¹¹⁰ South African authors and the judiciary give preference to substantive equality, in other words the social and economic circumstances of individuals and groups should also be taken into consideration when equality or inequality is judged, and not mere equal treatment under all circumstances.¹¹¹ The South African courts have also warned that equality should not be confused with uniformity. Justice Sachs, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹¹² thus declared as follows:

[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial

¹⁰⁵ The long title of the Act reads: 'To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.'

¹⁰⁶ See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 437.

¹⁰⁷ See Currie *et al* (n 85 above) 268.

¹⁰⁸ See sec 9(1).

¹⁰⁹ See secs 9(3) & (4).

¹¹⁰ See secs 9(3) & (5).

¹¹¹ The latter form of equality is referred to as formal equality. See the discussions of TP van Reenen 'Equality, discrimination and affirmative action: An analysis of section 9 of the Constitution of the Republic of South Africa' (1997) *SA Public Law* 153-154; *President of South Africa v Hugo* (n 60 above) para 41; *National Coalition for Gay and Lesbian Equality v The Minister of Justice* (n 92 above) paras 60-64.

¹¹² 1999 1 SA 6 (CC) para 132.

of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At best, it celebrates the vitality that difference brings to any society.

It is important to note that the South African jurisprudence has interpreted unfair discrimination to mean more than mere differentiation between persons or categories of persons.¹¹³ The constitutional test of unfairness has been fully canvassed by other accomplished writers and the judiciary, and it would suffice to point out that the discrimination would be unfair if it affects the human dignity of a person.¹¹⁴

The Swazi Constitution has no reference to the term 'unfair', but defines discrimination to mean

to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

The generality of this provision could be problematic. At first glance it creates the impression that there is a blanket prohibition on all forms of differentiation (albeit linked to the listed grounds), regardless whether such differentiation could be labelled fair or unfair as done in terms of the South African Constitution. The Swazi equality provision does contain an internal limitation in that the state is empowered to enact legislation that is necessary for implementing policies and programmes aimed at redressing social, economic, educational or other imbalances in society.¹¹⁵ Although these qualifications are normally associated with so-called affirmative action measures, it could be interpreted to allow for other forms of differentiation with the view to eradicate other inequalities. Also, the term 'discrimination' presupposes some form of unfairness¹¹⁶ and, following the Swazi courts' treatment of the South African jurisprudence, it is highly probable that they would expect some form of unfairness in order to determine whether there is actionable discrimination or not.

Another point of difference between the two equality provisions is the fact that the South African Constitution prohibits direct and indirect discrimination,¹¹⁷ whilst the text of the Swazi Constitution does not make the same distinction. Determining whether or not indirect

¹¹³ Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 259 say: 'The mere fact that a law treats different people in dissimilar ways is not necessarily discriminatory. Legislation that differentiates between people in a way which impairs their fundamental dignity as human beings is discrimination' (authors' emphasis).

¹¹⁴ See the discussion in Currie *et al* (n 85 above) 243-248.

¹¹⁵ See sec 20(5).

¹¹⁶ The dictionary meaning of discrimination includes '*unfair treatment* of a person, racial group, minority, etc,' and is an 'action based on prejudice' (my emphasis) Reverso Dictionary <http://dictionary.reverso.net/english-definitions/discrimination> (accessed 21 April 2008).

¹¹⁷ See sec 9(4).

discrimination does indeed exist has been no simple task in the South African jurisprudence. The approach of the South African Constitutional Court in this respect does not always present absolute clarity. The problem is that the Constitutional Court is not always in agreement on the precise content and meaning of indirect discrimination. To give one example, one can refer to *Pretoria City Council v Walker*,¹¹⁸ where the majority of the Court decided that the obvious neutral policy of the local government to demand higher service fees from the inhabitants of certain residential areas is tantamount to indirect discrimination based on race. The Court majority found: 'The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory.'¹¹⁹

However, Justice Sachs, who passed the minority judgment, was of opinion that the policy of the local government regarding service fees did not amount to direct or indirect discrimination. To his mind, the policy was founded on the determination of objective features of the different geographic areas and not on race.¹²⁰

Although Swaziland has not been burdened with the same grave racial issues as South Africa, it is nevertheless argued that the Swazi concept of discrimination is broad enough to include both direct and indirect discrimination and that the omission of these terms is immaterial for the purpose of determining whether there has been discrimination or not. In this regard, the Swazi courts can follow the lead of a recent decision of the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*,¹²¹ where the Court gave valuable guidelines in determining whether certain actions of a public school, which were neutral on the face of it, indeed was tantamount to indirect discrimination on the ground of religion.¹²² The Court found that discrimination which arose from a rule or practice that was superficially neutral and that was not designed to serve a valuable purpose, but nevertheless had a marginalising effect on certain portions of society, required a reasonable accommodation of religious differences. Since there was no reasonable accommodation in this instance, the Court came to the conclusion that the discrimination was unfair and therefore unconstitutional.¹²³ The case has far-reaching implications for the accommodation of religious and cultural rights and freedoms in public schools, and as a result it is envisaged that the codes of conduct of public schools would soon be re-evaluated by the various school bodies.

¹¹⁸ 1998 2 SA 363 (CC).

¹¹⁹ See para 32.

¹²⁰ See para 105.

¹²¹ 2008 1 SA 474 (CC).

¹²² In this case, the Court had to decide whether a public school's prohibition to wear a nose stud discriminated against a Hindu learner's freedom of religion or culture.

¹²³ See paras 70-79.

Another similarity between the Swazi and South African provisions is the possibility to enact affirmative action or positive discrimination legislation.¹²⁴ Although the accessible literature shows no social, economic, educational or other imbalances in Swaziland as a result of systemic discrimination on the grounds of religion, it is no guarantee that it does not occur in practice. There might therefore be circumstances where such positive discrimination measures might become important in order to eradicate imbalances of the past. South Africa already has a vast array of equality jurisprudence which can serve as valuable comparative material for future interpretations of the Swazi equality provision and it would be worthwhile for the Swazi courts to take their lead from them.¹²⁵

2.3.4 General freedom of religion provision

Similarly to the South African Constitution,¹²⁶ the Swazi Constitution defines freedom of religion positively: 'A person has a right to freedom of thought, conscience or religion.'¹²⁷ As already argued, the interchangeable use of the terms 'religion', 'conscience' and 'thought' indicates that the Swazi Constitution also protects beliefs founded on secular grounds, for example the freedom to follow agnosticism or atheism.¹²⁸ The scope of freedom of conscience is broadened to include¹²⁹ freedom of thought and religion; freedom to change religion or belief; and freedom to worship alone or 'in community' with others.¹³⁰

An anomaly in the Swazi freedom of religion provision is the fact that someone can freely consent to a hindrance in the enjoyment of the freedom of conscience.¹³¹ The scope of this exception is somewhat unclear. Does it mean that a person can renounce his or her religious rights or freedoms or that these rights or freedoms can be infringed when he consents thereto? Another problem is the fact that it is often difficult to determine whether or not consent was given freely. A wife might consent to her denouncing the Christian faith for the Islamic faith or *vice versa*, but the freeness of this consent may be doubtful

¹²⁴ Sec 9(2) of the South African Constitution and sec 20(5) of the Swazi Constitution.

¹²⁵ For a discussion of some of these cases, see C Albertyn & B Goldblatt 'Equality' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2008) 35.1-85 and Currie *et al* (n 85 above) 229-271 336-357.

¹²⁶ Sec 15(1) reads: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

¹²⁷ See sec 23(1).

¹²⁸ See also P Farlam 'Freedom of religion, belief and opinion' in Woolman *et al* (n 125 above) 41.12-16.

¹²⁹ See sec 23(2).

¹³⁰ What is protected here is the individual religious right exercised communally. Sec 31 of the South African Constitution has a similar effect. See the discussion in Currie *et al* (n 85 above) 623-635.

¹³¹ See sec 23(2) of the Swazi Constitution.

if one considers that she is often in a position where she can hardly refuse.¹³²

The South African Constitutional Court had the opportunity on a few occasions to express their views on freedom of religion in terms of the South African Constitution.¹³³ In *S v Lawrence*, *S v Negal*, *S v Solberg*,¹³⁴ the Constitutional Court had the first opportunity to give content to the right to freedom of religion.¹³⁵ The Court referred, with approval, to the definition of freedom of religion in the Canadian case *Big M Drug Mart*,¹³⁶ where it was stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

From this definition it can be inferred that freedom of religion includes the right to have a belief, to express that belief openly and to manifest that belief by means of worship, practice, teaching or dissemination.¹³⁷ What is required is an absence of coercion or constraint by the state and the absence of measures that could force people to act in a manner contrary to their religious beliefs.

In *S v Lawrence*, the question was whether the prohibition to sell liquor on a Sunday constituted religious coercion. The appellant contended that the purpose behind the prohibition was to induce observance of religious Christian beliefs and therefore it was unconstitutional.¹³⁸ The Court stated that the circumstances where a state's endorsement of a religion would contravene freedom of religion would be where the 'endorsement has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion'.¹³⁹ In the light of these statements, the Court found that the link between the Christian religion and the restriction to grocers to sell liquor on Sundays 'at

¹³² For a discussion of the problem on waiver in South African law, see Currie *et al* (n 85 above) 39-43.

¹³³ Eg *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC); *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2001 2 SA 388 (CC).

¹³⁴ 1997 4 SA 1176 (CC). The case dealt with religious freedom, contained in sec 14 of the 1993 Constitution. The wording of sec 14 is similar to that of sec 15 of the Constitution. The principles regarding sec 14 would therefore also apply to sec 15 of the Constitution.

¹³⁵ In this case, the Court had to consider whether the prohibition to sell liquor on a Sunday infringed on the appellants' freedom of religion.

¹³⁶ (1985) 13 CRR 64 97.

¹³⁷ Currie *et al* (n 85 above) 339. This is also in accordance with sec 23(2) of the Swazi Constitution.

¹³⁸ See para 85.

¹³⁹ Para 104. See also the discussion of Motala & Ramaphosa (n 113 above) 381-382.

a time when their shops are open for other business' was too poor for the restriction to be regarded as a violation of freedom of religion.¹⁴⁰

South Africa surmounted its history of suppression and human rights violations and has taken a leading role in the adjudication of human rights issues. The annual reports on international religious freedom of the United States Department of State illustrates that the Swazi government at all levels sought to protect freedom of religion in Swaziland and that it generally does not tolerate private or public abuse of religion.¹⁴¹ Except for a few earlier incidents regarding Jehovah's Witnesses and Seventh Day Adventists, followers of all religious faiths are generally free to practise their religion without government interference or restriction.¹⁴²

2.3.5 Religious education and observances

The Swazi Constitution makes provision for religious private schools by expressly granting religious communities the right to establish, maintain and manage places of education at their own expense. In addition, such a community may not be prohibited from providing religious education to the members of that community.¹⁴³ This provision does not expressly grant a religious community the right to establish religious places of education, but such a right exists by implication.¹⁴⁴

If a non-member of a particular religious community attends the place of education, such as a Christian school, he would not be in a position to challenge the constitutionality of the Christian faith teachings based on discrimination or the infringement of his freedom of religion. This fact is reiterated, firstly, by the general freedom of religion provision which lays down that a person's freedom of religion may be limited if he consents thereto¹⁴⁵ and, secondly, the implication that one should be able to observe and practise any religion or belief without the unsolicited intervention of members of any other religion

¹⁴⁰ Para 105.

¹⁴¹ The annual reports are accessible at <http://www.state.gov> (accessed 13 April 2008).

¹⁴² United States Department of State, 2006 *Report on International Religious Freedom — Swaziland*, 15 September 2006. Online US Department of State Bureau of Democracy, Human Rights and Labour <http://www.state.gov/g/drl/rls/irf/2006/71327.html> (accessed 12 March 2008).

¹⁴³ Sec 23(3) reads: 'A religious community is entitled to establish and maintain places of education and to manage any place of education which that community wholly maintains, and that community may not be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which that community wholly maintains or in the course of any education which that community otherwise provides.'

¹⁴⁴ Blake & Litchfield (n 103 above) 533.

¹⁴⁵ See sec 2.3.5 above. His attendance of the religious place of education will be seen as his consent to be taught in the religions of the relevant religious community.

or belief.¹⁴⁶ The Swazi Constitution is silent on the question as to who is to fund the religious place of education, although the phrase 'which that community wholly maintains' in all probability implies that it is to be the responsibility of the religious community itself.

Contrary to the South African Constitution,¹⁴⁷ the Swazi Constitution is silent about religious education and observances in state institutions, such as public schools, although it is allowed by the government. Even though the government does not favour the teaching of a particular religion there, it is mainly the Christian religion which is being taught in public schools, whilst the only organised religious youth groups operating in the schools are also mostly Christian.¹⁴⁸

However, the silence of the Swazi government on issues of religious education and observance, especially in public schools, does not mean that there is in reality no coercion of learners to participate in the teachings and observances of a preferred religion. Such coercion could, contrary to the situation in private schools where consent becomes significant, infringe a learner's freedom of religion or amount to discrimination on the ground of religion. Whether this infringement would be unconstitutional or not, will depend on the Swazi courts' interpretation of the concept of discrimination, as previously discussed.¹⁴⁹

With regard to religious observances,¹⁵⁰ the viewpoint of the South African Constitutional Court in *S v Lawrence*¹⁵¹ could provide valuable guidelines. In the context of religious observances in public schools, the Court held that compulsory attendance at school prayers would infringe the learner's freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers,

¹⁴⁶ See sec 23(4)(b) of the Swazi Constitution which reads: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision ... that is reasonably required for purposes of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of members of any other religion or belief.'

¹⁴⁷ The South African Constitution allows for religious observances in public schools under certain circumstances. Sec 15(2) reads: 'Religious observances may be conducted at state or state-aided institutions, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.' For a discussion of the scope and meaning of this provision, see Currie *et al* (n 85 above) 351-354.

¹⁴⁸ United States Department of State (n 20 above).

¹⁴⁹ See sec 2.3.3 above.

¹⁵⁰ In *Wittmann v Deutscher Schülverein*, Pretoria (n 10 above) 440, the court defined religious observance as 'an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance.'

¹⁵¹ n 134 above.

section 14(2)¹⁵² makes it clear that there should be no such coercion. It is in this context that it requires the regulation of school prayers to be carried out on an equitable basis. The Court remarked as follows:¹⁵³

Whether this means that a school must make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to me to require education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the 'non-believers'.

The situation is different in the case of religious education in public schools where religious believers and non-believers must be treated impartially. Equal treatment of religions entails that faith education must not favour one religion above another religion. In South Africa this requirement has led to multi-faith curricula in public schools.¹⁵⁴

2.3.6 Religious oaths

Taking an oath contrary to one's religious belief would almost certainly constitute coercion in violation of freedom of religion.¹⁵⁵ The Swazi Constitution does not have a specific provision dealing with religious oaths,¹⁵⁶ but it does allow for the making of an affirmation instead of taking an oath in certain circumstances. For example, someone who wishes to obtain citizenship may take 'the oath or affirmation of allegiance',¹⁵⁷ and parliamentary committees may examine witnesses under oath or affirmation.¹⁵⁸

2.3.7 Limitation of freedom of religion

The Swazi Constitution does not contain a general limitation provision such as that of the South African Constitution,¹⁵⁹ but allows for the limitation of religious freedom for purposes of national defence, public

¹⁵² This section refers to the 1993 Constitution and is the equivalent of sec 15(2) of the new South African Constitution.

¹⁵³ See para 103.

¹⁵⁴ See Currie *et al* (n 85 above) 353-354.

¹⁵⁵ Blake & Litchfield (n 103 above) 536.

¹⁵⁶ In terms of sec 261(1) of the Swazi Constitution, the term 'oath' also includes affirmation.

¹⁵⁷ Sec 45(4) Swazi Constitution.

¹⁵⁸ See sec 129(5)(a) of the Swazi Constitution.

¹⁵⁹ Sec 36(1) of the South African Constitution reads: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...' A list of factors are included in secs 36(1)(a)-(e) of the Constitution.

safety, public order, public morality or public health,¹⁶⁰ as well as for purposes of protecting religious rights and freedoms of others.¹⁶¹ In addition, religious freedom may also be limited by means of the consent of the person whose right to freedom of religion is being limited.¹⁶²

On a macro level there is one point of concern. Although not prescribed on a constitutional level, new religious groups or churches¹⁶³ have to register as non-profit organisations with the Swazi Ministry of Home Affairs.¹⁶⁴ In order to register, they have to show that they are organised. This requirement will be met when they can demonstrate that they are in possession of 'either substantial cash reserves or financial support from foreign religious groups with established ties to western or eastern religions'.¹⁶⁵ For indigenous religious groups, the requirements are somewhat different. These groups have to demonstrate that they have a proper building, a pastor or religious leader and a congregation in order to obtain organised status.¹⁶⁶ Requiring registration from religious groups, albeit new or indigenous religions, might be seen as a form of limitation of religious rights and freedoms. It may be argued that this limitation is necessary to protect the Swazi public interest. However, requiring substantial means and/or religious houses might be seen as unfair limitations on religious groups who do not have the necessary resources. In addition, if registration is a requirement for the rightful practice of a particular religion, it might be considered indirect discrimination if a religion is not allowed to be practised due to its non-registration. It is also difficult to see how non-compliance with the registration requirement in these circumstances could be detrimental to the public interest.

3 Conclusion

There are commonalities but also important differences between the South African and Swazi Constitutions when it comes to provisions dealing with religion. However, the basic scope and application of the relevant provisions are quite similar. Also, the foundation of both legal systems is comparable: a dual legal system with Roman-Dutch law and customary law as its basis. The majority of the population of both countries are adherents to the Christian religion, and the South African jurisprudence has had a huge influence on the judgments of the Swazi

¹⁶⁰ See sec 23(4)(a) of the Swazi Constitution. All these concepts resort under the maxim 'public interest'.

¹⁶¹ See sec 23(4)(b) of the Swazi Constitution.

¹⁶² See sec 23(2) of the Swazi Constitution.

¹⁶³ That is, religions that have not operated in Swaziland before.

¹⁶⁴ Mzizi (n 1 above) 930.

¹⁶⁵ United States Department of State (n 20 above).

¹⁶⁶ As above.

courts to date. It is thus a matter of course that Swaziland would follow South Africa's religious freedom jurisprudence. In 1998, Blake and Litchfield¹⁶⁷ argued the same and said the following:

- Courts in Swaziland often grapple with similar constitutional issues.
- Courts in Swaziland often use South African jurisprudence as persuasive comparison.
- Courts in South Africa have already had the opportunity to develop jurisprudence on constitutional religious issues which could be used as an example.
- Constitutional provisions pertaining to religion are fairly similar in the Swazi and South African Constitutions.
- South Africa surmounted its history of suppression and human rights violations and has taken a leading role in the adjudication of human rights issues.

Their arguments are also relevant for Swaziland and South Africa. However, the question is not only what Swaziland can learn from South Africa, but what South Africa can learn from Swaziland. Swaziland is a good example of religious tolerance and peace being possible on the African continent while many other African countries grapple with issues pertaining to religious prejudices.

¹⁶⁷ n 103 above, 558-560. Although their research focused on religious freedom in Southern Africa in general, their argument can be applied *mutatis mutandis* to constitutional issues pertaining to religious freedom in Swaziland.

Religion, law and human rights in post-conflict Liberia

Gwendolyn Heaner*

Department of the Study of Religions, School of Oriental and African Studies (SOAS), University of London, United Kingdom

Summary

Liberia has had a turbulent recent history, and today deals with extreme poverty, high crime, ethnic tensions, widespread impunity and corruption. In addition to this, there is a complex and contradictory relationship between law and religion, which further complicates the ongoing efforts towards peace building and reconstruction. This paper aims to highlight the fundamental question of whether certain laws and human rights — in this case, religious or cultural freedom — can or should be actively promoted by the state and by society in such a unique scenario as fragile, post-conflict Liberia. The paper first addresses this question with respect to the country's contradictory dual-justice system, highlighting the problems that arise when the weak state struggles to enforce statutory and human rights law, while much of the population still sees legitimate justice to be rooted in traditional mechanisms, such as trials by ordeal, which oppose these laws. The second section of the paper considers the extent to which all Liberians enjoy religious freedom. It is shown that, while Liberia is de facto a secular state, it is essentially de jure a Christian country. Although there are historically and presently few indications of unrest based strictly on religion, it is argued that there is underlying religious tension that makes it dangerous for the state or society to suggest any major integration of Islam into public life. Some of this tension can be attributed to the growing number of Pentecostal and charismatic churches, which are especially vocal about the encroachment of non-Christians. However, because of Liberia's fragility, it might be the case that promoting religious equality and actively eliminating the Christian bias might cause more harm than good in Liberia today.

* BA (Northampton), MA Study of Religions (SOAS, London), PhD candidate, Department of the Study of Religions (SOAS) researching the socio-political role of Pentecostal and charismatic Christianity in post-conflict Liberia, in-country for field-work from September 2007 until July 2008; gwendolynheaner@yahoo.com

1 Introduction

A consideration of the relationship between religion, law and human rights is a critical endeavour that has been attracting interest from a variety of fields in recent decades. It is becoming increasingly apparent that, when dealing with legal issues, one cannot sideline religion and its significant implications in a world that is not secularising, as past theorists so strongly argued. As Witte poignantly writes, 'Religion is an ineradicable condition of human lives and human communities ... provides many of the sources and scales of values by which persons and people govern themselves ...'¹ Examining varieties of religious beliefs, which are often inextricably linked with varieties of cultural practices,² with respect to law and human rights, opens the door for a number of questions. Are human rights universal or culturally specific?³ More specifically, should traditional cultural practices be protected when aspects of human rights law are antithetical to such tradition?⁴ To what extent should religious practices of one person or group be allowed to impinge on the religious practices of another? When should freedom to practise a religion be restricted if it conflicts with other human rights laws? When is one group's right to proselytise a violation of another's right to fight against such unwanted encroachment?

The complicated, contradictory and unstable relationship between religion, law and human rights in Liberia, combined with the country's turbulent recent history, ethnic tensions and current state of widespread impunity and corruption, risks impeding ongoing efforts towards peace building and reconstruction, unless these issues are addressed by the government and society at large. In this essay, I address two aspects of this relationship: first, the contradictory dual-justice system and traditional justice mechanisms and, second, the extent to which Liberians enjoy religious freedom, especially with respect to an evident

¹ J Witte Jr 'Law, religion, and human rights: A historical Protestant perspective' (1998) 26 *Journal of Religious Ethics* 257.

² The concept of 'culture' and 'religion' and how they relate to one another, is a contentious topic which has received an enormous amount of scholarly attention. See especially T Masuzawa 'Culture' in M Taylor (ed) *Critical terms for religious studies* (1998) 70-93; J Smith 'Religion, religions, religious' in Taylor (above) 269-284. For the purposes of this paper, 'religion' will be used to describe any belief system that specifically has to do with spiritual, cosmological or metaphysical issues and includes all forms of African traditional religions and monotheistic religions. 'Culture' will refer to the broader idea of the 'means of adapting to the physical world and creating systems of meaning through which experience can be interpreted; all human beings, by definition, are rooted in culture', as defined in M Moran *Liberia: The violence of democracy* (2006) 19.

³ S Ilesanmi 'Human rights discourse in modern Africa: A comparative religious ethical perspective' (1995) 23 *Journal of Religious Ethics* 293-295.

⁴ A An-Na'im 'The contingent universality of human rights: The case of freedom of expression in African and Islamic contexts (1997) 11 *Emory International Law Review* 30 53-54.

Christian bias. In the process, I highlight important issues regarding the extent to which certain human rights — in this case, religious or cultural freedom — can be actively promoted in such a unique scenario as fragile, post-conflict Liberia.

2 Liberia: Africa's oldest republic recovering from war

2.1 From pseudo-colony to dictatorship

The area which is now Liberia was settled upon in 1822 by freed American slaves under the aegis of the pseudo-humanitarian American Colonization Society (ACS).⁵ The sovereign state of Liberia was established in 1847 by these settlers who later established the True Whig Party (TWP) that ruled from 1858 to 1980.⁶ These settlers, known as Americo-Liberians, were never more than 5% of the population, yet effectively ran the state with little to no participation from indigenous Liberians, and largely for their personal benefit.⁷ By 1980, despite then-President Tolbert's attempts to further incorporate indigenous Liberians into politics, corruption and inefficiency had left the state without a channel through which non-Americo-Liberian political views and organisations could be effectively incorporated into government.⁸ On 12 April 1980, Master-Sergeant Samuel K Doe staged a bloody *coup* with 16 other low-ranking soldiers and became the first indigenous leader of Liberia, with the exuberant support of indigenous Liberians who had high hopes for their country.

Within weeks of taking leadership, Doe killed or dismissed most senior officers in the military, had hundreds of civilians associated with the TWP arrested and tortured, and killed 13 prominent members from the old regime. The People's Redemption Council imposed a ban on political activities, censored the media, and resorted to killing, looting, cheating and bullying any suspected opponents in order to cow dissent. By 1984, relations between civilian and military groups were severely fragmented, and the initial popular support and legitimacy of

⁵ Although the explanation given by the ACS for repatriation of African slaves was that the freed slaves would benefit, another key reason is probably that the US simply wanted a way to get rid of black freedmen as the institution of slavery was becoming more controversial. J Levitt *The evolution of deadly conflict in Liberia* (2005) 31-33.

⁶ S Ellis *The mask of anarchy: The destruction of Liberia and the religious dimension of an African civil war* (1999) 41.

⁷ By 1865, when colonisation stopped, there were only about 12 000 settlers in Liberia in total. Of these, 4 500 were freeborn, 7 000 born in slavery, and 5 700 freed from transport ships that never made it to the US (known as Congoes). S Hale cited in P Gifford *Christianity and politics in Doe's Liberia* (1993) 9-10.

⁸ C Clapham 'Liberia' in D Cruise O'Brien *et al* (eds) *Contemporary West African states* (1989) 99-111.

Doe and his People's Redemption Council had disappeared.⁹ When increasing pressure from America to return to civilian rule became evident, elections were held in 1984 and after getting 50,9% of the vote in flagrantly rigged elections, Doe declared himself President to the approval of US President Reagan, who sent him a congratulatory telegram.¹⁰ From then on, Doe's destructive leadership was largely for personal gain, not to fulfil the promises he had made to Liberia after his *coup*.

2.2 Civil war

At the end of 1989, future warlord Charles Taylor and his National Patriotic Front of Liberia (NPFL), made up of Liberians who had fled to Côte d'Ivoire and were united by a common hatred of Doe, invaded the country.¹¹ The conflict developed into a civil war and Doe was killed by (now Senator) Prince Johnson at the end of 1990, having maintained power only over his palace and a small section of Monrovia.¹² 'Greater Liberia' was, at its peak in 1992, made up of most of Liberia, parts of Guinea and about a quarter of Sierra Leone. Taylor's territory had its own banking system, currency, television and radio network, airfields and an export trade in diamonds, timber, gold and agricultural products.¹³ By 1996, a huge number of military factions had appeared, many of which were organised with respect to ethnicity, although only about seven were ever very strong, whose main intentions were to occupy territory so that it could utilise resources, much like Taylor did.¹⁴ Throughout the war, repeated attempts were made to restore peace in Liberia, but one warlord or another would either refuse to agree to a deal, or agree, sign papers, and then ignore it altogether.¹⁵

In August 1996, the fourteenth peace accord was signed and most of the fighting stopped. In 1997, Charles Taylor and his National Patriotic Party (NPP) won presidential and parliamentary elections with 75% of the vote (80% of the eligible population voted), probably because the people saw little hope for lasting peace unless Taylor was elected.¹⁶ Although the fighting had stopped, the security situation was still

⁹ Clapham (n 8 above) 103-5.

¹⁰ Gifford (n 7 above) 235.

¹¹ S Ellis 'Liberia 1989-1994: A study of ethnic and spiritual violence' (1995) 94 *African Affairs* 165-197.

¹² Ellis (n 11 above) 167.

¹³ W Reno 'Reinvention of an African patrimonial state: Charles Taylor's Liberia' (1995) 16 *Third World Quarterly* 112-113.

¹⁴ Ellis (n 6 above) 104-105.

¹⁵ MA Sesay 'Politics and society in post-war Liberia' (1996) 24 *The Journal of Modern African Studies* 397-405.

¹⁶ Ellis (n 6 above) 109-110. See also D Harris 'From "warlord" to "democratic" president: How Charles Taylor won the 1997 Liberian elections' (1999) 37 *The Journal of Modern African Studies* 431-432.

precarious. In 1998, after an armed clash outside of Monrovia, Taylor imprisoned a number of opponents and declared himself no longer committed to the conditions of the peace accord. In 2000, a new group of rebels, the Liberians United for Reconstruction and Democracy (LURD), gained control of much of Northern Liberia. By 2003, another rebel group, the Movement for Democracy in Liberia (MODEL), had taken over most of the country except Monrovia. By then the United Nations (UN) had imposed sanctions on the trade of diamonds, timber and weapons because of Taylor's continued support of the RUF in Sierra Leone.¹⁷ In the midst of peace negotiations in Ghana in 2003, the United Nations (UN) announced that Taylor was to be indicted for war crimes.

In June 2003, LURD attacked Monrovia, resulting in thousands of civilian deaths. Nigerian peacekeepers arrived and Taylor was convinced to step down from the presidency and left for exile in Nigeria in August.¹⁸ The peace process continued in Ghana, with Taylor fortunately out of the picture, with representation from warring factions, political parties and civil society organisations. The Comprehensive Peace Agreement was signed in August 2003 and an interim government was established by October, made up of members of various warring factions and political parties. By the end of the year, the United Nations Mission in Liberia (UNMIL) was established and had begun deploying over 15 000 peacekeepers to the country who disarmed and demobilised over 100 000 ex-combatants by September 2004.¹⁹

After largely peaceful, legitimate and free and fair elections in 2005, Ellen Johnson-Sirleaf became Liberia's new president and the first elected African female head of state. She turned Charles Taylor over to the Special Court for Sierra Leone in 2006; his trial is still ongoing at The Hague. With the help of UNMIL and many international and domestic non-governmental organisations (NGOs), and Johnson-Sirleaf's ambitious anti-corruption and development projects, Liberia is undergoing a critical and difficult period of total economic, political, infrastructural and social reconstruction.

2.3 The damage

The facts and figures show clearly the destruction and devastation affecting Liberia today. It is estimated that 270 000 people died during

¹⁷ D Nilsson & MS Kovacs 'Breaking the cycle of violence? Promises and pitfalls of the Liberian peace process' (2005) 7 *Civil Wars* 399-400.

¹⁸ M Moran & M Pitcher 'The "basket case" and the "poster child": Explaining the end of civil conflicts in Liberia and Mozambique' (2004) 25 *Third World Quarterly* 506.

¹⁹ This only resulted in the collection of 27 000 weapons, most of them small arms, strongly indicating that there are still armed individuals, arms caches, or export of weapons to other countries. Nilsson & Kovacs (n 17 above) 405. The World Bank reports that only 70 000 ex-combatants were disarmed by this time. P Richards *et al* 'Community cohesion in Liberia. A post-war rapid social assessment' in 'Conflict prevention and reconstruction' The World Bank and Reconstruction/Social Development Department Paper 21, Washington DC, January 2005 2.

the war and at least one million were displaced; 63,8% of Liberians live below the poverty line; 48% of Liberians live in extreme poverty; 73% of the poor live in rural areas.²⁰ Between 1987 and 1995, GDP fell 90% and external debt was \$3,7 billion. The average income is one-sixth of its level in 1979 and one-quarter of its level in 1987.²¹ Formal unemployment is 80%.²² Between 1987 and 2005, rice production fell 76%, financial services fell 93% and electricity and water fell 85%.²³ Transportation and communication, trade and hotels and construction all fell around 69%. There are an estimated 250 000 refugees, and 350 000 internally displaced persons still need to be resettled.²⁴ The demands on the capital city of Monrovia are massive, not least because of the massive influx of people from the countryside during the war. The population of the city is estimated to have increased from 300 000 in 1989 to more than 1,3 million by 2003.²⁵ Illiteracy is at least 55% and over half of Liberian children ages six to 11 are estimated to be out of school.²⁶ The judicial system is in shambles and there is a widespread climate of impunity and lawlessness.²⁷

Nonetheless, the situation is slowly improving. Economic growth reached 5,3% in 2005, 7,8% in 2006 and 9,4% in 2007. The World Bank has cancelled Liberia's massive debt arrears. Social services are becoming more available, roads are being repaired, schools are being refurbished, businesses are opening and refugees are returning to their homes.²⁸ According to the World Bank, Liberia in 2007 had the largest improvement in the world for 'control of corruption' between 2004 and 2007.²⁹ The Armed Forces of Liberia (AFL), the Liberian National Police (LNP) and Special Security Service (SSS) are gathering new recruits and putting them through training processes. Combined with this, the continued presence of UNMIL is assuring a maintained peace. A Truth and Reconciliation Commission (TRC) is collecting statements

²⁰ Government of Liberia (GOL) Poverty Reduction Strategy (PRS) 2008 25.

²¹ n 20 above, 15.

²² GOL Interim Poverty Reduction Strategy (IPRS) 2006, xiii.

²³ GOL PRS (n 20 above) 15-16.

²⁴ GOL PRS (n 20 above) 13.

²⁵ E Pajibo 'Traditional justice mechanisms. The Liberian case' International Institute for Democracy and Electoral Assistance, Stockholm, 2008 10. The latest census published preliminary results which confirmed the population of Liberia to be 3,49 million, and the population of Montserrado County (where Monrovia is located) to be 1,14 million. Government of Liberia '2008 Population and National Housing Census Provisional Results', LISGIS, June 2008.

²⁶ GOL PRS (n 20 above) 31-32.

²⁷ See International Crisis Group 'Liberia: Resurrecting the justice system', Africa Report 10, April 2006 1-2.

²⁸ In the last two years, there has been a 44% increase in school enrolment; 350 health facilities, 20 clinics and several hospitals and health centres have been restored. GOL PRS 17-19.

²⁹ World Bank Institute, Worldwide Governance Indicators, 2007.

from victims and perpetrators of atrocities during the war. Still, there is a long way to go. At this point, I focus on the particularly weak Liberian justice system.

3 Liberian laws, traditional justice and human rights

3.1 Statutory law

In a Gallup Poll conducted in February 2007, the least trusted institution in Liberia was found to be the judicial system and courts (47%).³⁰ During the war, Liberia descended into almost complete lawlessness. As the transitional government took power in 2003, the statutory justice system, from its inception based on United States and British common law,³¹ was totally defunct. Since the 2005 elections, this sector is still struggling to improve and achieve some degree of accountability, efficiency and respect. This 'culture of impunity' makes it extremely difficult for the enforcement of Liberian law specifically and human rights law generally. Of the many problems, one of the most critical is the severe lack of competent, uncorrupt and efficient staff.³² Judges and other key staff in county circuit courts are frequently absent, resulting in huge delays for trials.³³ Salaries are often late and very low, encouraging staff members to accept bribes for throwing out cases or illegally releasing criminal suspects.³⁴ Magistrate's and local courts are often found trying, sentencing, fining and imprisoning people for criminal and civil cases that lie outside of their jurisdiction.³⁵ Justices of the peace are often corrupt, unqualified and inefficient, yet many Liberians flock to them for help because of their proximity.³⁶ The prison system is substandard, keeping inmates, including juveniles, in overcrowded and unsanitary conditions for months on end; the vast majority of whom have yet to be convicted or tried for any crime, in violation of international human rights law. Release from jail is often expedited with the payment of a bribe. If they do make it to court, most defendants and detainees have no access to public legal aid; most people cannot afford to pay for a private lawyer.³⁷

³⁰ 91% of Liberians were found to trust religious institutions, far more than all other institutions the poll tested, as with most countries surveyed in sub-Saharan Africa. M Rheault 'Liberians give high marks to their government' Gallup Poll, February 2008.

³¹ GOL *Liberian legal codes revised* 15: 3.40.

³² GOL PRS (n 20 above) 20.

³³ UNMIL Report on the Human Rights Situation in Liberia, November 2006-January 2007, 16-18.

³⁴ UNMIL Report on the Human Rights Situation in Liberia, May-October 2007, 10-11.

³⁵ Human Rights Watch *Country summary: Liberia* (2007) 2.

³⁶ n 27 above, 3.

³⁷ UNMIL (n 34 above) 15-21.

UNMIL has played an important role in helping restore this sector under the Legal and Judicial System Support Division (LJSSD). Much has been done, such as the refurbishment and reconstruction of several courthouses and detention facilities and the training of key legal and judicial officers, but there are still huge challenges that must be overcome before the judiciary is considered functional.³⁸ The government is focusing a lot of necessary attention on this sector as well, including enacting and empowering the Law Reform Commission.³⁹

3.2 Human rights law

In writing, the government of Liberia generally respects most facets of human rights law. In practice, there are many violations. This is mostly because of the general absence of the rule of law, and the scale of these violations has improved massively since the end of the war and the regimes of Doe and Taylor.⁴⁰ Because of the massive work involved in establishing basic rule of law in Liberia, human rights issues are often sidelined. According to the Office of the High Commissioner for Human Rights (OHCHR), in Liberia '[h]uman rights are not promoted or protected', although the UN is working with the government to seriously address these problems.⁴¹ There are many human rights NGOs working freely in the country. For decades, Christian churches and organisations have been at the forefront of monitoring human rights. These groups include the Catholic Justice and Peace Commission (JPC), the Association of Evangelicals of Liberia (AEL) and the Liberian Council of Churches (LCC). From the pulpit, pastors of mainline denominations often preach about the need to appreciate human rights.⁴² Since 2003, there have been demands from civil society groups and international parties for the creation of the Independent National Commission on Human Rights (INCHR) in Liberia. The government will formally set up

³⁸ Between May 2006 and August 2007, UNMIL trained 336 magistrates, 220 justices of the peace, 226 prosecutors, 147 magistrate's court clerks and 53 circuit and Supreme Court clerks. UNMIL Fifteenth Progress Report of the Secretary-General on the United Nations Mission in Liberia, August 2007, 9.

³⁹ GOL PRS (n 20 above) 90. See also P Banks 'Reforming Liberia's legal and judicial system: Towards enhancing the rule of law' Republic of Liberia Governance Reform Commission, December 2006, 36-41.

⁴⁰ One obvious constitutional violation allows for only people of 'Negro' descent to be a citizen of Liberia and enjoy the benefits given to citizens, such as owning land. Constitution of Liberia, 1984; US State Department Report on Human Rights, 2007.

⁴¹ OHCHR 'Liberia 2008-2009' <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/LRSummary0809.aspx> (accessed 29 July 2008).

⁴² This can often be quite vague, and many Christian churches stay away from active involvement with human rights altogether. At best, they might pray against FGM, rape or child abuse, especially within the newer Pentecostal and charismatic churches that are rapidly expanding in number and influence. Based on author's own fieldwork.

this commission in December 2008.⁴³ Meanwhile, the majority of the population has little to no knowledge of the law and human rights. Moreover, it is by no means taken for granted that human rights laws should be obeyed, especially when they conflict with cultural norms, most particularly those that have a religious dimension. Furthermore, in light of the fragility of Liberia today, one might question the extent to which human rights laws *should* be enforced, especially if they risk exacerbating existing tensions.

3.3 Customary law

According to article 65 of the Constitution, Liberia recognises customary law, as written in the Revised Rules and Regulations Governing the Hinterland, updated in 2000.⁴⁴ These rules are nearly identical to those of indirect rule used in Anglophone African colonies in the 1930s and 1940s. As International Crisis Group (ICG), an NGO dedicated to conflict resolution, has noted:⁴⁵

Ironically, while Anglophone ex-colonies have mostly revised or abandoned such laws because of their fundamentally anti-democratic logic, Liberia — never a colony — has maintained them.

Because of the perpetual lack of efficiency, reputability and mere access to statutory legal resources, especially in rural areas, customary law is the most often used recourse to justice for Liberians.⁴⁶ Customary law is formally overseen by the Ministry of Internal Affairs and its representative chiefs (paramount, clan and village), commissioners and local officers. It is informally complemented by Poro and Sande secret societies and councils of elders.⁴⁷

Administering justice in the hinterland are government-created customary courts, presided over by the chiefs with commissioners and superintendents who are involved to administer and oversee their functions.⁴⁸ Statutory circuit courts are legally allowed to review customary law decisions,⁴⁹ but this is very rarely done.⁵⁰ Article 29, the General Rule of Administration, states:⁵¹

⁴³ See President Ellen Johnson-Sirleaf, Annual Address, 28 January 2008. INHCR is currently campaigning against mob violence and rape, but for the most part they are quite inactive. See 'Don't see human rights advocates as enemies' *The Analyst* 3 April 2008.

⁴⁴ Constitution of the Republic of Liberia, 1984 ch VII art 65.

⁴⁵ n 27 above, 7.

⁴⁶ n 27 above, 6-7.

⁴⁷ n 27 above, 8.

⁴⁸ n 27 above, 7.

⁴⁹ GOL *Liberian legal codes revised*, Judicial Code 3:4, 1986.

⁵⁰ n 27 above, 7.

⁵¹ GOL *Rules and Regulations Governing the Hinterland*, Ministry of Internal Affairs, 17.

It is the policy of government to administer tribal affairs through tribal chiefs who shall govern freely according to tribal customs and traditions so long as these are not contrary to [statutory] law.

In practice, there are many contradictions.

3.4 Traditional justice mechanisms

Traditional justice mechanisms in Liberia can be broken down into three main varieties: the sharing of the kola nut, the palaver hut, and trial by ordeal. These methods, or varieties on them, have been used since pre-settler Liberia. That said, state interference with traditional leaders and power structures since the 1940s, combined with industrial development, the movement of populations and the adoption of a dual system of justice, has led to the corruption of the processes from their traditional forms, such that they have lost much of their legitimacy.⁵² Still, they are widely used throughout the country.

The 'sharing of the kola nut' is generally used for breaches in civil law, such as adultery or debt. The perpetrator will provide kola nuts, cane juice and a chicken or a goat to the victim(s). The victim(s) will generally accept this and forgive the perpetrator according to the popular saying, 'Let bygones be bygones'. The palaver hut method is employed throughout Liberia, with a few major differences depending on the region. Generally, the process aims to resolve civil matters pertaining to adultery, divorce, land disputes, debts and, in some communities, theft, rape and murder. The process is overseen by elders, local chiefs and, in some parts of Liberia, by *Zoes* (traditional spiritual leaders). Its intention is to resolve such disputes through dialogue and mediation — specifically confession, apology and forgiveness, followed by some punishment as prescribed by the overseer, which can range from payment of food, money or manual labour, to scorn or banishment from the community.⁵³ There is a clear religious element to this process, in which a libation, ranging from palm wine to animal blood, is poured in order to invoke ancestral spirits, who then compel the contending parties to tell the truth and respect whatever resolution is decided at the end of the process. The process is also intended to drive out any evil spirits that might have caused the offence in the first place and to prevent it from happening again. If either party disobeys, the spirits are expected to cause misfortune.

Trial by ordeal is the most controversial form of traditional justice. This method is used for determining guilt for offences ranging from direct murder and theft, to indirect harm using witchcraft and sorcery. In the sassywood method, the accused person is made to drink a

⁵² Pajibo (n 25 above) 16. See also V Fuest 'Reflections on participatory approaches to "peace building" in Liberia' unpublished draft paper, AEGIS European Conference on African Studies, 11-14 July 2007, African Studies Centre, Leiden 7-8.

⁵³ Pajibo (n 25 above) 18-22.

mixture made from the toxic bark of the sassywood tree. Regurgitation of the drink (as opposed to death) proves that the accused is not guilty. Failure to undergo the trial signifies guilt and the person will be punished by banishment from the village for a charge of murder, and scorned and made to pay restitution in the case of theft. Another method of trial by ordeal involves putting hot metal on the skin of the accused. Withdrawing the leg and the subsequent appearance of a festering wound signify guilt, while an innocent will not be burned. The person who administers the trial by ordeal is considered to be a spiritually powerful and respected individual in the community. Libations are poured before the ritual in order to invoke the assistance of spirits, which make the trial fully legitimate.

The Supreme Court of Liberia in 1940 ruled that all trial by ordeal is in conflict with the statutory law of the state because 'no one shall be compelled to give evidence against himself'.⁵⁴ According to article 73 of the Rules and Regulations Governing the Hinterland, however, trial by ordeal is still legal so long as sassywood is not used: '[Ordeals] of a minor nature and which do not endanger the life of the individual, shall be allowed and is hereby authorized ...'.⁵⁵ Despite all trials by ordeal being made illegal by statutory law over 60 years ago, most Liberians are unaware of their illegality. Even if they do recognise that such trials are illegal, they still consider them an efficient, legitimate and fair method of determining a person's guilt or innocence. Trial by ordeal in all its varieties continues to be practised throughout Liberia, especially in rural areas.⁵⁶ The Ministry of Internal Affairs had, until June 2008, openly licensed 'ordeal doctors' to perform these rituals,⁵⁷ but in 2006 the Ministry revoked the licences of those found administering sassywood.⁵⁸ A former official of the Ministry of Internal Affairs defended trial by ordeal as one of the best means by which 'true Africans and traditional leaders find out facts about unfolding developments'.⁵⁹ As consultants from the International Crisis Group remarked of the Circuit Court in Grand Cape Mount County, which held only one licensed trial in five years in order to determine, ritually, whether or not witches were responsible for the community's lack of schools and healthcare facilities:⁶⁰

⁵⁴ *Tenteah v Republic of Liberia* 7LLR63 (1940), cited in ICG (n 27 above) 9.

⁵⁵ GOL *Hinterland* (n 51 above) art 73, 39.

⁵⁶ UNMIL (n 34 above) 22-23.

⁵⁷ n 27 above, 9. In June 2008, the Ministry claimed to have stopped issuing such licences and claimed that notice of the mandate had been sent to government officials around the country. 'Internal Affairs Bans Issuance of Licenses' *The News* 25 June 2008.

⁵⁸ US Dept of State, Religious Freedom, 2007.

⁵⁹ 'Justice Minister bans sassywood practice' *Daily Observer* 8 February 2007.

⁶⁰ n 27 above, 9.

The fact that the only trial ... has been a ritual practice, condemned by the judicial branch but condoned by the executive, speaks volumes about the state of the justice system and the executive's unwillingness to enforce the judicial decision that outlawed trial by ordeal.

There have been a few recent public statements to educate Liberians about the illegality of such practices, despite their cultural foundations.⁶¹ According to Tiawan Gongloe, current Solicitor-General of Liberia:⁶²

Because our Constitution guarantees the liberty of every Liberian, for a cultural practice that violates the rights of any Liberian I have no moral obligation to protect and respect such culture.

The government of Liberia has included plans for addressing traditional justice in the PRS, which states:⁶³

A national framework will be developed for the exercise of informal and customary justice to ensure that it conforms to human rights standards. It will include measures to inform the community and law enforcement agencies of harmful traditional practices and their contravention of Liberian law, particularly those that are harmful to women and marginalised groups.

3.5 Informal reconciliation and societal regulation

Not all forms of reconciliation and societal regulation are overseen by the government. There exist a number of informal societies that have an evident amount of authority over their communities, and are inextricably linked with traditional religious beliefs. Of course, these are many and varied, but the most well-known and widespread in Liberia are the Poro and Sande secret societies, or 'bush schools'. The exact nature of these societies varies, depending on the locale, and they have undergone many adaptations as they have spread throughout the country over time.⁶⁴ A few researchers have highlighted the political and legal functions of these societies have had in Liberia.⁶⁵

In general, they are overseen by traditional leaders or *Zoes*, who are considered to have significant spiritual power. Historically, the methods used by *Zoes* and initiates of the societies for obtaining and maintaining power were within an unwritten but very organised and rigid structure of spiritual authority that translated into authority in society at large.

⁶¹ n 59 above; 'Trial by ordeal declared illegal' *Informer* 8 April 2008.

⁶² BBC News *The World*, Interview with Jesse Graham, 22 February 2007.

⁶³ GOL PRS (n 20 above) 92.

⁶⁴ Poro and Sande societies were originally found in the border regions between Guinea and Liberia, but in modern times they have spread throughout Liberia, in various forms. Ellis (n 6 above) 226-229.

⁶⁵ See especially RP Fahey 'The Poro as a system of judicial administration in Northwestern Liberia: Its intraclan and interclan functions' (1971) 4 *African Legal Studies* 1-25; RM Fulton 'The political structures and functions of Poro in Kpelle society' (1972) 74 *American Anthropologist* 1218-1233; JL Gibbs 'Poro values and courtroom procedures in a Kpelle chiefdom' (1962) 42 *Journal of Anthropological Research* 279-288.

The spirit of the forest, or 'Bush Devil', was an ambivalent but particularly powerful deity that needed to be supplied with (sometimes human) blood sacrifice in order to 'keep people in their proper places in society, to prevent individuals from transforming in ways which are dangerous to others and to ensure orderly progress from one phase of life to another, such as from childhood to adulthood'.⁶⁶ These sacrifices were done by particularly powerful *Zoes*, in secret, for the purpose of the betterment of the community and according to very specific rituals.⁶⁷

Many facets of these institutions have greatly changed over time, not least because of the adoption of formal statutory and customary law systems, massive migration, the disruption caused by the war and the adoption of monotheistic religions. Nonetheless, individuals in these communities are still expected to respect the authority of the *Zoes*, including in matters of local reconciliation.⁶⁸ However, some of the methods allegedly used by the *Zoes* and other traditional religious leaders have endured through history and are quite contrary to modern statutory law and human rights law. For example, it is still widely believed that one can gain spiritual and physical power through human sacrifice. While historically such actions might have been relatively rare, and restricted to the most powerful of traditional religious leaders,⁶⁹ today there are reports of ritual killings throughout the country, in which a person is murdered and a body part removed for ritual purposes.⁷⁰ It is believed that these body parts can be used, perhaps eaten, for a person to gain spiritual power. Such ritual killings were relatively common during the war, for the purpose of gaining power in battle,⁷¹ but are strictly forbidden by customary and statutory law. According to the Revised Rules Governing the Hinterland, Poro, Sande and other 'cultural societies' are allowed to conduct themselves however they wish, so long as there is no 'abuse committed that is detrimental to public interest'. The Human Leopard Society, for example, which demands human sacrifice in return for spiritual power, is illegal according to customary law and its practice can lead to 20 years' imprisonment or capital punishment if the victim is, in fact, murdered in the process.⁷² Still, in order for the society to be considered legitimate by its members, such rituals are vital.

⁶⁶ Ellis (n 6 above) 278-279.

⁶⁷ Ellis (n 6 above) 231-237.

⁶⁸ C Hojbjerg 'Masked violence: Ritual action and the perception of violence in an upper Guinea ethnic conflict' in N Kastfelt (ed) *Religion and African civil wars* (2005) 156-157.

⁶⁹ Ellis (n 6 above) 232-235.

⁷⁰ US State Department report on human rights, 2007. It is likely that such killings happen far more than is reported.

⁷¹ Ellis (n 6 above) 261-265.

⁷² GOL *Hinterland* (n 51 above) art 68-69 38. About Leopard Society, see Ellis (n 6 above) 235-237.

Such contradictions between traditional religious beliefs and modern statutory laws are not only relevant in rural areas in the context of secret societies. Indeed, it is common for Liberians, regardless of locale, religion, age and level of education, to consider misfortune or strange events to be the result of witchcraft — popularly defined as a physical or spiritual attack on an individual by an ‘evildoer’, for the purposes of harming the victim and thus enabling the ‘witch’ to gain selfish spiritual and physical power.⁷³ Regardless of the number of people actually practising witchcraft for malevolent purposes, the suspicion and near-panic that Liberians have regarding such attacks prove problematic when it comes to bringing the alleged perpetrators to justice. Because a suspected witch cannot legally be arrested or convicted, unless he or she has actually been caught breaking a statutory law, members of the community take justice into their own hands via mob violence or trial by ordeal.⁷⁴ These problems are significant enough to have been highlighted by Deputy UN Envoy for Rule of Law, Ms Henrietta Mensa-Bonsu, at the launching of the most recent UNMIL Human Rights Report.⁷⁵

3.6 Bridging the divide

There are clearly a number of problems with customary and statutory law in Liberia, both in terms of the discrepancies among laws as they are written, the ability to enforce such laws, and in the (mostly rural and poor) public’s lack of knowledge of their rights under both systems. This is especially complicated when dealing with religiously-based traditional justice mechanisms, because they are considered to be fully legitimate to the public, yet are totally contrary to statutory and customary laws. Here one must appreciate the fundamental difference between the bureaucratic nature of *law* — punishment dictated by written laws and human administrators — and the moral nature of *justice* — punishment dictated by tradition and a common sentiment of what is morally fair or unfair.⁷⁶ This disparity, as manifest in the problems surrounding traditional justice mechanisms, creates a signifi-

⁷³ Based on personal fieldwork and interviews.

⁷⁴ See eg ‘Equip-Liberia aborts sassywood in Nimba, victim explains ordeal’ *Daily Observer* 5 October 2007; “For killing my mother I have no regrets” says 24 year-old disabled’ *Daily Observer* 23 October 2006; ‘Casket beats woman’ *Daily Observer* 1 November 2006; ‘UN urges Liberia to outlaw trials by ordeal’ *Reuters* 17 May 2007 <http://www.reuters.com/article/latestCrisis/idUSL17103867> (accessed 3 August 2008).

⁷⁵ ‘UN puts witchcraft center stage’ *The News* 4 April 2008.

⁷⁶ S Ellis & G ter Haar *Worlds of power: Religious thought and political practice in Africa* (2004) 144-147.

cant difficulty in protecting the human rights of every citizen.⁷⁷ Simple abolishment of the law is a weak solution, not least because traditional practices would still be practised nonetheless.⁷⁸ To complicate matters further, the abolishment of certain traditional practices might also be a violation of one's right to maintain his or her culture. The Constitution is vague about the extent to which such traditional practices should be protected.⁷⁹

The Republic shall ... preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian society.

Because of this complicated issue — perhaps in spite of it — moves are being made not only to publicly declare certain traditional practices as not promoting 'positive Liberian culture', but also to make them formally illegal and to educate the public about respecting such laws. A good example of attempts to bridge this divide between statutory law and traditional practices can be seen with respect to the rights of women.

3.7 Rights of women

There have been a number of legal changes in Liberia to give both rural and urban women more rights to be treated as citizens, not property, as Liberian tradition and customary law allow. Prior to 2003, the wife of a man married under customary law was inheritable property. Further, the age of consent was 12 years old in rural areas and 16 years old in urban areas. However, in 2003 the Association of Female Lawyers of Liberia (AFELL) was finally able to pass a bill they had been promoting for eight years, thanks primarily to Charles Taylor's departure: 'An Act to Govern the Devolution of Estates and Establish the Rights of Inheritance for Spouses of both Statutory and Customary Marriages',⁸⁰ which now allows women married under customary law to inherit from their deceased husbands and increases the age of consent to 18. In practice, most women are not able to take advantage of these new rights out of ignorance or inability to actually enforce men's families to respect them.⁸¹

⁷⁷ Further, 'Traditional justice mechanisms ... need to be seriously, rigorously interrogated so that a dual justice system — one for the rural poor and one for the urban elite — does not become entrenched ... this would inevitably polarise citizens and residents and sow fresh seeds of discord, possibly even violence.' Pajibo (n 25 above) 24.

⁷⁸ n 27 above, 9-10.

⁷⁹ Constitution of Liberia, art 5.

⁸⁰ An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages, approved 7 October 2003, published by Ministry of Foreign Affairs 1 December 2003.

⁸¹ UNDP Press Release, 'UNDP empowers AFELL' 23 May 2006.

Female genital mutilation (FGM) is a common practice in Liberia, especially in rural areas, as prescribed by the initiation into girls' Sande society. There are no laws, statutory or customary, that specifically prohibit FGM and the government has not taken any substantial steps to banish or discourage the practice.⁸² There is some public discourse surrounding the practice. AFELL have been especially vocal about their opposition to the practice, which they consider a human rights violation. In early 2006, the Minister of Internal Affairs vowed to not discourage the practice of FGM because it was part of Liberia's traditional culture.⁸³ Again, a clear complication arises when the enforcement of human rights conflicts with the respect for certain cultural (and in this case inextricably linked with religious) practices.

This section has considered the complications that arise between the dual system of customary law and statutory law, with specific reference to traditional practices which are popularly considered to be legitimate and given a degree of legitimacy through customary law, yet are contrary to statutory law and international human rights law. At this point it is important to understand the specific issue of religious freedom in Liberia, and the problems in trying to promote it fully.

4 Religious freedom in Liberia

4.1 Religious demography

The religious demography of Liberia is a contentious subject for a variety of reasons. First, in March 2008 the government held the first national census since 1984. The results of this latest census are not expected until 2009, but it will determine the percentages of Muslims, Christians, followers of exclusively African traditional religion, other religions or no religion.⁸⁴ Second, and equally problematic, is the extent to which a Liberian might fit into the neat category of Christian, Muslim, African traditional religion or other. In reality, as is the case in much of sub-Saharan Africa, many individuals overlap African traditional religion with another monotheistic faith, whether they profess to be exclusively one or the other or not. Thirdly, the immigration and emigration scenarios of post-conflict Liberia have hugely complicated the demography. Many Liberians became refugees during the war and may or may not have returned. Similarly, many refugees from other unstable West African countries, especially Guinea, Sierra Leone and

⁸² As above. State Department, Human rights, 2007. This issue is given absolutely no mention in the entire final draft of the PRS, while other issues, such as rape and GBV, are given ample attention. GOL PRS (n 20 above).

⁸³ 'Female circumcision sparks debate' *Daily Observer* 20 February 2006.

⁸⁴ In addition, a Pew survey is currently being developed in order to determine, very specifically, religious affiliations in Liberia and other sub-Saharan African countries. Results for this, though probably not available for years, will be extremely helpful.

Côte d'Ivoire, have settled in Liberia; many of these are thought to be Muslims. Finally, depending on where the statistics come from, numbers can be grossly overestimated. Because of these complications, estimates for the religious demography of Liberia are hugely varied and often disputed. According to the most reliable estimates, as of 2007, Muslims make up 20%, Christians 40% and 'exclusively animists' 40%.⁸⁵

The Portuguese had contact with the area that is now Liberia as early as the fifteenth century, but Christianity was only truly established in 1822 when Baptist settlers from the United States arrived and built the Providence Baptist Church on the coastal stretch of land they named Christopolis, now Monrovia. Other mainline Protestant denominations — the Methodists, Episcopalians, Lutherans and Presbyterians — were established in Liberia soon after and formed the religious backdrop for Americo-Liberians, especially those in power under the TWP, who were often ministers or bishops in these churches. The Roman Catholics have been present since the mid-nineteenth century, but only in 1906 did they establish themselves permanently.⁸⁶ Presently, among the Christian population, the United Methodists and varieties of Baptists are probably the most numerous,⁸⁷ although the many varieties of Pentecostalism, charismatic Christianity and non-mainline Evangelical Christianity have been growing phenomenally since the 1980s. Some of these churches were planted by churches in the United States, Europe or elsewhere in Africa, while many are Liberian-initiated. A few of the US-based variety, such as African Methodist Episcopal, African Methodist Episcopal-Zion, Church of God in Christ and Assemblies of God, have been in Liberia since the early 1900s, but most are less than 30 years old. In Monrovia, at least, these newer churches form a large percentage of the Christian population.⁸⁸ Many of these churches are also adamantly anti-African traditional religion, and actively demonise anything to do with traditional practices or world religions, especially Islam. Also represented are Seventh Day Adventists, Jehovah Witnesses and a sprinkling of Latter Day Saints.

⁸⁵ US State Department, Religious Freedom, 2007. Based on other sources, these percentages vary widely — eg, in 1986 it was estimated that the percentages of Muslims and Christians was 5% and 15% respectively. At the same time, many Muslim leaders claimed that 50% of Liberia was Muslim. Gifford (n 7 above) 262.

⁸⁶ Gifford (n 7 above) 55-56.

⁸⁷ In 1989, according to estimates, there were 67 109 Methodists, about the same number of Baptists, 75 000 Catholics, 30 000 Lutherans, 20 000 Episcopalians, 3 000 Presbyterians; all of which were claiming to be growing substantially at this time. Gifford (n 7 above) 51-57. Baptists in 1998 numbered 60 000 members according to the Baptist World Alliance, <http://www.bwanet.org>; Roman Catholics in 2004 numbered 170 000 members according to diocese counts reported on <http://www.catholic-hierarchy.org>. UMC claims 168 300 members, <http://www.umcliberia.org>.

⁸⁸ Based on author's own fieldwork.

Muslims have been in the area which is now Liberia since the fifteenth century, perhaps earlier, but never in significantly large numbers. The demographic concerning the different types of Islam is even more complicated, because many Muslims might not self-identify as belonging to a certain school or sect. They are overwhelmingly found among the Vai of Western Liberia, the Mandingo who are dispersed throughout the country, and the Fulah who have immigrated from surrounding West African countries, especially Mali, Guinea, Côte d'Ivoire and Sierra Leone. Most Liberian Muslims are Sunnis of the Maliki school, although Wahhabi Muslims are to be found especially among the Mandingo, in addition to a small movement of ultra-conservative Iranian-supported National Repentant Muslims.⁸⁹ There are also a number of Sufi Muslims, many of them immigrants from Mali, Guinea or Senegal, and a few thousand members of the Ahmadiyya sect, especially among the Vai.⁹⁰ A small number of Shiite Muslims are among some of the Lebanese community, many of whom have resided in Liberia for three generations.

Those who practise any variety of African traditional religion exclusively are predominantly in rural areas. Traditional religious beliefs and institutions, like Poro and Sande, have lost much of their historical form, legitimacy and influence in many communities. For example, initiations into Poro take as little as two months, when historically it would take up to three years.⁹¹ The societies have also lost much of their secrecy, especially due to the growing number of born-again Christians, who no longer consider Poro and Sande authority to be legitimate, and therefore are not reluctant to 'expose the truths' about their 'demonic' ways.⁹² Despite these changes, it is still common for most individuals in rural areas to be active members of society, even if they are also active Muslims or Christians, or else they will be scorned, punished or banished from the community and their families, often their only sources of support. The statistic of 40% *exclusive* practitioners of African traditional religion is, arguably, far too high, not least due to the spread of Pentecostal and other non-mainline Evangelical churches into the interior and the mass influx of persons from the rural areas into

⁸⁹ Gifford (n 7 above) 287.

⁹⁰ Based on e-mail correspondence with John York, head of the Inter-Religious Affairs desk of the Liberian Council of Churches (LCC), 20 July 2008; Mohammad Sheriff, Vice-President of the IRCL, 14 July 2008. See also Gifford (n 7 above) 261-263.

⁹¹ Ellis (n 6 above) 224.

⁹² When being initiated into Poro or Sande, individuals take an oath of secrecy; they are told that to reveal anything about their initiation will result in death. Many born-again Christians will talk about their initiation in detail, claiming that although they still believe in the power of the societies (controlled by Satan), Jesus Christ is strong enough to fight the evil forces. Many varieties of Christianity, especially those with Pentecostal and charismatic learnings, are very active in attempting to eradicate the influence of these societies in members' lives, in addition to any other 'traditional' beliefs. Based on fieldwork and personal interviews.

Monrovia during the war.⁹³ Most of these individuals are probably at least nominally Christian or Muslim and affiliated with some monotheistic place of worship.⁹⁴

4.2 A secular state, a Christian country

Since its inception as a sovereign state, Liberia has granted legal freedom of religion to everybody. In practice, the country, founded and ruled by the Christian Americo-Liberians, was for many years a *de facto* Christian state because of its failure to incorporate indigenous Liberians and thus any non-Christians into the government or other significant positions. The original Constitution did not specifically declare Liberia to be a Christian state, but until it was re-written in 1984, it was not specifically secular either. A very lively debate has been going on in Liberia for years regarding religion in public life, and to what extent Liberia can be considered a Christian country.⁹⁵ Christians will very often point out that 'Liberia was founded on Christian principles', because all the original settlers were Christian, the Declaration of Independence was signed in the first Christian church in Liberia (Providence Baptist Church) and all of its presidents, until Samuel Doe, were prominent Christians. There is also a fairly widespread opinion among Christians that Samuel Doe changed the Constitution to make Liberia a secular state against the general consensus of the land, and was only able to do so because of the government that he put in place, which was anti-Americo-Liberian and thus opposed to Christian hegemony.⁹⁶ The wording of each Constitution is worth examining in detail.

The 1847 Constitution of Liberia clearly grants freedom to practise any religion, but mentions Christianity twice and does not specify a separation between church and state. Article 1 of the Declaration of Rights reads:

Therefore, we the People of the Commonwealth of Liberia, in Africa, acknowledging with devout gratitude, the goodness of God, in granting to us the blessings of the Christian religion, and political, religious, and civil liberty, do, in order to secure these blessings for ourselves and our posterity, and to establish justice, insure domestic peace, and promote the general welfare, hereby solemnly associate and constitute ourselves a Free, Sovereign and Independent State.

and further:⁹⁷

⁹³ A recent study on mental health in Liberia measured religious affiliation and found that 89,6% of respondents identified as Christian, 9,1% as Muslim, and 1,3% as African traditional religion or other. K Johnson *et al* 'Association of combatant status and sexual violence with mental health outcomes in post-conflict Liberia' (2008) 300 *Journal of the American Medical Association* 681.

⁹⁴ Ellis (n 6 above) 245.

⁹⁵ Gifford (n 7 above) 265.

⁹⁶ Based on personal interview with John York, 19 January 2008.

⁹⁷ Constitution of the Republic of Liberia, 1847.

All men have a natural and unalienable right to worship God, according to the dictates of their own consciences, without obstruction or molestation from others: all persons demeaning themselves peaceably, and not obstructing others in their religious worship, are entitled to the protection of law, in the free exercise of their own religion; and no sect of Christians shall have exclusive privileges or preference, over any other sect; but all shall be alike tolerated: and no religious test whatever shall be required as a qualification for civil office, or the exercise of any civil right.

The People's Redemption Council made some key changes to the treatment of religion, removing all mention of Christianity, as in the Preamble, '[a]cknowledging our devout gratitude to God for our existence as a Free, Sovereign and Independent State, and relying on His Divine Guidance for our survival as a Nation ...'⁹⁸ Even more importantly, article 14 reads:⁹⁹

All persons shall be entitled to freedom of thought, conscience and religion and no person shall be hindered in the enjoyment thereof except as may be required by law to protect public safety, order, health or morals or in the fundamental rights and freedoms of others. All persons who, in the practice of their religion, conduct themselves peaceably, not obstructing others and conforming to the standards set out herein, shall be entitled to the protection of the law. No religious denomination or sect shall have any exclusive privilege or preference over any other, but all shall be treated alike; and no religious tests shall be required for any civil or military office or for the exercise of any civil right. Consistent with the principle of separation of religion and state, the Republic shall establish no state religion.

Despite the clear mandate for Liberia to be a secular state and to allow religious freedom and equality, these principles are not actively promoted by the government and much of the Christian population does not acknowledge it as such; if they do, they do not necessarily agree with it. Although non-Christians are not actively persecuted, restricted or treated as lesser citizens by the government, the Christian religion still enjoys evident preference and, historically, the Christian religion has shaped much of the culture, law, government and practices of modern Liberia. Further, because of the tendency of the average Liberian not to appreciate or even understand a government totally separate from God, this translates into a tendency for public outcry when it seems this Christian hegemony might be violated. There are most certainly calls within the (mainly Pentecostal and Evangelical) Christian community to not only spread the Christian message throughout Liberia, but to make it a legal Christian state.¹⁰⁰ Although such proposals are not given serious attention by the government and would certainly be overturned by the Supreme Court, there is still a tense debate which, although not yet violent, is certainly not getting any less impassioned.

⁹⁸ Constitution of the Republic of Liberia, Preamble, 1984.

⁹⁹ n 98 above, art 14.

¹⁰⁰ 'The Liberian Christian church and political salvation' *The Perspective* 21 June 2002; 'Bropleh plays with fire!' *The Analyst* 7 January 2008.

While it is not uncommon for countries in sub-Saharan Africa to be *de jure* secular states, yet *de facto* Christian states, many of these countries do not have as many non-Christian citizens as Liberia. As will be addressed below, the discrimination that non-Christian religions face makes the situation concerning religious freedom in Liberia considerably more problematic.

4.3 Christian bias in public life

4.3.1 Religion in schools

There are a number of private Christian and Muslim schools throughout Liberia which are permitted to teach the Bible or Koran and to conduct prayers, as long as they adhere to the basic requirements for curriculum. In public schools, however, according to the Education Law, religious education is forbidden: 'No special or sectarian religious instruction shall be given in the public schools of this Republic other than such general instructions in morals and ethics as the Ministry of Education shall by regulation require.'¹⁰¹ However, the Bible is taught as a major subject in all government schools from primary school to high school and is on the national curriculum as a required course. The Koran is not taught in public schools, and Muslim students do not have a legal option to opt out of Bible class. According to the Bureau of Curriculum, this law forbidding religiously-biased education is in the process of being revised.¹⁰²

It is also common for public schools to practise daily devotional (Christian) prayers in which Muslims are expected to take part. There have been reports of Muslim students not being allowed to use school facilities or be excused from class in order to perform their daily prayers, as there is no legal requirement for schools to allow them to do so. Such discrimination is sometimes fought against by the Muslim community. President Ibrahim Al-bakri Nyei of the Organisation of Liberian Muslim Youth (OLMY) once remarked that the government 'is deeply involved in evangelising Christianity in public schools at the expense of Muslim'. OLMY has made appeals to the Ministry of Education to introduce Islamic education in the public school curriculum, or at least general religious knowledge, but no changes to the curriculum have yet been made.¹⁰³ The Bureau of Curriculum is aware of these

¹⁰¹ Liberian Codes Revised, vol III, ch XIV, 94, 216.

¹⁰² However, nobody was able to show me any documentation of such changes. Personal interview with attorney Zeor Daylur Bernard, 8 April 2008; personal interview with Rev P Tehnesse Brohdonyeu, Bureau of Curriculum, Ministry of Education, 2 April 2008. See also 'Bropleh's call for religious tolerance is the right call, but patronising to gain political advantage is wrong' *The Liberian Dialogue* 8 January 2008.

¹⁰³ 'Muslims adopt 5-count resolution' *Daily Observer* 17 January 2008.

demands and claims to be addressing them in a new curriculum, yet to be released.¹⁰⁴

When asked for comment regarding this discrimination, most lawyers, officials, students and teachers, Muslim and Christian, alluded to the 'general tolerance' that most Christians had for Muslims, allowing them to perform their religious duties during school or work hours, despite there being no legal mandate to do so.¹⁰⁵ That said, whenever asked whether there should be a legal mandate, Christians generally insisted, 'No, this is a Christian country', while Muslims said they would welcome such changes. Whatever moves are made to formally make any changes to the laws involving religion, heated debates are likely to be the result.

4.3.2 Religious holidays

Liberia celebrates Christian holidays as national holidays along with non-religious holidays such as ex-presidents' birthdays, and requires all businesses to be closed on Sundays and holidays. Some members of the Muslim community have vocalised a desire for equal observance of their religious holidays, as well as time off on Fridays in order to pray and permission to conduct business on Sundays and Christian holidays. In one case, Muslim leaders took the issue of the ban on doing business on Sundays to the Supreme Court. Their efforts were ineffective, as the Supreme Court ruled that markets must be closed on Sundays on the grounds that they needed to be cleaned.¹⁰⁶ Although such legal actions are not at all common or widely supported, even within the Muslim community, there are periodic calls from Muslims to remove the Christian bias. For Christian leaders to suggest more rights for the Islamic population is extremely rare. When it does occur, it sparks an impassioned debate. A prominent example occurred in January 2008 when Minister of Information and Methodist Reverend Lawrence Bropleh publicly called for, among other things, the national recognition of Islamic holidays or the proscription of Christian holidays in order to achieve a Christian-Muslim balance in Liberia.¹⁰⁷

As we seek religious tolerance, our national legislature needs to revisit the exclusivity of national holidays granted to the Christian religion, and think of a more equitable religious arrangement ... I will even dare to recommend that we enact a legislation that will set a day aside at the height of the Muslim Hajj as a national holiday. Alternatively, all religious holidays

¹⁰⁴ Personal Interview with Rev P Tehnesse Brohdonyeu, Bureau of Curriculum, Ministry of Education, 2 April 2008.

¹⁰⁵ Based on personal interviews.

¹⁰⁶ US State Department 'Religious freedom' 2007.

¹⁰⁷ S Tewroh-Wehtoe 'Bropleh's call for religious tolerance is the right call, but patronising to gain political advantage is wrong' in Online Newspaper *The Liberian Dialogue* 8 January 2008 <http://www.theliberiandialogue.org/articles/c010808tws.htm> (accessed 30 September 2008).

could be declared as working holidays wherein those persons who are religiously inclined would seek time out to give special prayers and thanks to the Almighty God.

In churches, Pentecostal and mainline, in the media and on the street, these statements invoked a huge response, overwhelmingly critical of Bropleh's comments. Leaders of the Christian community, including the Liberian Council of Churches, which represents over 32 Christian denominations and organisations, immediately spoke out. A Baptist minister accused Bropleh of being 'anti-Christ'; another church commented that Bropleh was 'playing with fire and whipping up religious tension'. A civil society group, Disable Rights Watchdog for Peace Building and Democracy (DIRWAPDEM), went so far to say that Bropleh's comments clearly indicated that his belief system had been tampered with, that he needed to be delivered from the hands of satanic powers with a week of fast and prayer, that his licence as a UMC Minister should be revoked and that he should undergo spiritual counselling. President Sirleaf skirted around the issue, commenting that Bropleh has a right to hold 'personal' opinions on national issues, but that she was not in a position to comment any further. Even some Muslim leaders said the Minister's comments were not helpful and simply caused more religious tension.¹⁰⁸

4.3.3 Inflammatory public statements

It is not uncommon to hear inflammatory public statements that target the Muslim population in Liberia. Police director Beatrice Munah Sieh once condemned Muslim women dressed in veils, comparing them to terrorists and publicly declaring that they could not wear these. Despite this demand, there were no reports of arrest for such activity, and full veils are not a rare sight on the streets in Monrovia. President Sirleaf's religious advisor, Esther Nyameh, sparked controversy when she remarked that she would boycott any forum in which Muslims were allowed to offer prayer. After a public outcry from Muslim groups, she offered a public apology.¹⁰⁹ In January 2008 the high-profile (Christian) National Youth Council led by Reverend Manasseh Conto blamed Muslim extremists for burning down the Minister's house.¹¹⁰

This diabolical attack on the lives of Bishop Conto and his family is believed to be perpetrated by a group of Islamic (Muslim) extremists who have vowed to eliminate Pastor Conto as a means of silencing him from opening the eyes of the Liberian people on the Islamic faith, and his stand that Liberia be declared a Christian nation ... we see the burning down of the Bishop's residence as no accident, but rather a calculated plan by the agent of evil.

¹⁰⁸ *Analyst* (n 100 above).

¹⁰⁹ *As above*.

¹¹⁰ *Daily Observer* (n 103 above).

In addition, many Pentecostal and Evangelical churches are extremely numerous and vocal and very concerned with ridding Liberia of all Islam, a religion they consider to be equivalent to Satan worship. During loud outdoor crusades, on the radio, during street preaching, and from the pulpit, it is very common to hear the speakers asking God to rid Liberia of the demons of Islam. Spiritual warfare is a common theme; Christians are told that the devil is attacking them, and that the spread of Islam is making this threat more severe. Church leaders often encourage their members to focus on evangelising to the Muslim community, and doing whatever it takes to make them born again in Christ.¹¹¹

4.3.4 Weak public displays of religious equality and tolerance

There is one Muslim in the cabinet of President Sirleaf and one Muslim Supreme Court Justice.¹¹² There is little formal promotion of religious tolerance or anti-bias education in Liberia, aside from the Inter-Religious Council of Liberia (ICRL) which mostly concerns itself with general peace building and women's issues, not inter-religious dialogue specifically.¹¹³ There are sporadic actions or statements made by the President to show support for the Muslim community, such as donating rice at the end of Ramadan in 2007. High-level government officials are required to take oaths. Whoever is being sworn in has the choice of swearing on a Bible or Koran, then opening it and kissing it. Government meetings, NGO workshops and conferences generally open and close with Christian hymns and prayers, although occasionally these are mixed with Islamic prayers. In some cases they begin and end with a moment of silence. However, even this can be controversial.¹¹⁴

4.3.5 Opening religious institutions, regulation of religious institutions and proselytisation

In order for a religious institution to be opened and classed as non-profit, they must produce a constitution and articles of incorporation and apply through the Ministry of Foreign Affairs for approval. The process is straightforward. According to the Liberian Council of Churches (LCC), the ministry forwards all applications for Christian churches to their office for approval; they have yet to deny approval

¹¹¹ Based on author's own fieldwork.

¹¹² US State Department (n 106 above).

¹¹³ Based on author's work with them from January to July 2008; personal interviews with ICRL leaders Mohammad Sheriff and Rev Boimah Freeman throughout.

¹¹⁴ The author witnessed an impassioned hour-long debate regarding religion in Liberia, brought on because the agenda did not include an opening prayer, in a workshop for women's leadership in Liberia, sponsored by an INGO and attended by at least 60 influential women in government, business and civil society, 20 February 2008.

for any institution.¹¹⁵ In rural areas, it is expected that the chief is asked permission to open a new religious institution. They are generally tolerant of such activity, and in some cases have granted the church land on which to build a facility. In one case, the town chief of Medina, a Muslim-dominated area in Grand Cape Mount County, forbade a second church from opening after already giving permission to another.¹¹⁶ There is a huge amount of Christian mission activity throughout Liberia, mainly Evangelicals from the United States and United Kingdom. Legally they enjoy full freedom to work and generally face few restrictions in practice.

The specific activities of any religious group, once registered, are mostly unregulated by the government, provided the religious group is not breaking any statutory laws. Religious groups are classed as not-for-profit corporations, and there have been no formal moves, to this author's knowledge, to investigate whether or not some religious institutions are making an illegal profit. Information Minister Lawrence Bropleh once called on churches to report their earnings and explain what they did with the money. In response, 20 pastors collectively issued a statement calling him the 'anti-Christ'.¹¹⁷ No legal actions were ever taken regarding this matter. It is almost certain that many pastors and overseers of some churches, especially those of the Pentecostal and charismatic variety that preach the gospel of prosperity, are making a very good amount of money and using it to purchase personal automobiles, houses, clothing, trips abroad, and the like. By their theology, such wealth is considered to be legitimate, and prosperity is essential to their faith. Therefore, even if they were brought to court regarding their non-profit status, it would probably be difficult to get a conviction. Of course, such issues are by no means limited to the African context.¹¹⁸

In general, there is great freedom for religious proselytisation. In practice, there is far more vocal Christian activity than Muslim activity, in the form of loud crusades and church services, free tracts, street preachers, posters, banners, and sermons on the radio. Muslims are sometimes heard preaching in front of mosques, and they are largely tolerated, although in many churches, people vocalise that such Muslim preaching invokes demons to attack Christians, so they should sing and pray louder to combat it. There are no laws to regulate the

¹¹⁵ Interview with J York, LCC, 30 March 2008.

¹¹⁶ Personal interviews in Medina, GCM, February 2008. Also based on interviews with Africa for Jesus, a Christian missionary organisation focused specifically on entering Muslim areas to open churches.

¹¹⁷ 'In praise of the Almighty God or the almighty dollar?' *The New Democrat* 15 October 2007.

¹¹⁸ See especially the recent US Senate investigation into six prominent evangelists: 'Senator questions ministries on spending' *The New York Times* 7 November 2007; 'Televangelist preaches prosperity — and relatives gain it' *Chicago Tribune* 27 July 2008.

volume of a worship service, or the hours in which they may go on. For larger gatherings in public fields, the church is required to register with the government, a procedure that is straightforward and non-discriminatory.

4.3.6 Religiously-motivated violence

Despite these incidences of Christian bias, discrimination and heated debate, there have been no substantiated incidents of religiously-based violence and few reports of religiously-motivated murder or assault, although this may just be due to a lack of reporting. In 2007, five men in Grand Gedeh County were sentenced to life imprisonment for the September 2005 beheading of Hastings Tokpah, who refused to join a traditional Poro society because he was a Christian.¹¹⁹ It is believed that such killings are relatively commonplace, especially in rural areas. Quite possibly the mere threat of violence or oppression upon an individual who might refuse to join such a society might be considered a violation of his or her right to practise whatever religion he or she chooses. The power that Zoes and other traditional religious leaders have over their people in rural areas must not be understated. One well-established NGO president who has worked in Northern Liberia for over 20 years described it as nothing more than a 'reign of terror' on the people, which has increased in intensity since the war ended.¹²⁰

Both during and after the war, there were periodic reports of churches or mosques being burned down. However, these attacks were aimed at ethnicity, not religion specifically. Riots occurred in 2004 in Jacobstown, Monrovia, and a number of churches and mosques were burned. Initially, this was reported as a conflict between Christians and Muslims, but after investigation it was discovered to have erupted over a land dispute between Mandingo and other non-Muslim ethnic groups, not over religious matters.¹²¹ These events highlight the difficulty in determining the extent to which incidents during Liberia's civil crisis, which in many cases turned Christians against Muslims solely because of the ethnicity, might have fuelled religious tension, and to what degree this tension remains and could lead to specifically religious violence in the future. Although many Liberians might argue that there seems to be great tolerance between Muslim and Christians, any in-depth consideration of these two groups, given the recent history of Liberia and current attitudes among believers, raises the great need

¹¹⁹ US State Department (n 106 above).

¹²⁰ Personal interview, June 2008.

¹²¹ J York 'A study of the events leading to the October, 28 2004 violence in Jacobstown, Paynesville' June 2007, unpublished paper in author's possession.

to address these existing tensions before they are manifest in increased discrimination or violence.¹²²

5 Conclusion

This essay has only skimmed the surface of the issues and problems surrounding religion, law and human rights in Liberia. A few issues are clear and require much more discussion and debate, both in academia and in Liberian public life. Overall, with respect to the current state of the Liberian justice system, one must question how human rights can be promoted in a scenario where customary laws and traditional religious practices are widely considered to be more legitimate than statutory and human rights laws. This is due to a number of factors. First, because of the dual-system of law in Liberia, a large proportion of Liberians are unaware of their human rights. In many cases these human rights contradict their cultural and religious practices under customary law. Therefore, even if they did know about their statutory and human rights, they might not necessarily respect them. Second, a major challenge stems from the current dysfunctional state of the justice system in Liberia. People generally have little trust in these institutions. Because they fall under the jurisdiction of humans, many of whom have proven themselves to be endlessly fallible, untrustworthy, inaccessible and undependable, it will be very difficult to discourage recourse to traditional and sacred justice mechanisms that are legitimised by the spirit world, which does command great respect. That trial by ordeal is still widely considered to be legitimate indicates a notion of causality that is not necessarily conducive to a respect for profane systems of statutory law.

With respect to the level of religious freedom in the country, one must consider whether or not promoting religious equality and actively eliminating the Christian bias might cause more harm than good in Liberia today. Several factors might make such efforts highly problematic. First, the lack of public understanding or appreciation for what constitutes a 'secular' state makes it difficult to even begin a legitimate dialogue concerning religious freedom and equality. Second, the tendency for high-profile Liberians to largely avoid addressing certain controversial topics that might inflame sentiments, cause debate or 'open old wounds', for the sake of keeping peace, makes it difficult to address a variety of issues relating to human rights. This is especially relevant when it comes to the government's reluctance to address in

¹²² York concludes that the Jacobstown violence 'has therefore gone way ahead in justifying these suspicions of Christians in Liberia about Muslims and obviously worsened the relations of Christians and Muslims in Jacobstown in particular, to the extend [sic] that people in the community do still entertain the fears that any little discord has the propensity to cause a flare-up between the two groups'; n 121 above, 64-68.

any serious capacity the tensions between Muslims and Christians. That said, it should be noted that any premature attempts to address it might simply generate further unrest. Third, the powerful influence that traditional religious leaders have over their communities in rural areas should not be overlooked as a form of widespread and active religious oppression. However, regulating such practices might be considered an attack on Liberian culture. Finally, the growing tendency for Pentecostal Christian churches to indoctrinate their members, many of them young children who also attend Evangelical Christian schools, with an ideology so focused on spiritual warfare and the African traditional religion and Islamic threat, must be considered to be counterproductive in encouraging religious tolerance and respect for religious freedom. Many are toeing the line of actively promoting religious intolerance, inequality, and therefore, perhaps coming close to violating human rights law. However, to regulate the ideology of a religious group is not only contrary to freedom of religion, but if it were done, many of these churches would perceive it as an attack by the 'agent of evil', further generating religious tension.

The extent to which all of these issues may in fact impede the peace-building and reconstruction efforts, increase religious tensions or engender religious violence, is yet to be seen, but in such a fragile country that is improving so slowly and is home to hundreds of thousands of demoralised, poor and uneducated citizens, one can see the potential danger it not giving these issues serious and thoughtful attention.

Law, religion and human rights in Botswana

Emmanuel Kwabena Quansah*

Professor of Law, Department of Law, University of Botswana, Gaborone, Botswana

Summary

Religion is universally recognised as a fundamental and inalienable right. It comprises a set of common beliefs and practices generally held by a group of people, codified as prayer, ritual, religious law as well as cultural and ancestral traditions and myths. In Botswana, religion plays a significant part in the lives of the majority of people. The constitutional framework within which religion is practised allows freedom of religion and a number of legal provisions exist to protect this freedom. This article appraises the current state of religious freedom in Botswana in the context of constitutionally guaranteed human rights. It concludes that the basic framework established by the Constitution creates a separation of religion and state and provides the enabling environment for the exercise of freedom of religion. Consequently, it has ensured the requisite social harmony not only for continuous development, but also for continuous enjoyment of freedom of religion.

1 Introduction

Religion is universally recognised as a fundamental and inalienable right of man.¹ It has been defined in a wide variety of ways,² but for

* LLB (Hons), LLM (London), LLD (UNISA); quansahe@mopipi.ub.bw

¹ See eg sec 26 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (UN General Assembly Resolution 36/56 of 25 November 1981; sec 3 of the Universal Declaration of Human Rights (UN General Assembly Resolution 217A of 10 December 1948); sec 21 of the International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200 of 16 December 1966); and art 8 of the African Charter on Human and Peoples' Rights 1981/1986.

² See eg GA Lindbeck *Nature of doctrine* (1984) 33 and L Jones (ed) *Encyclopedia of religion* (2005) 7692-7701. For the problems in defining religion, see JG Platvoet & AL Molendijk (eds) *The pragmatics of defining religion: Contexts, concepts and contests* (1999) especially 260-261; JM Donovan 'God is as God does: Law, anthropology, and the definition of "religion"' (1995) 6 *Seton Hall Constitutional Law Journal* 23 70; GC Freeman 'The misguided search for the constitutional definition of "religion"' (1983) 71 *Georgetown Law*

the purposes of this paper religion will be defined as a set of common beliefs and practices generally held by a group of people, often codified as prayer, ritual and religious law. Religion also encompasses ancestral or cultural traditions, writings, history and mythology, as well as personal faith and mystic experience. Thus, as will be seen below, many Batswana³ blend Christian beliefs with aspects of traditional beliefs such as ancestral worship. Religion in Botswana has been fashioned by a combination of factors, which include the introduction of foreign monotheistic religions such as Christianity and Islam, the activities of foreign missionary groups, such as the London Missionary Society (LMS), the colonial subjugation of the indigenous people and the emergence of the modern state.

Before the advent of colonialism in Bechuanaland⁴ (as Botswana was formerly known before its independence on 30 September 1966), the majority of the people who inhabited the territory, the Tswana, like most Africans believed in a supreme being, Modimo ('the one out there').⁵ This being was described in anthropomorphic terms. He could see, hear, get angry, forgive, answer and so on.⁶ The Tswana also believed in ancestral spirits (*badimo*). The dead were considered to continue to exist in a spiritual form, and they served as mediators between the living and God. Spirits could also neglect or punish the living; they could forgive, protect and come closer to them in times of need. When they were angry, the spirits were able to bring disease, misfortune, or death. Certain rituals had to be performed to make them happy. Some of these practices, such as birth rites to protect a child from disease and bad spirits and marriage rites to ensure that couples do not divorce, live on today.⁷ These beliefs later became a source of conflict with Christian missionaries, who believed, for example, that the worship of the Tswana deity, Modimo, amounted to nothing more than idol worship.⁸

The traditional concept of the supreme being was seriously undermined during the first half of the eighteenth century by missionaries

Journal 1519; and TJ Gunn 'The complexity of religion and the definition of "religion" in international law' (2003) 16 *Harvard Human Rights Journal* 189 191.

³ A name used to describe the people of Botswana.

⁴ For an insight into the establishment of the Bechuanaland Protectorate, see J Ramsay 'The establishment and consolidation of Bechuanaland Protectorate, 1870-1910' in WA Edge & MH Lekorwe (eds) *Botswana, politics and society* (1998) 62.

⁵ Recent archaeological findings of carvings about 70 000 years old on a snake-like rock in a cave in Botswana indicate that Stone Age people developed religious rituals far earlier than previously believed. These carvings are believed to be evidence of the oldest religion in the world; <http://www.namibian.com.na/2006/December/africa/0660AC849A.html> (accessed 30 September 2008).

⁶ See L Nyati-Ramahobo 'The language situation in Botswana' (2000) 1 *Current Issues in Language Planning* 243 254.

⁷ Nyati-Ramahobo (n 6 above) 255.

⁸ See JN Amanze *Ecumenism in Botswana — The story of the Botswana Christian Council* (2006).

from the LMS, notably the Scottish Congregationalist, Robert Moffat, and his son-in-law, Dr David Livingstone, and African missionaries from South Africa who brought Christianity to Bechuanaland.⁹ The LMS's initial task was to convert each of the paramount chiefs of the eight major tribes¹⁰ of Bechuanaland to Christianity. By the last part of the nineteenth century, Christianity was established as the official religion of the Kwenana, Ngwaketse, Ngwato and Tawana under the auspices of the LMS and the Kgatla under the auspices of the Dutch Reformed Mission (DRM).¹¹ In the early twentieth century, the allegiance to the 'tribal' state churches was challenged by the advent of other Christian missions, such as Anglican, Roman Catholic, Seventh Day Adventist and the Zion Christian Church, and attendance in the 'tribal' churches rapidly declined. This initial incursion into the 'tribal' state churches was followed by a second wave of incursion by the Apostolic/Pentecostal churches as well as the United Reformed (Congregational and Methodist) churches. There are also predominantly expatriate Muslim, Quaker, Hindu and Baha'i congregations in major towns. Consequently, the contemporary religious outlook of Botswana consists of multi-faith adherents, whose outlook is emphasised by the Constitution's adherence to secularism and the guarantee of fundamental human rights, including freedom of conscience, which embodies freedom of religion.¹²

The relationship between human rights and religion dates back to ancient times. It has been said that the Persian empire of ancient Iran established unprecedented principles of human rights in the sixth century BC under Cyrus the Great. After Cyrus conquered Babylon in 539 BC, he issued the 'Cyrus cylinder', considered by many today to be the first human rights document. The cylinder declared that citizens of the empire would be allowed to practise their religious beliefs freely, with adherents of different religions having the same rights. The cylinder also contained protection of such rights as liberty and security, freedom of movement and economic and social rights.¹³ St Thomas Aquinas, the Catholic philosopher, successfully synthesised Aristotelian teleology and Christian dogma to produce a comprehensive doctrine of natural law which had a great influence on legal thinking in his day and subsequently.¹⁴ In the modern era, further developments on the

⁹ See N Parsons *The Botswana history pages* ch 11 <http://ubh.tripod.com/bhp11.htm> (accessed 5 January 2008); Nyati-Ramahobo (n 6 above) 255.

¹⁰ These were the Ngwato, the Tawana, the Kwenana, the Ngwaketse, the Kgatla, the Maletle, the Rolong and the Tlokwa.

¹¹ Parsons (n 9 above). See also SN Parratt 'Religious change among women in urban Botswana' (1995) 25 *Journal of Religion in Africa* 73-74.

¹² See ch II of the 1966 Constitution.

¹³ See AH Robertson & JG Merrills *Human rights in the world: An introduction to the study of the international protection of human rights* (1996).

¹⁴ See his *Summa theologiae* (1265-1274).

international plane took place after the two world wars.¹⁵ In Africa, the decolonisation process accelerated the protection of human rights by the inclusion, within the various independence constitutions, of a set of internationally-recognised human rights. The 1966 Botswana Constitution followed this trend and included a chapter on human rights.¹⁶ The Constitution is the supreme law of the country and any law that is judged to be inconsistent with it is void to the extent of such inconsistency.¹⁷ Consequently, by enshrining and entrenching human rights in the Constitution, these rights were elevated to the status of supreme law. This was done to ensure that, irrespective of the nature or predilections of the government in power, the individual is able to assert these rights and freedoms without reliance on the goodwill or courtesy of the government.¹⁸

2 Religious demography

Botswana is approximately 581 730 square kilometres (224 710 square miles in size, about the size of Texas (USA) and slightly larger than France), two-thirds of which is covered by the Kalahari Desert. Botswana's population is currently estimated to be 1 800 000,¹⁹ almost all of whom are indigenous Africans and who live mainly in the east of the country. The country is ethnically more or less homogenous, the majority of the population being Tswana, a southern Bantu people closely related to the Sotho of Lesotho and South Africa.²⁰ A small section of the population consists of Kalanga, Basarwa and Herero people. The non-African population consists of Europeans, mainly of British, Afrikaans and Asian origin. The social and cultural values of the country are embodied in four principles, namely, (1) democracy (*puso ya batho ka batho*); (2) development (*ditiro tsa ditlhabololo*); (3) self-reliance (*boipelego*); and (4) unity (*popagano ya sechaba*). These principles are derived from traditional culture and are designed to promote social harmony (*kagisano*).

Although the Constitution does not advocate a state religion,²¹ statutory observance of Ascension Day, Easter and Christmas makes

¹⁵ Eg, the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly.

¹⁶ See CM Fombad 'The protection of human rights in Botswana: An overview of the regulatory framework' in CM Fombad (ed) *Essays on the law of Botswana* (2007) ch 1.

¹⁷ See *Petrus & Another v The State* [1984] BLR 14 33 and *Attorney-General v Unity Dow* [1992] BLR 119 129 166.

¹⁸ See *Dow* (n 17 above) 148.

¹⁹ See <http://www.prb.org> (accessed 28 February 2008). The 2001 Population Census gave the population as 1 680 863.

²⁰ See <http://strategyleader.org/profiles/tswana.html> (accessed 5 January 2008).

²¹ See DD Nsereko 'Religious liberty and the law in Botswana' (1992) 34 *Journal of Church and State* 843.

Botswana unofficially a Christian country.²² It is said that a total of eight world religions are represented in Botswana, namely, African traditional religions, Christianity, Islam, Hinduism, Buddhism, Baha'i, Sikhism and Judaism.²³ The oldest of these in the context of Botswana is said to be African traditional religions.²⁴ These are as old as the Tswana people themselves. They have no specific founders, no sacred scriptures, no written theologies and no missionaries. They are embodied in the blood stream of the people themselves.²⁵

It is estimated that 70% of the population identify themselves as Christians.²⁶ Christian churches may be grouped into three categories, namely, (1) mission churches, which arrived because of missionary work in Africa; (2) Pentecostal churches; and (3) independent churches, mainly of African or specifically Tswana origin.²⁷ A denominational classification of Christian churches in Botswana includes Roman Catholics, considered to be the largest, Lutheran, Presbyterian, Anglican, Congregational, Methodist, Baptist, Seventh Day Adventist, Pentecostal and independent churches,²⁸ the most prominent being the Zion Christian Church (both Star and Dove branches) based in South Africa. They are called 'independent churches' because they are free from western control and leadership. They also draw their membership predominantly from Africans, especially the working class and the marginalised. Adherents of the Islamic faith are said to number some 5 000 people,²⁹ Hinduism attracts some 3 000 people and the Baha'i faith some 700 adherents. Some 20% of the population does not subscribe to any religion.³⁰

²² See Public Holidays Act (Cap 03:07) and Government Notice 506 of 2007. In 2008, the following Christian days will be observed as public holidays: Good Friday 21 March; Easter Monday 24 March and Ascension Day 1 May.

²³ See Amanze (n 8 above) 229.

²⁴ As above.

²⁵ As above.

²⁶ See *Botswana: International Religious Freedom Report 2007* released by the US Bureau of Democracy, Human Rights and Labour on 14 September 2007. The *World Christian encyclopedia*, OUP, Vol 1 (2001) 126 gives the religious demography as follows: Christians 59,9%; Independent 30,6%; Protestant 11,0%; Roman Catholic 3,7%; Anglican 0,7%; Marginal 0,3%; Ethno religious 38,8%; Bahai 0,8%, Muslim 0,2%; non-religious 9,1% and Hindus 0,1%. The Joshua Project gives the following religious breakdown: Buddhism 0,1%; Christianity 66,3%; Ethnic religion 32,3%; Hinduism 0,1%; Islam 0,2%; non-religious 0,2%; other/small 0,8%. See <http://www.joshuaproject.net> (accessed 28 February 2008). Parsons (n 9 above) cautions about statistics relating to Christian affiliation and church members as membership of independent churches is hard to measure and is often overlooked.

²⁷ See Nyati-Ramahobo (n 6 above) 256 and Amanze (n 8 above) 3-40.

²⁸ See J Amanze *A history of the ecumenical movement in Africa* (1999).

²⁹ For an insight of Muslims in Botswana, see SN Parratt 'Muslims in Botswana' (1989) 48 *African Studies* 71-82.

³⁰ See *International Religious Freedom Report 2007* (n 26 above).

3 Legal and policy framework

3.1 The Constitution

Chapter II of the 1966 Constitution contains a Bill of Rights guaranteeing certain fundamental rights and freedoms of the individual.³¹ Section 3 of the Constitution declares that every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, to enjoy these rights and freedoms whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to the rights and freedoms set out under the Constitution. This section is the key or umbrella provision in chapter II, under which all rights and freedoms protected under that chapter are to be subsumed.³² These rights and freedoms are referred to as fundamental because they are basic to the individual's continued existence as a rational being. They are said to help to distinguish him from other rational beings, animate or inanimate, which have no conscience or power of reason.³³ They are inherent in his very nature. Thus, article 1 of the Universal Declaration of Human Rights (Universal Declaration) proclaims that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'³⁴ It is in this spirit that the enshrined rights in the Constitution are to be viewed.³⁵

However, there is no particular provision in the Constitution dealing with the right to self-determination of cultural communities. This omission may be explicable on the basis that when the Constitution was promulgated, this type of right was not in vogue. It forms part of the so-called third generation human rights; rights that go beyond mere civil political and social rights.³⁶ Although the Constitution has subsequently been amended to take into account certain contemporary issues,³⁷ the right to self-determination has not been a topical issue warranting its consideration as a subject for inclusion in the Constitution. There have been some attempts by some cultural

³¹ See secs 3-19 of the Constitution.

³² See *Dow* (n 17 above) 133.

³³ See *Nsereko* (n 21 above) 844.

³⁴ As above.

³⁵ See *Kamanakao I & Others v Attorney-General & Another* [2001] 2 BLR 654 666.

³⁶ These rights have not been concretised and include an extremely broad spectrum of rights such as the right to self-determination, the right to a healthy environment and the right to participation in cultural heritage. See generally K Vasak 'Human rights: A thirty-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) *UNESCO Courier* 30:11.

³⁷ See Constitution (Amendment) Act, 2005, dealing with such issues as sex discrimination, reform of the House of Chiefs and the establishment of the office of Director of Public Prosecutions.

communities to assert their rights as a community. In *Kamanakao I and Others v Attorney-General and Another*,³⁸ for example, the applicants (a paramount chief of the Wayeyi tribe, a society which promoted the Shiyeyi culture and language and a senior Wayeyi tribesman) applied to the High Court under the provisions of section 18 of the Constitution³⁹ for the nullification of sections 77 to 79⁴⁰ of the Constitution and section 2 of the Chieftaincy Act⁴¹ as unconstitutional, as they discriminated against their tribe and denied them and their tribe their rights in terms of sections 3 and 15 of the Constitution.⁴² The Court held that it had no power to order that the said sections be amended. To be able to do so, it was its view that the Court needed to have expressed powers from the Constitution enabling it to be a revisionary instrument for the alteration of the Constitution. The Court, however, observed that:⁴³

There is no doubt that under the wide definition of the expression 'discriminatory', the treatment given to the Wayeyi and other tribes by omitting their tribe from having an *ex officio* member in the House of Chiefs under the provisions of section 77(2)(a) amounts to unfairness and discrimination which, if not justified, is intolerable. They are subjected to a disability which the named eight tribes do not suffer; or put in another way these eight tribes have a privilege or advantage which is not accorded to the Wayeyi.

Subsequent to the case, a constitutional amendment has been enacted to address the issues raised in the case.⁴⁴

The controversial resettlement of the Barsarwa (San), who inhabit mainly the Central Kalahari Game Reserve (CKGR) in the Kalahari Desert, has become a topical issue in recent years. It centres on the government's policy of resettling them outside the CKGR in order to preserve the wildlife in the reserve for tourism in spite of criticism by

³⁸ n 34 above.

³⁹ The section provides for a general machinery for the enforcement of fundamental rights and freedoms by providing that any person who alleges that any of the provisions has been, is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress.

⁴⁰ Sec 77 provided for a House of Chiefs consisting of eight *ex officio* members, four elected members and three specially elected members (now see sec 11 Constitution (Amendment) Act 2005). Sec 78 made it clear that the *ex officio* members shall come only from those who are acting as chiefs in the eight 'principal tribes' of the majority Tswana ethnic group and sec 79 provided for the four elected members to be drawn from some smaller specified tribes (now see secs 12 & 13 Constitution (Amendment) Act 2005).

⁴¹ This section defines a 'chief' as a chief of one of the principal Tswana tribes.

⁴² This section provides for the protection from discrimination on the grounds of race, tribe or place of origin.

⁴³ 671.

⁴⁴ See n 37 above.

national and international non-governmental organisations (NGOs).⁴⁵ This culminated in the case of *Sesana and Others v Attorney-General*,⁴⁶ in which the Barsarwa won a right to return to the CKGR. The Barsarwa are an indigenous group whose numbers are not only rapidly declining, but their language, culture and way of life risk extinction with all the consequences that this entails for the cultural diversity of the country, yet no positive measures have been taken to arrest the situation.⁴⁷

3.1.1 Freedom of conscience

The right or freedom germane to the discussion in this paper is that of freedom of conscience. This right is enshrined in the Constitution and machinery is provided for its enforcement.⁴⁸ Freedom of conscience entails the freedom to hold or consider a fact, viewpoint or thought regardless of anyone else's view. Freedom of thought hinges on the freedom of the individual to believe whatever he or she thinks is best and freedom of religion is closely related and inextricably bound up with these. Section 11 of the Constitution guarantees freedom of religion in the following terms:

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.
- (2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which it wholly maintains or in the course of any education which it otherwise provides.
- (3) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.
- (4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.
- (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the

⁴⁵ On the resettlement policy, see DG Boko 'Integrating the Basarwa under Botswana's Remote Area Development Programme: Empowerment or marginalisation?' (2002) *Australian Journal of Human Rights* 19.

⁴⁶ [2006] 2 BLR 633.

⁴⁷ See CM Fombad 'The constitutional protection against discrimination in Botswana (2004) 53 *International and Comparative Law Quarterly* 139 160.

⁴⁸ See n 33 above.

extent that the law in question makes provision which is reasonably required -

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Although religious freedom is defined in the negative, the provisions clearly demonstrate not only its multi-faceted nature, but also the non-preference of any particular religion over others. There is no state religion;⁴⁹ rather the provisions provide a framework within which all and sundry may practise whatever religion they profess subject only to considerations of the protection of freedoms of others, and in the interest of defence and public morality. Freedom of religion includes the right to have a religion or not to have one at all and the right to change one's religion. It also includes the right to manifest one's religion. As aptly observed by one writer:⁵⁰

It is quite one thing to say that in the solitude of one's own mind there is freedom of belief. It is quite another — and for our purposes a much more important — thing to acknowledge a right to act out the tenets of one's belief, particularly in the company of others.

It further recognises one's right to propagate his or her religion.

Proselytising or converting other people to one's own religion is permissible. Such conversion must be voluntary without any force, duress or undue influence being exercised on the convert. In this regard, the right of a religious community to establish and maintain educational facilities is recognised. Three of the prominent senior secondary schools in Botswana, Moeding and Moeng Colleges and Maun Secondary School, were built by the LMS. Educational institutions set up by religious bodies do not only teach their religion but teach secular subjects as well. This serves to assist adherents to relate secular knowledge to their religion.⁵¹

It must be noted that there has been no recorded conflict between religious communities over the years.⁵² Consequently, one can assert

⁴⁹ There is some evidence, however, of Christian preference by the statutory observance of Christian events as public holidays. See n 18 above.

⁵⁰ See RS Clarke 'The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (1983) 31 *Chitty's Law Journal and Family Law Review* 23.

⁵¹ See Nsereko (n 21 above) 847.

⁵² In 2004, however, there was reported to have been a minor controversy over some stores' practice of buying halal products, particularly chicken, which was alleged to unfairly favour Muslims at the expense of others. This led to public comments in newspapers, but this did not translate into any discrimination or antagonistic attitudes towards Muslims. See US Department of State's *International Religious Freedom Report 2005* released on 8 November 2005.

that there exists an amicable relationship among religious communities in Botswana.

3.1.2 Protection of freedom of religion

A number of provisions are in place to protect freedom of religion. The Constitution forbids discrimination on the basis of religion although this is not expressly stated. Section 15(3) of the Constitution prohibits discrimination on the basis of one's creed. What constitutes creed is not defined, but a variety of dictionaries define creed almost exclusively in terms of religious beliefs.⁵³ It is therefore conceivable that the courts will interpret creed broadly to include religious beliefs in order to afford protection against discrimination on the basis of one's religion. It must be pointed out, though, that in *Attorney-General v Unity Dow*⁵⁴ it was said, in terms of section 15(3) of the Constitution, that '[a]rguably religion is different from creed'. This statement notwithstanding, it is submitted that the essence of the *dicta* in which this statement was made is not that creed should be protected under the Constitution whilst religion should be excluded, but that, even though religion was not specifically mentioned, it might nevertheless be considered a right protected from discrimination under section 15 of the Constitution.⁵⁵

The Penal Code 1964 (as amended) makes it an offence for any person to destroy, damage or defile any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons.⁵⁶ It is also an offence under the Code for any person to cause disturbance to any religious assembly,⁵⁷ trespass on burial places,⁵⁸ hinder the burial of the dead,⁵⁹ and write or utter words with intent to wound religious feelings.⁶⁰ Conviction for any of these offences may attract a term of imprisonment not exceeding two years with or without a fine, or both.⁶¹ It is a measure of the maturity and tolerance of Botswana that these laws have remained largely paper tigers. A search in the law reports reveals no reported

⁵³ See eg *Oxford dictionary of current English* which defines creed as '[system of] beliefs or opinions, especially on religious doctrine'.

⁵⁴ n 17 above, 147 per Amissah JP.

⁵⁵ See RC Blake & L Litchfield 'Religious freedom in Southern Africa: The developing jurisprudence' (1998) *Brigham Young University Law Review* 515-562.

⁵⁶ See sec 136.

⁵⁷ Sec 137.

⁵⁸ Sec 138.

⁵⁹ Sec 139.

⁶⁰ Sec 140.

⁶¹ See sec 33 of the Penal Code which provides general punishment for offences for which no punishment is prescribed. Of the offences created by secs 136-140, only sec 140 provides a specific punishment for the infringement of the offence created by that section. The rest do not specify the punishment for their infringement, hence the general provision in sec 33 applies.

case in which a prosecution for infringement of these offences had been brought before the courts.

3.1.3 Constitutional limitation on religious freedom

The religious freedom guaranteed under the Constitution is not expressed in absolute terms. The proviso to section 3 of the Constitution provides that the enjoyment of the rights and freedoms is subject to such limitations as are designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.⁶² This proviso complies with article 29(2) of the Universal Declaration, which provides as follows:

In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are deemed by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

Furthermore, as seen from the provisions of section 11(5) of the Constitution set out above, it is permissible to limit the enjoyment of freedom of religion in the interest of national defence, public safety, public order, public morality, public health, or for the protection of the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion. However, such limitations must be deemed reasonably justifiable in a democratic society.

In the light of the above, there are in place some limitations on freedom of religion. For example, under section 66(2)(b) of the Penal Code 1964, the President is empowered to declare any society which is dangerous to the peace and order of Botswana to be unlawful. Any person who assists in the management of such a society will be guilty of a criminal offence. This provision may be used to declare a religious society engaged in subversive activities under the guise of propagating their religion dangerous and thus be prohibited from carrying on its activities. Section 47 of the Code further empowers the President, in his absolute discretion, to declare any publication he considers to be 'contrary to the public interest' to be a prohibited publication. Furthermore, under the Code, the police have the power to declare any meeting, which will include a religious meeting, to be an 'unlawful assembly' or 'a riot'.⁶³ Once again, like the laws geared towards the enhancement of freedom of religion, these possible limitations on freedom of religion have remained largely unused due to the relative tolerance of religious opinions in the country.

⁶² See *Kamanakao* (n 34 above) 669.

⁶³ See secs 74-79 of the Penal Code.

Another possible area in which the law may intervene to limit one's freedom of religion to protect the freedom of other persons is in the area of parental rights *vis-à-vis* their children. There are religious sects in Botswana, notably, the Jehovah's Witnesses, which advocate abstinence from any or specific forms of medication or hospitalisation for their adherents. They fervently believe in spiritual healing without the intervention of medical science. There is bound to be a conflict between this stand and the requirement of the law that any person who omits to do any act which it is his duty to do by which omission harm is caused to any person is guilty of an offence.⁶⁴ In *State v Motlogelwa*,⁶⁵ the failure of a parent to provide health care to his child was the subject of the prosecution of the accused. Two of his children contracted measles. A community health nurse, a public health inspector, a counselling nursing matron and the police repeatedly advised him to take the children to the hospital, but he refused to do so on account of his religious beliefs. He simply prayed and gave them water. The children eventually died and he was charged with failing to provide them with health care and consequently endangering their lives. The accused was a member of the Immanuel Church of God in Zion. He testified:

I am a believer in God and his son Jesus Christ. I used to attend hospital but since God converted me, he gave me power on the book of Isaiah where my spirit was warned that God's spirit is in me that I was chosen to preach to the whole world the Good News, to tell the oppressed of liberation, that prisons are open, to order that those who are not happy be clothed with happiness ... There is no other God that I obey. No medicine enters my mouth or any of my children.

The court rejected his religious belief as a lawful excuse for omitting to take his critically ill children to hospital for treatment. The court held that the Constitution does not provide 'wholesale religious rights for anybody to practise or propagate their religion in complete disregard of the rights of others or the laws of this country'. The court was also of the view that 'the accused's religious belief in the instant case is subordinate to the law that imposes a duty on him to provide the necessities of life to his children ...' The accused was convicted and sentenced to three years' imprisonment and a fine of P600 (approximately US \$101) or six months' imprisonment in default of payment. Commenting on the case, a learned writer opines that, while adults are entitled to make decisions which may adversely affect their health or life, the state has a right to ensure that such decisions do not cover their minor children.⁶⁶ Support for the court's decision can be found

⁶⁴ See sec 240 of the Penal Code. A similar offence is created by sec 11(2) (b) of the Children's Act 1981.

⁶⁵ Criminal case KN17/1990, Kanye Magistrate's Court (unreported) confirmed by the High Court in Review Case 155/1990 (unreported) but set out in Nsereko (n 21 above) 854-855.

⁶⁶ See Nsereko (n 21 above) 855.

in article 5(5) of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.⁶⁷ The said article provides that '[p]ractices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development', taking into account that freedom to manifest one's religion or belief may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Apart from the above there are no legal impediments in the way of African indigenous religions. Most Batswana are as likely, in time of crisis or ill health, to seek help from a traditional healer as they are likely to visit a priest or a hospital. As stated above, traditional rituals are invoked at naming ceremonies of children and at marriages to ask for the intervention and approval of ancestors.

3.2 State policy

As indicated above, the Constitution does not prefer one religion over others and this is reflected in official policy towards religious communities. Although it is common at government functions to begin with a Christian prayer, members of other religious groups are not excluded from offering non-Christian prayers at such occasions. On such occasions, such as Independence Day celebrations, it is common practice to have prayers from a wide variety of faiths, time and circumstances permitting. However, the statutory observance of certain Christian events as public holidays is indicative of the preference given to Christianity.⁶⁸ This notwithstanding, other religious groups are allowed to commemorate their religious holidays without state interference. Despite this apparent preference for Christianity, the state does not impose the tenets of Christianity on the country. Thus, commercial activities are allowed on Sundays,⁶⁹ the acknowledged day of rest for Christians, and marriages (be it polygamous or otherwise) contracted in accordance with Muslim, Hindu and other religious rites are recognised and given legal validity.⁷⁰ Other religions are allowed to establish schools and to teach their religions. The national policy on culture encourages tradi-

⁶⁷ See n 1 above. See also DJ Sullivan 'Advancing the freedom of religion or belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 487.

⁶⁸ See n 22 above. Other evidence of preference for Christianity is found in the introduction to the Ministry of Education's Religious Education Syllabus for Senior Secondary Schools. It states: 'The syllabus takes cognisance of the religious pluralism of the society of Botswana. All learners are expected to do Christianity and then they can choose any other two religions.' See http://www.moe.gov.bw/downloads/BGCSE_RE.pdf (accessed 30 September 2009).

⁶⁹ See Shop Hours (Extended Hours) Order 1990 (as amended).

⁷⁰ See part II of the Marriage Act 2000.

tional beliefs that are not in conflict with modern religion and social ethics.⁷¹

The overall state policy on religion is that it provides the requisite legal framework within which multi-faceted religious practices may be undertaken. This is in compliance with its constitutional obligation to ensure that no person shall be hindered in the enjoyment of his freedom of conscience. As noted earlier, many legal provisions are in place to ensure the enjoyment of this freedom with the minimum of state interference.

There is, however, a legal requirement that all societies, including religious organisations, register under the Societies Act of 1972.⁷² No legal benefits, such as conferment of body corporate status, are derived from registration.⁷³ However, a society must be registered before it can conduct business, sign contracts or open a bank account. Any society that is not a registered society or an exempted society⁷⁴ is deemed to be an illegal society.⁷⁵ It has been reported that between July 2006 and May 2007, 69 religious groups registered under the Act and a further 256 applications were automatically terminated after their failure to submit the requisite forms, fees or constitution within the stipulated 90 days under the Act.⁷⁶ The Registrar of Societies has the power to refuse registration or to strike off the register any society on a number of grounds where 'it appears to him that the objects of the society are, or are likely to be used for any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order of Botswana'.⁷⁷ The available evidence indicates that this power has been used sparingly. In 1984, for example, the Unification Church was denied registration on public order grounds. The government perceived the church as anti-Semitic.⁷⁸

⁷¹ See para 6.10 National Policy on Culture http://www.gov.bw/docs/national_policy_on_culture_v2.pdf (accessed 28 February 2008).

⁷² Under sec 3 of the Act, 'society' is defined to include any club, company, partnership or association of 10 or more persons, whatever its nature or objects. It excludes certain bodies such as political parties, companies as defined under the Companies Act 2003 and any society or class of society which may be declared not to be a society for the purpose of the Act. See Registration of Societies Regulations 1973 (as amended) and Societies (Declaration of Non-Societies) Regulations 1977.

⁷³ See *The Evangelical Lutheran Church in Southern Africa v Phillip Jeremiah Robinson & Another* [1982] 1 BLR 215 (CA) 219.

⁷⁴ In terms of sec 3 and the schedule to the Act, certain societies such as political parties are exempted from registering under the Act.

⁷⁵ See sec 20 of the Societies Act 1972.

⁷⁶ See *Botswana: International Religious Freedom Report 2007* (n 26 above). Under sec 7(1) (b) of the Act, the Registrar may refuse to register a society where the society, within 90 days immediately after being required to provide information to the Registrar, fails to provide the requisite information.

⁷⁷ See sec 7 of the Act.

⁷⁸ See US Department of State *International Religious Freedom Report 2002* released on 7 October 2002.

Registration under the Act does not give a licence to the government to interfere in the internal workings of religious organisations. Rather, it ensures that the registered constitution or by-laws of the society are strictly followed in the administration of the affairs of societies so as 'to minimise the chances of citizens being dealt with fraudulently by unscrupulous persons masquerading as leaders of what may basically be doubtful organisations'.⁷⁹ Thus, where there is a dispute among members with regard to the affairs of the society, the first reference point will be the constitution or by-laws to ascertain whether they have been complied with. An example of this can be seen from the decision of the Court of Appeal in *Seboni v Twelve Apostles' Church of Africa and Another*.⁸⁰ In this case, the constitution of the respondent with regard to the succession to the first apostle, the head of the church, provided as follows:

- (d) The successor of the apostle shall be the person who shall be revealed through the apostle as his successor. Such revelation shall be in writing under the hand of the apostle or shall be revealed by the apostle to a notary public.
- (e) In the event of the apostle dying without revealing his successor, the overseers shall in consultation appoint the successor.

The first apostle, Jim Scotch Ndlovu, died without appointing a successor as stipulated by the above provision. After his death, his widow called a meeting of the overseers at which she revealed that the first apostle had wished that he be succeeded by two brother apostles, Abel Makgale and Harry Mkhonza. The meeting accepted the first apostle's wish and endorsed the appointment. The appellant disputed the decision and the matter was referred to the High Court, which held in favour of the respondents, on the grounds that the case was one where the court should have accepted the *de facto* situation and exercised its inherent jurisdiction and that the *status quo* ought not to be disturbed but regularised. The appellant appealed to the Court of Appeal contending that the appointment of Makgale and Mkhonza was *ultra vires* the church's constitution. The Court held that the wording of the church's constitution was clear in that it referred to a successor and not successors and to the successor as being a person and not persons. The wording was unambiguous and had been meant to mean that any successor to the first apostle should be one person and not two or more persons. Accordingly, the appointment of two persons had been *ultra vires* the church's constitution. The Court said:⁸¹

⁷⁹ Remarks made by Hon M Ngwako, the then Minister of Health, Labour and Home Affairs when introducing the Societies Bill in parliament. See *National Assembly Official Record (Hansard-39)*, 3rd session of the Second Parliament 3-16 December 1971 151.

⁸⁰ [1995] BLR 161.

⁸¹ Tebbutt JA 165.

In construing the constitution, therefore, the Court must have regard to the intention of the contracting parties as expressed in the wording of the contract. Where the wording is clear and unequivocal the court must give effect to that wording.

The Court further held that regularising the *de facto* situation had not been an issue before the trial court and as such the court should not have regularised the situation. The above decision clearly demonstrates that religious organisations are left to administer their affairs in accordance with the constitution or by-laws that they have voluntarily registered as the foundational document of the organisation.

Various penalties are imposed on officials and members of unregistered societies for non-registration of their society.⁸² Recently, there has been disquiet about the proliferation of churches which prompted the Minister of Labour and Home Affairs, under whose ministry the registration of societies falls, to indicate that the provisions of the Societies Act may be looked at to see if measures can be taken to curb the trend.⁸³ No such measures have since been taken.

4 Future developments

It is clear from the preceding discussion that religious pluralism exists in Botswana. The legal framework is such that it encourages the promotion of autonomy and ongoing development of diverse religions within the country. The evidence of the number of religious bodies registering under the Societies Act indicates substantial growth in religious pluralism. The question that has to be asked is about the future prospects of religious pluralism in Botswana. Despite the multi-faceted religious outlook of the country, how much co-operation exists between the different faiths? To answer these questions, a brief look will be taken at attempts at church unity and interfaith co-operation. In this regard, the work of the Botswana Christian Council requires a brief mention.

The Botswana Christian Council was inaugurated in 1966 with a membership of five churches, namely, the Anglican Church, the London Missionary Society (now UCCSA), the Lutheran Church, the Methodist Church and the United Free Church of Scotland.⁸⁴ The Council was the successor of the Northern Botswana Christian Council (NBCC), which was set up to give relief to the victims of the severe drought that affected the northern parts of the country in the 1964. Its constitution was based on the World Council of Churches' constitution, which defined itself as 'a fellowship of churches which confess the Lord Jesus Christ as God and Saviour according to the Scriptures and therefore seek to fulfil together their common calling to the glory of one God'. The stated

⁸² See secs 21-23 of the Act.

⁸³ See the *Daily News* of 4 September 2002 and 5 September 2003.

⁸⁴ See Amanze (n 8 above) 76.

objectives of the Council are (a) to draw the churches represented on the Council into greater understanding of one another; (b) to enable the churches more fully to share in the ecumenical movement; (c) to give such expressions to their common faith and devotion as may from time to time be found desirable; and (d) to enable the churches to bear a more united witness in all Botswana, to serve its people, and to make its evangelising work more effective.⁸⁵ The establishment of the Council was a bold step towards breaking down the early missionaries' policy during the colonial period, which encouraged Christianity along tribal lines, eventually resulting in tribal churches.⁸⁶

The principal aim of the Council from its inception was to foster growth and unity between Christians. Thus, the Council has become a forum where members express their feelings, provide advice, constructive criticism and exchange ideas about their Christian life. It has further encouraged religious dialogue with other religions, as can be seen from the following excerpt from the minutes of its 33rd Annual Assembly:⁸⁷

The church today has to recognise that it is living in a multi-religious context. The other religions, especially Islam, should not be perceived as a threat but rather as an unavoidable reality which is part of the African religious setting while preserving the specificity and originality of the Christian faith, Christians at all levels must advocate and work for tolerance and above all, for dialogue. Dialogue with other religions has the objective of ensuring that each citizen can freely practise his/her faith.

In line with the above expression, the Council in 2003 appointed an interfaith committee tasked with the organising of workshops to sensitise the population on the need for dialogue among different religions in the country. One of such workshops, organised in 2003, observed that there was a need to come up with strategies and develop an action plan that will help the interfaith committee develop activities that promote interfaith dialogue and co-operation.⁸⁸ Admittedly, not much progress has been made in this regard, but the mere fact that an attempt has been made towards dialogue and mutual understanding of the different faiths augur well for the future continuance of religious pluralism in Botswana. This is evident from the co-operation exhibited between the church leadership in the Evangelical/Pentecostal churches, on the one hand, and the mainline churches, on the other, in the fight against the HIV/AIDS scourge by the creation of the 'Faith Sector' to combat the pandemic.⁸⁹ One can therefore conclude that, despite doctrinal differences between churches in Botswana, there is a genuine attempt to work together and foster co-operation on national

⁸⁵ See Council's Constitution adopted on 21 May 1966 1.

⁸⁶ Amanze (n 8 above) 79.

⁸⁷ Amanze (n 8 above) 235.

⁸⁸ Amanze (n 8 above) 245.

⁸⁹ Amanze (n 8 above) 369-374.

issues and concerns. If this trend is to continue, and there is no reason it should not, the various faiths must strive to accommodate each other in the quest for the spiritual fulfilment of their adherents and be open-minded in their doctrinal approach to each other.

A possible challenge to religious freedom which may confront the Christian churches in the immediate future is the admission of homosexual persons to their congregations. The Anglican Province of Central Africa, to which Botswana belongs,⁹⁰ supports Resolution 1.10 passed at the 1998 Lambeth Conference of Anglican Bishops which rejects homosexual practices as incompatible with scriptures and calls upon the faithful to minister pastorally and sensitively to all irrespective of sexual orientation. In November 2007, seven priests of the Anglican Church in Botswana were suspended for having a meeting with the dismissed Bishop Kunonga of Harare, who was expelled by the Province of Central Africa for unilaterally withdrawing the diocese of Harare from the province and alleging widespread homosexuality among the Anglican churches in the province. He particularly alleged that Bishop Mwamba of Botswana had made a number of public statements since June 2006 sympathetic to homosexuality and the Diocese of Harare had 'refused to be represented by him and will not accept him as a diocese'.⁹¹ These allegations have been strenuously denied by the province. Meanwhile, the seven priests who were suspended have filed a suit in the High Court challenging their suspension.⁹² The suit may give rise to human rights issues such as freedom of association, and it will be interesting to see how the Court will react to such right (if contended by the plaintiffs) in the light of section 13 of the Constitution, which protects freedom of association.

The issue of homosexuality in Botswana society as a whole is a contentious one. Currently, the law prohibits homosexual practices between consenting adults,⁹³ and the courts have held that the time has not yet come to decriminalise homosexual practices between consenting adults even in private.⁹⁴ Unlike the South African Constitution, which outlaws discrimination on the ground of sexual orientation,⁹⁵ the Botswana Constitution does not specifically prohibit such discrimination. The challenge facing the Anglican Church in Botswana is how to reconcile the condemnation of homosexuality and the call to minister to all, irrespective of sexual orientation contained in the Lambeth Resolution.

⁹⁰ The other countries are Malawi, Zambia and Zimbabwe.

⁹¹ See *The Zimbabwean Independent* of 19 October 2007.

⁹² See the Botswana newspaper, *Mmegi/Reporter* of 25 January 2008.

⁹³ See secs 164, 165 & 167 of the Penal Code.

⁹⁴ See *Kanane v The State* [2003] 2 BLR 67 (CA) and EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201.

⁹⁵ See sec 9(3) of the South African Constitution 1996.

In terms of legislative prognosis, there is neither an indication from government of any imminent legislation to curb religious freedom, nor is there a desire to curb the perceived proliferation of churches, although there have been some rumblings to that effect. With a large percentage of the population adhering to one religion or the other, it is going to be increasingly difficult to keep religion in the private domain as religious people and bodies will continue to form a large public constituency. The interests of this constituency cannot be ignored.

5 Conclusion

Law, religion and human rights are intertwined in the legal framework within which freedom of religion is practised in Botswana. The basic framework established by the Constitution creates a separation of religion and state and provides the enabling environment for the exercise of freedom of religion. This has created a tolerance of all types of religions leading to a peaceful coexistence among adherents. The state has so far steered clear of religious affairs and has allowed religious bodies to operate without interference. On the face of it, the requirement of registration under the Societies Act would seem to be an attempt to interfere with the administration of religious bodies, but the empirical evidence is to the contrary. There is substantial co-operation between the various religions despite doctrinal differences and challenges. This has contributed in no small measure to the peace and tranquillity that Botswana enjoys in this context. By entrenching the right of religious freedom in her Constitution and putting in place mechanisms for its protection and enjoyment, Botswana has demonstrated that law, religion and human rights can be a very happy mixture if the right political will is exercised. The future challenge facing the state is to find an answer to the question of how, in the era of globalisation and cultural transformation, to maintain the delicate balance between the private interests of religious adherents and the overall public interests to ensure the continuous enjoyment of freedom of religion in a manner that will be fair to all religions. One can prophesy an answer to the effect that with her long democratic credentials, political realism and adherence to the rule of law, it will come to pass that the trinity — law, religion and human rights — will continue to thrive in the spirit of tolerance and mutual respect which Botswana have so far accorded to the religious opinions and affiliations of one another. This will undoubtedly ensure the requisite social harmony, not only for continuous development, but also for the continuous enjoyment of freedom of religion which seems to play a significant part in the lives of the majority of the population.

Law, religion and human rights in the Democratic Republic of Congo

*André Mbata B Mangu**

Professor, Department of Public, Constitutional and International Law,
University of South Africa; Professor, Faculty of Law, University of Kinshasa,
DRC

Summary

In 2005, the Parliament of the Democratic Republic of Congo (DRC) enacted a new Constitution aimed at establishing democratic rule and replacing the interim Constitution that was enacted after and in line with the resolutions of the inter-Congolese dialogue held at Sun City, South Africa, in 2002 and 2003. The new Constitution was approved by referendum in December 2005. It was promulgated by the President on 18 February 2006 and has since then governed the country. This Constitution provides that the DRC is a democratic country based on the rule of law and respect for human rights. It enshrines the rights of all the people in the country, including the right to freedom of thought, conscience and religion. This article reflects on law, religion and human rights in the DRC. It argues that the right to freedom of religion is closely related to other civil and political rights or fundamental freedoms. This right is subject to the law and is critical for peace, development, and democracy.

1 Introduction

In the Democratic Republic of Congo (DRC), as in many other African countries, religion is part of the culture of the people. Although there are no reliable statistics, the major religions in the DRC are Christianity, Islam and African traditional religions. The arrival of Christianity

* LLB (Kinshasa), LL.M, LL.D (South Africa); manguamb@unisa.ac.za. This material is based upon work supported financially by the National Research Foundation (NRF). Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard thereto.

in Africa owes a great deal to colonialism. Christianity was the main religion practised by the colonial masters. They brought it to the continent. Christianity then became an important part of the formidable machinery that they used in their colonial enterprise. Together with colonisation and commerce or trade, Christianity constituted a 'Holy Trinity' or a 'Tripartite Alliance'.

In terms of the logic of this alliance, colonial administrators and Christian missionaries had to work together and indeed co-operated. Arguably, a colonial administrator was hiding behind every Christian missionary preaching the Gospel and receiving confessions from African 'sinners'. Many of those newly-converted Christians who had confessed disobedience to the colonial rule could find themselves in colonial jails or were severely whipped days after their confessions. On the other hand, the administrators regularly invited missionaries to Christianise and baptise 'indigenous' people who had fallen under colonial law to ensure that they complied strictly with it.

In terms of the sacrosanct alliance between colonisation and Christianity, the law enacted in the colonial state promoted Christianity as a superior religion to the detriment of other religions. African traditional religions, especially, were demonised. The colonial law was predominantly a Christian law, and the colonial state a *de facto* or *de jure* Christian state. The state was either Catholic or Protestant, depending on whether the colonial masters were predominantly Catholic, such as the French, Belgian, Spanish and Portuguese, or Protestant, like the British, Dutch and German colonisers. This close relationship between state, state law and Christianity survived colonialism.

The African post-colonial state inherited and preserved much of the colonial law. Accordingly, it continued to promote Christianity to the expense of other religions. The elite, who led their countries to independence, were mainly Christian and had been educated in Christian schools. In the Belgian Congo, for instance, Catholic intellectuals were among the first to be associated with the colonisers in the administration of the colony as *évolués*.¹

The first schools and universities established in the country were run by Christian churches, either Catholic or Protestant.² The first

¹ *Evolués* referred to 'civilised' blacks. These were teachers, clerks or civil servants who had been educated and christianised. They attended Christian schools. They had learnt the colonisers' language and spoke French. They could talk, dress, and walk like the whites. To borrow from Frantz-Fanon, they were 'Black men in white masks.' Accordingly, they were part of the colonisers and were therefore co-opted to work with them in their colonial enterprise. They enjoyed a special status as compared to other blacks. An indigenous Congolese only qualified as or deserved the status of *évolué* if she or he could demonstrate that her or his education or way of life approximated that of a 'civilised' white from Belgium.

² The University of Lovanium was established in Leopoldville around 1954 as a Catholic university. Later on, the Protestants created their own university in Stanleyville, currently Kisangani. The University of Elisabethville (Lubumbashi) was the only state university.

Congolese political leaders, including Kasa-Vubu and Lumumba, who respectively became the first President and Prime Minister, were Christians. Kasa-Vubu, a former candidate priest, was Catholic, while the former unionist Lumumba was Protestant.

During the colonial era, religions and religious issues attracted little attention of intellectuals, with the exception of theologians, sociologists, anthropologists, philosophers and the missionaries themselves. The main issue was whether or not the colonised people, particularly black people, knew and worshipped God before their encounter with Westerners. One major intellectual contribution to the debate was Father Tempels's *The Bantu philosophy*.³ Published by a Belgian missionary, this work stressed that Africans knew and worshipped God under various names long before their encounter with whites and were therefore also God's children entitled to the heavenly kingdom. The book read like a revolution or rather an intellectual betrayal of the colonial enterprise by one of the most respectable agents of the 'Tripartite Alliance'. Following Tempels, Africans invested heavily in philosophy, ethno-philosophy and theology. As a result, the intellectual discourse changed dramatically.

Unlike their theologian and philosopher counterparts, social scientists in general, and legal scholars in particular, were excluded, or rather excluded themselves, from much of the discussion on religion in Africa, despite the major role played by religion in our society. Indeed, in our conflict-ravaged and underdeveloped world, religion can be the worst and the best of things. It can help bring peace and national reconciliation that are prerequisites for development. However, it can also fuel wars and conflicts. One can think of the Crusades, those famous religious wars at the dawn of the second historical millennium. Religious wars are a part of our world.

The American-led 'War on Terror' appears to be a modern version of the 'Crusades'. Terrorists who are hunted in Afghanistan, Iran, Iraq, Palestine or Somalia, considered major 'terrorist training camps', are almost exclusively Muslim, while the nations waging this 'War on Terror' are predominantly Christian.

However, as demonstrated by the protracted war between Catholics and Protestants in Northern Ireland, 'terrorists' can also be Westerners and Christians. The Israeli-Palestinian war is also fundamentally a religious war. Huntington's much celebrated thesis in *The clash of civilisations?*,⁴ for instance, actually posits a clash of religions, which is not new at all. Yet, religion and religious issues are too important to be left to theologians, philosophers, religious people and churches. They should be taken seriously as a major issue of governance on the continent.

³ P Tempels *The Bantu philosophy* (1959).

⁴ SP Huntington *The clash of civilisations?* (1993).

In view of the foregoing, Trust Africa, a Dakar-based pan-African non-governmental organisation (NGO), convened a workshop on 'Meeting the challenge of religion and pluralism in Africa'.⁵ The aim of the workshop was to amplify the voices of marginalised believers in African countries, to promote interfaith dialogue, and to help African religious leaders to build peace and social inclusion in Africa.⁶ On the other hand, considering that religions and religious issues in Africa are worthy of scientific investigation, the Council for the Development of Social Science in Research in Africa (CODESRIA), the biggest gathering of African social scientists, decided that 'religions and religiosities in African governance' should be the theme of its 2008 Institute on Democratic Governance.⁷

Outside the continent, centres on the study of law and religion have been established at some universities, especially in the United States of America. Unfortunately, African universities still lag behind in this intellectual effort. The organisation of the Durban workshop by the Center for the Study of Law and Religion of Emory University to help legal experts and religious leaders ponder the interrelation between law, religion and human rights on the continent should therefore be welcomed as a timely endeavour to engage African legal scholars and civil society organisations in a debate that for long intimidated them or from which they shy away.

Against this background, this paper reflects on law, religion and human rights in the DRC. It examines the current religious demography of the DRC. It looks into its political and legal history to assess the relationship between politics and religions on the one hand, and law and religions on the other. It concentrates on the right to freedom of religion, its scope, bearers, limitations, its enforcement and practice as well as its relationships with other human rights and fundamental freedoms. The law governing religious organisations is also investigated, as it provides the framework in which different religions and churches actually operate. A brief conclusion ends the study.

2 Religious demography of the DRC

As pointed out earlier, the DRC is a religious country. It is inhabited by people practising different religions or beliefs. The main religions include Christianity, Islam and African traditional religions. The country's major churches are reported to be Roman Catholic, Protestant, Muslim, Orthodox and Kimbanguist (Big Five). The remainder of the

⁵ Workshop held from 10 to 12 July 2007 in Dakar, Senegal.

⁶ Trust Africa *Report of the Workshop on Meeting the Challenge of Religion and Pluralism in Africa* (2007) 1.

⁷ This CODESRIA Summer Institute was held in Dakar, Senegal, from 4 to 29 September 2008.

population largely practise traditional indigenous religious beliefs.⁸ No credible census has been conducted since the 1980s, but the total population of the DRC is currently estimated to be around 65 million.

Christianity is by far the largest religion in the DRC. Out of the Big Five, four are Christian, namely, the Catholic, Protestant, Orthodox, and Kimbanguist churches. Approximately 45% of the population are Roman Catholic.⁹ The Roman Catholic Church is the biggest and most powerful single church in the country. It is present throughout the country and counts more than 60 dioceses, missions, parishes and local communities. Each diocese is headed by a bishop appointed by the Pope and comprises several missions and parishes, which are administrated by local priests and foreign missionaries. Dioceses are also regrouped into several ecclesiastic provinces or archdioceses led by archbishops. Mgr Monsengwo, formerly President of the Episcopal National Conference of Congo (CENCO) and Archbishop of Kisangani, was recently appointed Archbishop of Kinshasa to replace Cardinal Etsiou who died in January 2007. Cardinal Etsiou was himself appointed to replace Cardinal Malula, who was the first Congolese priest to preside over the Archdiocese of Kinshasa. Congolese bishops and archbishops regularly meet within the CENCO and issue pastoral letters to the faithful in which they examine the state of the nation. Apart from the Roman Catholic Church, there is a relatively small Orthodox Church which is located mainly in Kinshasa.

Around 30% of the Congolese population are Protestant. The Protestant Church is a mosaic of several other churches organised under the umbrella of the Church of Christ in the Congo — *Eglise du Christ of Congo* (ECC). Bishop Marini Bodho is currently the ECC President. There are at least 60 religious Protestant communities, including the Presbyterians, the Salvation Army, the Lutherans, the Methodists, the Baptists, the Adventists, the Mennonites, the Mormons (the Church of Jesus Christ of Latter Day Saints), and the Branhamists. Like the Roman Catholic Church, the Protestant Church is also established throughout the country.

The Muslim and the Kimbanguist churches represent less than 5% of the population respectively. Islam is established mainly in Kinshasa and in the eastern part of the DRC, especially in Maniema and Kivu, where the Arabic influence was the strongest. On the other hand, the Kimbanguist church is based mainly in Kinshasa and in the Bas-Congo province. Its founder, Prophet Simon Kimbangu, was himself from the

⁸ See <http://www.state.gov/g/drl/rls/irf//2007/90091.htm> (accessed 27 March 2008).

⁹ According to the statistics released by the Inter-Diocesan Centre in Kinshasa, the Catholic Church counts 47 dioceses divided into six ecclesiastic provinces headed by 49 bishops and archbishops. There are 1 104 missions and parishes, 3 773 local or 'secular' priests and 1 806 missionaries or 'regular' priests, 8 102 nuns and 1 440 brothers. The number of Catholic believers is estimated at 26 067 715, almost 44,2% of the total population of the Congo.

Congo ethnic group, like the overwhelming majority of the people inhabiting the province. Nkamba, the Prophet's place of birth, is considered the 'Holy Land' for pilgrimage of the Kimbanguists.

The origins of the Kimbanguist Church go back to the early 1920s when Kimbangu, a former Protestant catechist, started preaching the Gospel in March 1921, performing miracles, and reportedly healing the sick and raising people from the dead after he claimed that Jesus had been revealed to him and anointed him as His prophet. His message was a message for the liberation of the black people in general and of the Congolese people in particular. It espoused the aspirations of the black and colonised people and presented Jesus as an African and black Messiah. However, it conflicted with the conventional Gospel of the Catholic and Protestant Churches that was allied with the colonial authority. Accordingly, Kimbangu was considered a 'subversive' preacher and he became a public enemy, especially from June 1921, when hundreds of colonial workers started to follow him in the Bas-Congo and the population manifested the first signs of civil disobedience and opposition to colonialism.¹⁰

Kimbangu was one of the first and most prominent figures in the struggle for independence.¹¹ Kimbanguism became the epitome of nationalism and inspired early nationalist groups, particularly the Alliance of the Bakongo (ABAKO).¹² Kimbangu was arrested and sentenced to death. He died in prison in the 1950s after the sentence had been commuted to life imprisonment. After his death, his message spread throughout the country from the Bas-Congo province and Leopoldville. It also reached parts of Angola and the Republic of the Congo. The Kimbanguist Church, which is also a Christian church, has believers in many other African countries and even outside the African continent. As the first African Church in the country and in the sub-region, it is to the DRC and Central Africa what the Zion Christian Church (ZCC) is to South and Southern Africa. There are other Abrahamic churches in the DRC, such as the Apostles' Church. It cannot be denied that atheists also exist, despite the absence of statistics regarding their number.

As Magbadelo put it in the case of Nigeria,¹³ the advent of a Pentecostal revolution with its messages of miraculous healing, blessings and prosperity has succeeded in expanding the frontiers of Christianity in the DRC. Besides Christianity, Islam and other foreign-inspired religions, African traditional religions or churches exist but remain mar-

¹⁰ C Young *Introduction à la politique congolaise* (1979) 143-144.

¹¹ AMB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 317-318.

¹² Mangu (n 11 above) 318.

¹³ JO Magbadelo 'Pentecostalism in Nigeria: Exploring or edifying the masses' (2005) 1 & 2 CODESRIA *Bulletin* 45-46.

ginalised. The marginalisation of indigenous religions is an enduring legacy of colonial bias.¹⁴

Syncretic religious movements and cultural associations also developed in the DRC.¹⁵ The Kitawala appeared in the 1930s in Katanga and quickly spread to several other regions of the Belgian colony. Unlike Kimbanguism, it was not linked to any specific ethnic group, but it likewise gave rise to a number of revolts against colonialism. So did the Mwana Lesa (Son of God) movement, which originated in Northern Rhodesia.

Recently, an organisation known as the Bundu Dia Kongo (BDK) has become famous in Congolese politics. The BDK started as a cultural association of the Bakongo. It is a religious movement with churches and believers who worship God and ancestors. It grew more political at the beginning of the 2000s when it started calling for the re-establishment of an 'ethnically pure' Kongo Kingdom that developed during the fifteenth century and comprised sections of the country and also Angola and the Republic of Congo. The BDK also demanded autonomy for the Bas-Congo province. It reportedly claimed the province for the native and established its own rule to replace the official administration, infringing the rights of non-members and people from other Congolese provinces, disturbing law and order and challenging state authority and security in parts of the Bas-Congo. Over the past years, the BDK activists have clashed with the police and armed forces on several occasions.

On 30 June 2006, heavily armed soldiers of the national army in the Bas-Congo capital of Matadi fired indiscriminately at a demonstration by BDK separatists after one of them had attacked and killed a soldier. Thirteen civilians were also killed and 20 injured. One year later, on 31 January and 1 February 2007, security forces using excessive force confronted BDK demonstrators after the latter had killed ten soldiers/policemen and two civilians before breaking into government buildings, erecting illegal traffic barricades, and stopping and harassing civilians. The confrontation resulted in more than 100 civilian and security force deaths. The United Nations Organisation Mission in the Congo (MONUC) and parliament blamed both sides for excessive use of force.¹⁶ In March 2008, the government decided to withdraw the recognition of BDK as a non-profit organisation (ASBL) and closed all their places of gathering. The Minister of the Interior, Denis Kalume, requested the withdrawal of parliamentary immunities granted to Honourable Ne Muanda N'Semy, BDK spiritual leader. Parliament recommended that Ne Muanda N'Semy should clarify the legal status of his association, whether it is a cultural, religious association or a political party.

¹⁴ Trust Africa (n 6 above) 3.

¹⁵ Mangu (n 11 above) 318.

¹⁶ n 8 above.

3 Politics and religions in the DRC

A close relationship has always existed between politics and religions in the DRC. As stressed earlier, this relationship was relatively good and even excellent during colonisation, especially with regard to Christianity and its clergy. Christians, Christian clergymen and Christian intellectuals remained on good terms with the colonial administration that favoured them, while undermining Islam and African traditional religions.

The relationship between the state and Christianity became strained when religious leaders started denouncing the abuse of the rights of indigenous people by the colonial administration. Around 1950, Catholic intellectuals such as Father Joseph Malula, Mr Joseph Ileo and Mr Joseph Ngalula, created a circle for reflection named African Consciousness (*Conscience africaine*).¹⁷ In 1956, they published a manifesto in response to the Bilsen Plan recommending the independence of the Belgian Congo within 30 years. Nevertheless, this manifesto did not signal any divorce between the colonial administration and Christianity in general and the Catholic Church and intellectuals in particular. As colonial rule was drawing to an end, the colonial administration co-opted many Christian intellectuals to become their successors.

The Roman Catholic Church was firmly involved in politics and its interference with national politics continued unabated during the Congolese First Republic (1960-1965). Under the Second Republic, which was inaugurated by Mobutu's *coup d'état* on 24 November 1965 and ended when he was toppled in 1997, the relationship between his government and churches, especially the Roman Catholic Church, became particularly difficult, especially when Mobutu started laying the foundations for the one party, the *Mouvement Populaire de la Révolution* (MPR).

The MPR was created on 20 May 1967. Established throughout the country, the Roman Catholic Church was seen as a threat to the one-party and authoritarian system. In 1969, students of the (Roman Catholic) University of Lovanium in Kinshasa revolted against the regime. Clashes with the security forces led to 100 deaths among the students. The regime closed Lovanium and other universities where solidarity protests took place. When these universities reopened in 1973, they were no longer confessional institutions. The country's three universities were nationalised and merged into a single public institution of higher education named as the National University of Zaire (*Université Nationale du Zaïre* (UNAZA)), with three campuses established in Lubumbashi, Kinshasa and Kisangani respectively. UNAZA operated until the early 1980s, when the former three universities of Kinshasa, Kisangani and Lubumbashi were restored but remained public institutions.

¹⁷ Mangu (n 11 above) 319-320.

In the 1970s, Mobutu launched his famous policy of ‘authenticity’ to promote African culture. Foreign and Christian names were banned and replaced with African names. Cardinal Malula, the Archbishop of Kinshasa, took the lead in contesting the regime. He was exiled to Rome for many years before returning to Kinshasa following a deal between the Vatican and the government of Zaïre. Mobutu, who was himself a Roman Catholic believer, undertook to divide the church by favouring bishops and archbishops who supported the regime. He also promoted Islam, Kimbanguism and especially the Protestant Church and ensured that clergy members more sympathetic to his regime were appointed to lead the various religious communities that constituted this church. Later on, with the Pentecostal revolution, many independent churches saw the light of day. The Constitution provided — and still provides — that the country is a secular state where the government is to play a neutral role by protecting the right to freedom of religion, but favouring no particular faith. Mobutu supported this revolution and worked to ensure that the leaders and members of the new churches supported his regime.

When Cardinal Malula died in the 1980s, Mobutu recommended the appointment of Mgr Etsiou to replace him as the Archbishop of Kinshasa. Cardinal Etsiou, who also passed away in 2007, was from the same Equateur Province as Mobutu and used to bless his authoritarian regime. The church’s interference with politics reached its climax during the National Sovereign Conference that was organised in the early 1990s to prepare a transition from the single-party and authoritarian rule to a multiparty state and a democracy. The Roman Catholic Church was the most powerful segment of the civil society movement that demanded the organisation of this conference to bring Mobutu’s single-party and authoritarian rule to a peaceful end and to establish a democracy in the then Zaïre. Mgr Monsegwo was then the Archbishop of Kisangani and the President of the Episcopal Conference of Catholic Bishops when he was elected Chairperson of the Conference and later on the Speaker of the High Council of the Republic (*Haut Conseil de la République* (HCR)), the transitional parliament established by the Conference. The Christian churches in general and the Roman Catholic Church in particular remained very influential in national politics until Mobutu was deposed by the Alliance of Forces for Congo’s Liberation (*Alliance des Forces de Libération du Congo* (AFDL)) led by Laurent-Désiré Kabila in May 1997.

Christianity also benefited a great deal from the regimes of Laurent-Désiré Kabila and Joseph Kabila, despite Mobutu’s successors being reported to be Muslims. After the Inter-Congolese Dialogue that took place in 2003 at Sun City, South Africa, the government of Joseph Kabila supported Bishop Marini Bodho, the President of the Protestant Church, who was appointed to preside over the Senate, one of the two houses of the DRC transitional parliament. On the other hand, leaders of other Christian and independent churches who opposed the regime

found themselves on the wrong side of the law. This is the case of Archbishop Fernando Kuthino, the leader of the Army of Victory (*Armée de Victoire*). Archbishop Kuthino launched a political campaign known as 'Let's save the Congo' (*Sauvons le Congo*) (from dictatorship) and was associated with the opposition of Jean-Pierre Bemba, the leader of the Movement of the Liberation of Congo (MLC). He was persecuted and managed to flee to Europe. When he returned, his church was closed and the church's television and radio channel suspended while he was arrested and prosecuted for subversion, illegal detention of weapons, and his attempts to endanger state security. The security services took advantage of his conflict with a colleague church leader, Reverend Ngalasi, to keep him in prison for attempted murder of the latter.

He was sentenced to 20 years' imprisonment and remains in prison despite pressure from many quarters. Kuthino's case reminds us of that of the Jehovah's Witnesses who were interdicted for breach of public order and subversion in the 1990s when they refused to sing the national anthem and salute government authorities. Later on, the presidential decree that banned them and allowed for the closure of their churches and the confiscation of their assets was struck down. The Constitutional Court declared it unconstitutional and invalid.¹⁸ Using positive law, the DRC government has tried from time to time to undermine the main religious groups, to divide them or to encourage others in order to ensure that no single religion or church has the potential to threaten the state and national politics.

4 Positive law and religions in the DRC

Law and religion are related. Religion features among the various factors of law. Some legal norms are based on religious principles, but others contradict them. However, law and religions are not synonymous. Unlike religious norms that apply only to those who practise a particular religion, legal norms are general and impartial. They apply throughout the state and bind all people in a country, whether they are believers or atheists. Religion is subject to law.

4.1 Sources of Congolese law

The sources of Congolese law can be divided into domestic and international sources depending on their origin.

4.1.1 Domestic sources

The domestic sources comprise the Constitution, legislation, case law and administrative acts. The current Constitution was drafted by

¹⁸ *L'Association sans but lucratif Les Témoins de Jéhovah v La République du Zaïre* judgment RA 266 of 8 January 1993.

the Senate and approved by the National Assembly that constituted parliament during the transition. It was adopted by popular referendum organised on 18 and 19 December 2005 and enacted into law on 18 February 2006. The Constitution provides that the DRC is an independent, sovereign, united and indivisible, social, democratic and secular state subject to the law.¹⁹ The second title of the Constitution deals with human rights, fundamental freedoms and duties of the citizen and of the state. Rights entrenched in this Constitution include civil and political rights,²⁰ economic, social and cultural rights²¹ and collective rights.²²

The Constitution provides that every person has the right to freedom of thought, conscience and religion. Everyone has the right to practise his or her religion or beliefs, alone or with others, in public or in private, through worshipping, teaching, practice, accomplishment of rituals and religious life, subject to the law, public order, good morale and respect for others' rights. An Act of Parliament determines the conditions of the exercise of this freedom.²³ The right to freedom of thought, conscience and religion is related to other rights enshrined in the Constitution. These include civil and political rights, such as the right to freedom of expression,²⁴ the right to information,²⁵ the right to hold peaceful meetings,²⁶ the right to demonstrate,²⁷ the right to petition,²⁸ the right to inviolability of domicile,²⁹ and the right to respect for private life and communications.³⁰ There are also socio-economic rights, such as property rights,³¹ the right to freedom of association,³² the right to education,³³ and the right to organise education freely.³⁴ The impact of religion can also be found in several provisions where the Constitution uses the qualification 'sacred' to refer to some fundamental human rights, freedoms and duties.³⁵ Despite

¹⁹ Art 1 of the 2006 Constitution.

²⁰ Arts 11-33 of the Constitution.

²¹ Arts 34-49 of the Constitution.

²² Arts 50-61 of the Constitution.

²³ Art 22 of the Constitution.

²⁴ Art 23 of the Constitution.

²⁵ Art 24 of the Constitution.

²⁶ Art 25 of the Constitution.

²⁷ Art 26 of the Constitution.

²⁸ Art 27 of the Constitution.

²⁹ Art 29 of the Constitution.

³⁰ Art 31 of the Constitution.

³¹ Art 34 of the Constitution.

³² Art 37 of the Constitution.

³³ Art 43 of the Constitution.

³⁴ Art 45 of the Constitution.

³⁵ Arts 16 (right to life), 34 (property rights), 36 (right and duty to work) & 63 (duty to defend the country and its territorial integrity) of the Constitution.

the fact that the right to freedom of thought, conscience and religion is entrenched in the Constitution, the modalities of its exercise are to be determined by an Act of Parliament. Legislation therefore constitutes a second source of law.

The provisions of the Family Code³⁶ that exclude polygamist marriages from the legal definition of marriage,³⁷ or that consider married women as minors, incapable persons from whom the marital (husband's) authorisation is required to pose any legal act³⁸ also betray the influence of religions, especially Christianity. The same goes for a number of Christian events, such as Christmas and Easter, considered public holidays in the Republic.

The main piece of legislation regarding religions or churches also deals with non-profit organisations and public utility institutions. Administrative acts in the form of ordinances, decrees, decisions and circulars can also be taken to enforce legislation and the right to freedom of thought, conscience and religion. They constitute another source of law on religion. Failure to comply with legislation may result in the suspension or withdrawal of their recognition as juristic persons or in their dissolution. This happened to the Jehovah's Witnesses in the 1990s and to the BDK in March 2008.

Case law, which is made up of the judgments of courts and tribunals, is also an authoritative source of law. The judgment of the Supreme Court of Justice in *Jehovah's Witnesses v Republic of Zaire* remains the landmark judgment on the right to freedom of thought, conscience and religion in the DRC. However, the importance of case law should not be overestimated. The same goes for doctrine. Since independence, very little has been written that may constitute a Congolese legal doctrine on the right to freedom of thought, conscience and religion. Religions are also governed by international law.

4.1.2 International sources

According to the Statute of the International Court of Justice, sources of international law include international agreements, treaties or conventions, international customs, and general principles of law recognised by civilised nations, decisions of international courts or tribunals, and the writings of the most highly qualified publicists.³⁹ There are also United Nations (UN) General Assembly resolutions, which are not binding *per se*. They are generally considered 'soft law', but the doctrine admits that with their global acceptance and the view shared by many

³⁶ Act 87-010 of 1 August 1987 on Family Code published in the official journal (Gazette) special issue of August 1987.

³⁷ Art 330 of the Family Code.

³⁸ Arts 448-450 of the Family Code.

³⁹ Art 38(1) of the Statute of the International Court of Justice.

states that they are binding, some of their norms have achieved the status of customary international law, which is binding law.⁴⁰

As far as the relationship between domestic and international law is concerned,⁴¹ the DRC, as a former Belgian colony that inherited from it the Roman-Dutch law system, adopted a monist system as opposed to the dualist system generally adopted in the Anglo-American system. According to monism, domestic and international law are regarded as two aspects or branches of the same law. Treaties, conventions or international agreements do not need to be enacted into domestic law after their ratification or accession to become part of domestic law and to be enforced in the Republic. Ratification by the executive suffices to give them force in domestic law. In the DRC, as in many other countries that inherited Roman-Dutch law, international law is given a much higher status than legislation in domestic law.

The DRC 2006 Constitution contains a special Title for Treaties and International Agreements.⁴² It provides that the President negotiates and ratifies treaties and international agreements.⁴³ Treaties that have been regularly concluded prevail over legislation on their publication under the proviso, for each treaty or agreement, of its respect by the other party.⁴⁴ Accordingly, contrary to what the Constitution provides in common law and Anglophone countries, such as South Africa,⁴⁵ treaties and international agreements prevail over Acts of Parliament, but remain subject to the Constitution. However, the proviso in the DRC Constitution is particularly controversial. Human rights treaties are generally multilateral agreements. Subjecting the enforcement of a human rights treaty or an international agreement to the compliance by the other party makes no sense when this party cannot be identified. On the other hand, the failure of a single state party to comply with a multilateral agreement or some of its provisions should not serve as a justification for non compliance by others.

The DRC ratified the International Covenant on Civil and Political Rights (CCPR)⁴⁶ and other international agreements, such as the African Charter on Human and Peoples' Rights (African Charter),⁴⁷ while endorsing the Universal Declaration of Human Rights (Universal Declaration)⁴⁸ that promotes the right to freedom of thought, conscience and religion.

⁴⁰ J Dugard *International law: A South African perspective* (2000) 43-45.

⁴¹ Dugard (n 40 above) 43.

⁴² Arts 213-217 of the Constitution.

⁴³ Art 213 of the Constitution.

⁴⁴ Art 215 of the Constitution.

⁴⁵ Sec 231 of the 1996 Constitution of the Republic of South Africa.

⁴⁶ Art 18 of CCPR.

⁴⁷ Art 8 of the African Charter.

⁴⁸ Art 18 of the Universal Declaration.

5 The right to freedom of religion: Contents, bearers, limitations and duties and relation to other human rights

The right to freedom of religion is both an individual and a collective right that can be enjoyed by individuals individually or collectively. However, this right is not classified among 'collective rights' in the DRC Constitution.⁴⁹ Collective rights only refer to the rights of Congolese citizens living abroad.⁵⁰ Surprisingly, they even include the duties of the state⁵¹ and peoples' rights.⁵²

As emphasised earlier, everyone is entitled to adhere to a religion, to profess, practise and disseminate a religion of his or her choice in private or in public, alone or in association with other people.⁵³ Nobody is therefore compelled to practise or profess a religion or to belong to a particular religious group. The exercise of the right to freedom of thought, conscience and religion is related to the exercise of other rights, such as the right to freedom of expression, the right to freedom of communication and information, the right to freedom of movement, the right to education, the right to petition, the right to freedom of association, and the right to assemble peacefully and unarmed. As far as the right to freedom of communication is concerned, it is interesting to note that there are at least 20 radio and television stations that belong to religious groups in the DRC. Churches are entitled to run schools and even private universities on condition that they register with the government.

Critical to the right to freedom of thought, conscience and religion granted to anyone individually or in association with others is also the right to equality and non-discrimination enshrined in the Constitution⁵⁴ and in international instruments such as the Universal Declaration,⁵⁵ CCPR⁵⁶ and the African Charter.⁵⁷ Accordingly, everyone is equal in the exercise of his or her right to freedom of religion. Every religious

⁴⁹ Arts 50–61 of the Constitution.

⁵⁰ Art 50 of the Constitution.

⁵¹ The duty to promote the rights and legitimate interests of Congolese citizens in or outside the country (art 50); to ensure and promote a peaceful and harmonious coexistence of the different ethnic groups as well as the rights of vulnerable and minority groups (art 51).

⁵² See the DRC 2006 Constitution: the right to peace and security (art 52); the right to a safe environment conducive to development (arts 53–57); the right to enjoy the national resources and to development (art 58); and the right to enjoy the common heritage of humanity (art 59).

⁵³ Art 22 of the Constitution.

⁵⁴ Arts 11 & 12 of the Constitution.

⁵⁵ Art 18 of the Universal Declaration.

⁵⁶ Art 18 of CCPR.

⁵⁷ Art 8 of the African Charter.

group or church is also equal and no one should be discriminated against.

It is clear that this principle of equality and non-discrimination is generally respected in the DRC. However, practice reveals that some religious groups or churches are privileged over others which are marginalised. This is, for instance, the case of the Big Five, namely the Roman Catholic, Protestant, Orthodox, Muslim and Kimbanguist Churches, which are regularly invited by the government to attend public meetings or to discuss matters of concern to all churches. Discrimination also exists among the Big Five. The Roman Catholic Church has always been privileged despite tensions that regularly exist between its leaders and the government. Public authorities are always invited and personally attend ceremonies during which new members of the clergy are inaugurated. The current practice is that the President, the government or the provincial governor generally makes a donation in the form of a large amount of money and a luxurious car. The clergy of other churches hardly enjoy the same privilege.

Like any other human right, the right to freedom of religion is not absolute. Apart from the limitations provided in international human rights law under CCPR,⁵⁸ the DRC Constitution provides that this right should be exercised in the respect of the rights of other people, of public order and good morale.⁵⁹ These are internal limitations since there is no general limitation clause in the DRC Constitution. Respect for the rights of other people to profess, practise and disseminate their own religions is in line with the principle of the secularity of the state protected by the Constitution. No one and no religious group or church can infringe on the right of anyone else to profess, practise or disseminate his or her own religion. Unfortunately, the right to freedom of religion and related rights are violated not only by the state, but also by individuals acting individually or collectively. Religious groups are also involved in the violation of the rights of their members. This is the case of children, divorced wives and elderly persons accused of witchcraft. The practice of imposed fasting, and the refusal to be treated at hospitals or to accept blood transfusions, which are encouraged by some church leaders and have resulted in many deaths, also violate human rights. In a democratic and secular state subject to the rule of law, the state should intervene to ensure that the exercise of the right to freedom of religion by some members of society does not result in the violation of the rights of others and in the destruction of the moral fabric of society.

⁵⁸ Art 18(3) of CCPR.

⁵⁹ Art 22(2) of the 2006 Constitution.

6 Law and the exercise of the right to freedom of religion in the DRC

The Constitution entrenches the right to freedom of thought, conscience and belief and leaves the determination of the modalities of the exercise of this right to legislation to be enacted by parliament.⁶⁰

In the absence of parliament, a Decree-Law was passed in 2001.⁶¹ This Decree-Law, which is still in force, deals with non-profit organisations or *associations sans but lucratif* (ASBL). The 2001 Decree-Law defines an ASBL as an association or company that principally operates in the industrial or commercial domain and does not make any material or financial profit which can benefit its members.⁶² An ASBL is a juristic person in its own right and exists independently from its members. Unlike political parties that are regulated by a different piece of legislation,⁶³ an ASBL is apolitical in the sense that it is not involved in or does not do politics although its members can individually do so.

This Decree-Law distinguishes between three categories of non-profit organisations, namely, cultural, social or educational and economic organisations, NGOs and confessional or religious organisations.⁶⁴ Religious groups constitute one category of ASBL. These organisations must register and be granted legal personality by the Minister of Justice in order to operate.⁶⁵ The requirements for the granting of such legal personality apply to all three forms of non-profit organisations.⁶⁶ The application for legal personality is made to the Minister of Justice. It is signed and submitted by all active members of the organisation or by its executive board and supported by a number of documents.⁶⁷ Pending the granting of legal personality, an organisation may start operating with the authorisation of the Minister in its sector or of the governor of a province. This authorisation is valid for a period of six months, after which the Minister of Justice must grant legal personali-

⁶⁰ Art 22(3) of the Constitution.

⁶¹ Decree-Law 004 /2001 of 20 July 2001 on General Provisions related to Non-Profit Organisations and Public Utility Institutions (2001 Decree-Law). In the Congolese legal order, a decree-law is an act taken by the President where legislation would have been passed by parliament. It is therefore a legislative act emanating from the executive when parliament is unable to legislate. It therefore has the same status as an Act of Parliament and remains valid as long as parliament has not amended it or passed a new Act.

⁶² Art 1 of the 2001 Decree-Law.

⁶³ Act 04/002 of 15 March 2004 on the Organisation and Functioning of Political Parties.

⁶⁴ Art 2 of the 2001 Decree-Law.

⁶⁵ Art 3 of the 2001 Decree-Law.

⁶⁶ Ch I, arts 4-9 of the 2001 Decree-Law.

⁶⁷ Art 4 of the 2001 Decree-Law.

ty.⁶⁸ The number of active members of an ASBL cannot be fewer than seven.⁶⁹

An association is also governed by its constitution, statute and by its rules of proceedings. These instruments should comply with the Constitution and they should be consistent with the law, public order and good conduct or morale.⁷⁰ They are to be published in the official journal (National Gazette).⁷¹ The 2001 Decree-Law makes a further distinction between the organisations created under DRC law and foreign organisations to be recognised under this law.⁷² Like any ASBL or non-profit organisation,⁷³ religious organisations operating in the DRC can be of Congolese or foreign origin.

The Decree-Law contains specific provisions dealing with NGOs,⁷⁴ religious organisations and institutions of public utility.⁷⁵ As far as religious organisations⁷⁶ are concerned, the Decree-Law does not define a 'religion', a 'religious organisation' or a 'sect'. It echoes the Constitution by providing that there is no official state religion in the DRC. Everyone is entitled to the right to freedom of thought, conscience and religion. He or she is free to express his or her religion or convictions alone or in association with others, in public or in private, subject to respect of law, public order and good morale.⁷⁷

Any religious organisation should have one or several places of worship which conform to security and safety norms and should not disturb the tranquillity of those in the neighbourhood.⁷⁸ No one can receive gifts, presents, legs or offerings, and tithes in the name of a religious organisation which does not have legal personality or has not been authorised to operate.⁷⁹

In addition to the requirements for legal personality as any ASBL,⁸⁰ religious organisations should comply with the following:⁸¹

- produce a document detailing the fundamental principles and the main ideas of its religious doctrine;

⁶⁸ Art 5 of the 2001 Decree-Law.

⁶⁹ Art 6 of the 2001 Decree-Law.

⁷⁰ Art 7 of the 2001 Decree-Law.

⁷¹ Art 9 of the 2001 Decree-Law.

⁷² Ch II, arts 10-34 of the 2001 Decree-Law.

⁷³ Ch III, arts 35-37 of the 2001 Decree-Law.

⁷⁴ Ch III, arts 35-45 of the 2001 Decree-Law.

⁷⁵ Arts 58-73 of the 2001 Decree-Law.

⁷⁶ Ch III, arts 46-56 of the 2001 Decree-Law.

⁷⁷ Ch III, art 46 of the 2001 Decree-Law.

⁷⁸ Ch III, art 47 of the 2001 Decree-Law.

⁷⁹ Ch III, art 48 of the 2001 Decree-Law.

⁸⁰ Ch I, arts 4, 6 & 7 of the 2001 Decree-Law.

⁸¹ Ch III, art 52 of the 2001 Decree-Law.

- commit itself not to establish rules or provide teachings that would be inconsistent with the laws and public order; and
- commit itself not to do practices or establish rules that would violate the rights to life and good health of its members.

Specific conditions are also to be complied with by any leader, founder or legal representative of a religious organisation. He or she should be of sound spirit, good morality, at least 30 years old, and conversant with or trained in a religious doctrine.⁸²

Moreover, the legal representative should not have been convicted for a period of more than five years unless he or she was granted amnesty or rehabilitated. The legal representative should also hold a degree conferred by a recognised religious institution of higher education.⁸³ Legal representatives of foreign religious organisations should meet the same conditions and the organisation represented must also enjoy legal personality in the foreign country where it has its headquarters.⁸⁴

Unfortunately, the law is not always enforced with regard to religious organisations. This is a field where Congolese people have invested greatly since the 1980s, as they did in music. As pointed out earlier, under the influence of Pentecostalism, the number of churches and ministries has increased. So too has the number of proclaimed and self-proclaimed evangelists, apostles, prophets, pastors, archbishops, bishops, reverends and other ministers claiming to have received God's revelation and mission to save, heal and bless the people. One gets the impression that the Lord is revealing every day. As a result, religious groups and churches are mushrooming in the DRC.

Most legal representatives and religious leaders never attended or graduated from a recognised religious institution, as required by the law. There are also hundreds of other religious denominations that operate freely without being registered or granted legal personality by the Ministry of Justice.

In the context of the extreme misery of the overwhelming majority of the population, piety and profit go hand in hand. Many people have invested in the religious field to benefit from offerings and tithes and their material and financial standard of living does not match that of their followers. They drive expensive cars. They own some of the most expensive homes, even when they worship in the streets. Many places of worship are just chucks. Religious organisations that should be non-profit organisations have turned into organisations in aid of the material and financial profit of church leaders and their close family members. Many churches operate in violation of the law, public order and good morale. Believers gather and sing every night without caring for calm

⁸² Ch III, art 49 of the 2001 Decree-Law.

⁸³ Ch III, art 50 of the 2001 Decree-Law.

⁸⁴ Ch III, art 51 of the 2001 Decree-Law.

in the neighbourhood. The DRC government has so far failed to bring some order in this sector, involuntarily or voluntarily, as it has also been taking advantage of this situation where many citizens resort to God and churches for better conditions of life instead of demanding that their political leaders should account for poor or bad governance.

7 Conclusion

A dialectic relationship has always existed between religion and law in the DRC, as elsewhere. Religion is a factor of law. At the same time, it is subject to the law. Despite some harmony, there is also a potential for conflict, not only between law and religion or public and religious authorities, but also among religions and religious groups themselves. Religions and churches are channels for the exercise of the right to freedom of religion, which is entrenched in a number of international and domestic instruments.

Since the DRC achieved its independence from Belgium on 30 June 1960, the country has always been a *de jure* secular state protecting the right to freedom of religion. This has not prevented the marginalisation of some religions and religious organisations to the benefit of others. African traditional religions have been the most marginalised, despite having the biggest number of believers considering the multiple religious identities of many Africans who worship God or Allah and still believe in their ancestors and other spirits.

Globally, Christianity is privileged, since out of the five major churches, four are Christian. Within Christianity, the most privileged is the Roman Catholic Church. As demonstrated by the present study, there has been a big impact of religion on law and politics in the DRC and also a reciprocal interference between them.

Arguably, the DRC is one of the most religious states on the continent when one considers the number of churches, mosques, temples, archbishops, bishops, prophets, evangelists, pastors and apostles. One would say that no one is an atheist in this country. There is practically a church and a prophet on each street corner in the major cities of the Republic.

The right to freedom of thought, conscience and religion entrenched in the Constitution and a number of other international human rights instruments binding on the Republic is a reality. Coupled with the right to freedom of expression and of the media, the exercise of the right to freedom of religion has resulted in several religious radio and television stations operating in the Republic, as many churches run their own media. Churches also run primary and high schools and institutions of higher education such as universities. It is much easier to establish a church or a religious organisation than a political party. The state is church-friendly in the registration of religious organisations and in the enforcement of the law on religion. Many churches and religious

organisations even operate freely without prior registration with the public authorities. People may also receive offerings, donations and tithes in the name of religious organisations not recognised by the law. Many in the clergy of independent churches officiate without complying with the legal requirement that a legal representative should be a graduate from a recognised religious institution of higher education.

Undoubtedly, the right to freedom of religion is among the civil and political rights most widely enjoyed by the Congolese people. The enjoyment of the right to freedom of religion in the long run helped the people to engage in the struggle for political freedom and democracy. On the other hand, the regime did not see any reason to interfere with the exercise of this right as religion, like music, was helping to keep the people away from politics. It is only when religions, religious organisations or churches manifestly engaged in politics that the regime had to intervene. Archbishop Kuthino could not have been prosecuted and the BDK banned had not they engaged in politics.

Although religious pluralism is good for democracy, it may also become detrimental to the rule of law. While protecting the right to freedom of religion, the government should ensure that the enjoyment of this right by some people does not lead to the abuse of the rights to which other people are entitled in terms of the Constitution and international human rights law. There is an urgent need to bring some order in religious matters, to ensure that the law is enforced and limitations are brought to the exercise of the right to freedom of religion by some religious groups or churches whose activities or prescriptions would be in violation of the rule of law. The state should not continue to allow religious organisations that are non-profit organisations to actually become profit organisations for those religious leaders who use the Gospel of healing, financial and material prosperity to exploit the believers who naively trust and enrich them.

A much stricter regulation is required to ensure that religious organisations operate in line with their mission statements and status as non-profit organisations that respect the rights of their own members and also contribute to the economic development of the country. The piety of the believers should not be used for the profit of the church leaders. The state should also address the issue of *de jure* and *de facto* marginalisation suffered by some religions or churches, including African traditional religions, to the benefit of the Big Five, especially the Roman Catholic Church. Otherwise, the prospects for the exercise of the right to freedom of religion are good. No religious war is looming. On the other hand, the interference between religion and politics will continue. This is also good for democracy and good governance.

In a country that has suffered decades of authoritarianism and wars and which is now considered one of the poorest, despite being endowed with abundant natural resources, time may have come for the Congolese people to ensure that religions and religious organisations become and are used as agents for democracy, peace, national

reconciliation and development, which are closely related, and that the right to freedom of religion is enjoyed according to the law and with respect for the rights of other people, whether they are believers or not. As the participants in the Trust Africa workshop acknowledged, 'religion is both an agent of peace and of violence. It is a product of divine revelation and human experiences.'⁸⁵ The state and the law should not only ensure that the right to freedom of religion is granted and enjoyed, but also that religions, religious organisations, their leaders and members contribute to sustainable peace and development.

⁸⁵ Trust Africa (n 6 above) 14.

Religion, law and human rights in Zimbabwe

Tarisai Mutangi*

Researcher and LLD candidate, Centre for Human Rights, University of Pretoria, South Africa

Summary

This article is an audit of the interplay between religion, law and human rights in Zimbabwe. It examines key issues such as the legal framework in place for the protection of freedom of conscience, including court jurisprudence, the religious demography of Zimbabwe, and the place of religion in politics, education and the Zimbabwean lifestyle. It also scrutinises the co-existence of ideologically antagonistic practices, such as Pentecostal Christianity versus indigenous beliefs and practices. The article argues that the subject of religion is not a sensitive one in Zimbabwe, hence it does not easily occur in political or general debates. Drawing from his own experiences, the author concludes that, apart from looking after spiritual needs, churches play a significant role in subsidising the state's obligations in the provision of socio-economic rights such as health, education and food. For this reason, churches have an important place in national politics as partners in development. The article concludes by citing problematic areas involving religion and politics, such as child marriages practised in certain religious groupings. The author also notes the harassment of church leaders who express their alarm about the political and economic melt-down of the country. This is another problem bedevilling a somewhat previously tranquil relationship between the state and religion.

1 Introduction

Men may believe in what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet, the fact that they be

* LLB (Zimbabwe), LLM (Human Rights and Democratisation in Africa) (Pretoria); mutangit@yahoo.com

beyond the ken of mortals does not mean that they can be made suspect before the law.¹

In view of the above quotation, organisers of the Center for the Study of Law and Religion at Emory Law School's Durban conference on law, religion and human rights in Africa should be commended for identifying the very contentious but critical subject of religious freedom as the focus of this dialogue. This paper is an audit of Zimbabwe. It seeks to address, among other things, contemporary issues in Zimbabwe in relation to religion, law and human rights. With a practical approach in mind, a course is adopted by way of which readers are introduced to a clear portrait of the nature and scope of applicable religious laws, beliefs, rituals and practices germane to the scope of the conference theme. The paper identifies potential problems in the thematic areas of law, religion and human rights in a bid to determine the potential impact of these problems. It also recommends certain measures to be taken to avert anticipated consequences.

This paper is made up of three distinct sections. Section one introduces the discussion and provides some preliminary remarks and statistics. Section two deals with the legislative framework within which religion is practised in Zimbabwe, beginning with its formulation as a fundamental freedom in the Constitution of Zimbabwe, and other jurisprudence relating to the relationship between religion, law and human rights.² It is an argument of this paper that law is the grand factor from which all other issues affecting the exercise of freedom of religion flow, but that there exists the potential for future problems. Finally, section three is devoted to concluding remarks and targeted recommendations.

2 Definition of terms: Religion, law and human rights

It is important to define concepts before engaging in the current dialogue. Whilst definitions of concepts such as law and human rights might be free from controversy, defining religion has an inherent difficulty. Law is loosely defined in lay terms as the set of rules and regulations that govern human conduct. This definition does not take into account the various categories of law, which would require a much lengthier analysis. For our purposes, it suffices to adopt this conventional and all-encompassing definition. Human rights have been defined in various ways; however, the golden thread in those definitions is the proposition that rights are privileges and liberties conferred

¹ *United States v Ballard* 322 US 78 (1944) 86-7 (quoting Justice Douglas).

² Constitution of Zimbabwe 1980, as amended by 18 Constitutional Amendment Acts of Parliament.

upon individuals by virtue of their nature of being human.³ They are not conferred on individuals by any political system, constitution or international human rights instruments. These simply confirm in writing (and sometimes unwritten without writing) the fact that human beings have such fundamental rights and liberties. They further provide a mechanism to assert or challenge their violation before institutions established to cater for that process.

Religion ought to be defined in terms of its relationship with law and human rights. As already noted, its definition is not free from controversy. Horton summarises three prominent definitions of religion.⁴ One defines religion as 'covering an area of human activity which lacks sharply delineated boundaries', the second refers to religion as 'a class of metaphorical statements and actions obliquely denoting social relationships and claims to social status', whilst the third definition is 'the belief in the supernatural'.⁵ However, despite the ingenuity of these definitions, Horton concludes that they are not satisfactory.

The definition of religion in Zimbabwe, as held by the Supreme Court of Zimbabwe in *Dzvova v Minister of Education and Culture and Others*,⁶ is as follows:

The New English Dictionary on Historical Principles, VIII, gives the following definition of religion:

- 1 a state of life bound by monastic vows;
- 2 a particular monastic or religious order or rule;
- 3 action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;
- 4 a particular system of faith and worship;
- 5 recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship; the general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.
- 6 devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment.

I have adopted the above definition as the working definition for auditing Zimbabwe for purposes of the current dialogue. All references to religion and religious groups, rituals, practice and observance should be understood in the above context as guidelines rather than exhaustive or authoritative definitions of 'religion, law and human rights'.

³ F Viljoen *International human rights law in Africa* (2007) 4-5.

⁴ R Horton 'A definition of religion, and its uses' (1960) 90 *Journal of the Royal Anthropological Institute of Great Britain and Ireland* 201.

⁵ As above.

⁶ Case SC 26/07 (2007) ZNSC. This case will be fully discussed in the coming paragraphs in relation to the relationship between law, religion and human rights.

3 Religious demography in Zimbabwe

A country considered worst affected by outward migration due to the economic melt-down, often referred to as the 'brain-drain', Zimbabwe has a population of about 13 million, with a substantial portion thereof being of Malawian and Zambian origin.⁷ Of the 13 million, at least three million have permanently left or are living outside of Zimbabwe, whether by choice or due to the socio-economic and political environment in Zimbabwe.⁸ Outward migration has a place in the current discourse, as it adversely affects the accuracy and credibility of religious demographic statistics in Zimbabwe. As shall be demonstrated below, the voluntary repatriation of persons of Malawian origin back to Malawi and other countries has a direct effect on demography, the religion they believed in, practised and propagated a distinct indigenous religious practice whilst resident in Zimbabwe.

In light of the fluidity of the religious demography in Zimbabwe, no recent reports have been published which accurately depict the demographic distribution in matters of religion. Furthermore, with regard to the status of respect for religious freedom in Zimbabwe, research organisations have labelled Zimbabwe as 'generally free'.⁹ I will hasten to note with concern that some of these reports do not elaborate on the research methodology that was implemented. This, in my view, is a serious indictment on the credibility of such reports. However, those organisations that claim to have undertaken quantitative research on religious statistics and general census in Zimbabwe have come up with generally consistent reports. For instance, the *World fact book* reported that Zimbabweans of African descent constitute 98% of the population whilst Asians and whites constitute 2% collectively.¹⁰ Of the

⁷ The population make-up has its history in the colonial period when there used to be the Federation of Rhodesia and Nyasaland, also known as the Central Africa Federation (CAF) (1953-1963), which encompassed Northern Rhodesia (Zambia), Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi). With Southern Rhodesia being the economic hub, manpower for mines and farms was drawn from throughout the Federation, hence a substantial portion of people with Malawian and/or Zambian origin. The Federation crumbled in 1963 when Northern Rhodesia and Nyasaland became independent. See R Blake *A history of Rhodesia* (1977); P Mason *Year of decision: Rhodesia and Nyasaland in 1960* (1961); R Dorien *Venturing to Rhodesia and Nyasaland* (1962); CH Thompson *Economic development in Rhodesia and Nyasaland* (1954); LH Gann *Central Africa: The former British states* (1971); RA Sowelem *Toward financial independence in a developing economy: An analysis of the monetary experience of the Federation of Rhodesia and Nyasaland, 1952-63* (1967).

⁸ 'So where are Zimbabweans going?' <http://news.bbc.co.uk/1/hi/world/africa/4416820.stm> (accessed 30 September 2008). The article puts together and analyses statistics from different organisations and comes to a conclusion that, though exact numbers are not known, the most probable figure is three million.

⁹ 'Freedom in the world 2008: Zimbabwe' http://www.freedomhouse.org/uploads/press_release/Zimbabwe_FIW_08.pdf (accessed 30 September 2008).

¹⁰ <https://www.cia.gov/library/publications/the-world-factbook/print/zi.html> (accessed 3 March 2008).

98% Africans, 82% are Shona, 14% Ndebele, whilst the other groups constitute 2%.¹¹ According to the report, about 50% of the population believe in both Christianity and traditional religion.¹² These have been termed 'syncretic'. Pure Christians have been put at 25% and the followers of pure traditional religion are at 24%. Muslims and the rest occupy an undisputed 1%.¹³ In stark contrast, the US State Department reported in 2007 that between 70% and 80% of the whole population belonged to 'mainstream denominations such as Roman Catholic, Anglican, Methodist churches'.¹⁴

The proposition that mainstream Christians constitute about 80% of the population can no longer stand. In proof thereof, the same US Department of State's 2007 Report correctly states that 'a variety of indigenous churches and groups have emerged from these mainstream denominations'.¹⁵ This development has occurred on such a massive scale that it is very unlikely that the mainstream Christian population still stands at between 70% and 80%. In most cases, it is the young people who are 'floor-crossing' to join the Protestant churches, a term virtually unused in Zimbabwe. In the place of 'Protestant', preference is given to the use of the term 'Pentecostal' to depict 'radical Christianity'. Mainstream Christianity is associated with elderly people for the reason that it allows syncretism. Pentecostal Christians, who tend to reflect a younger membership, believe that such conduct amounts to a compromise of faith, thereby diluting the level of sanctity expected from Pentecostal Christians.

Perhaps the most important reason for this huge population in mainstream churches is the fact that many educational institutions in Zimbabwe, especially secondary schools, are church-run. Due to sufficient funding, these schools are well-equipped with essential facilities, hence they have become so popular that every family strives to send at least one child to such a school.¹⁶ Without understating the effect of exposing pupils to mainstream religious groups in schools, it does not

¹¹ As above.

¹² These demographic figures have been confirmed as accurate as at 17 April 2007 by Indexmundi Co <http://www.indexmundi.com/zimbabwe/religions.html> (accessed 2 March 2008).

¹³ For the Jewish community in Zimbabwe, see <http://www.zjc.org.il/showpage.php> (accessed 30 September 2008).

¹⁴ US Department of State *International Religious Freedom Report, Zimbabwe, 2007*, released by the Bureau of Democracy, Human Rights and Labour.

¹⁵ As above.

¹⁶ In Masvingo Province, a provincial area believed to produce Zimbabwe's largest and finest academics and leaders, almost all the first-ranked secondary schools are church-run and, therefore, commonly called 'mission schools'. These include Gokomere (Catholic), St Anthons Mission (Catholic), Chibi Mission (Catholic), Berejena Mission (Catholic), Holy Cross (Catholic), Dewure (Catholic), Zimuto Mission (Catholic), Silveira Mission (Catholic), Mukaro Girls High (Catholic), and Gutu Mission (Catholic).

necessarily follow that, once introduced to religion in school; pupils cannot practise another religion, or no religion, after school.

In view of the above concerns about the accuracy of the religious demographic figures, it is suggested that this is an area that needs specialised research in order to fully appreciate the dynamics of religion in Zimbabwe. Further, it is extremely difficult to put Zimbabweans of African descent into categories of religious affiliation given the relativity of religion and beliefs as depicted in the guiding definitions quoted above. Whereas people might claim to belong to a particular religion or belief, the centrality of that religion or belief to peoples' lives might be different. The practical knowledge of the writer of Zimbabwean society is that for every two persons, one believes in both God and indigenous beliefs and practises both (syncretism). Similarly, for every two persons, one entertains certain beliefs or none at all. The writer's own knowledge of the Zimbabwean religious dynamics is that out of every two believers, one is syncretic, that is, believing in both God and indigenous traditions. However, in respect of the general population, out of every two people, one is likely to profess no belief at all.

4 Legal framework and practice of religion

For reasons unclear to this writer, there is not much legislation dealing with the practice of religion and human rights in Zimbabwe. The most elaborate legislative text on religion in the Zimbabwean legal system is the Constitution that conceptualises the practice of religion. Section 19 of the Constitution is hereby quoted *verbatim*. It provides as follows:¹⁷

Protection of freedom of conscience

- (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say, freedom of thought and of religion, freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or in private, to manifest and propagate his religion or belief through worship, teaching, practice and observance.
- (2) Except with his own consent or, if he is a minor, the consent of his parent or guardian, no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.
- (3) No religious community shall be prevented from making provision for the giving by persons lawfully in Zimbabwe of religious instruction to persons of that community in the course of any education provided

¹⁷ Sec 19 of the Constitution of Zimbabwe, 1980.

- by that community, whether or not that community is in receipt of any subsidy, grant or other form of financial assistance from the state.
- (4) No person shall be compelled to take any oath that is contrary to his religion or belief or to take any oath in a manner that is contrary to his religion or belief.
 - (5) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision —
 - (a) in the interests of defence, public safety, public order, public morality or public health;
 - (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of persons professing any other religion or belief; or
 - (c) with respect to standards or qualifications to be required in relation to places of education, including any instruction, not being religious instruction, given at such places; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
 - (6) References in this section to a religion shall be construed as including references to a religious denomination and cognate expressions shall be construed accordingly.

Before considering other issues relative to freedom of conscience in Zimbabwe, it is important to discuss issues emanating from this provision in its implementation through the legislation enabled by the Constitution.

4.1 Freedom to belong to or to change one's faith

Germane to the theme of the Durban conference is the prescription that children are also regarded as bearers of freedom of conscience, which can only be limited by consent or through parental discipline. Furthermore, the law clearly protects one's freedom to choose a religion, as well as the freedom to change such religion or belief.¹⁸ This has been necessitated by the practice of the state to allow people freely to choose their lifestyles. As already stated, in Zimbabwe, religion, politics and culture are always kept separate from the law; hence there is minimal regulation. The other reason has to do with the basis of these religions. For instance, Christians maintain a fundamental doctrine to the effect that no one should be forced to be a follower of Christianity. The basis of this doctrinal teaching is that a call to this faith or absence of it should be entirely an individual's informed choice, rather than the result of coercive recruitment tactics. The textual background of this line of teaching is in the Holy Bible, the primary text establishing and regulating the Christian faith.¹⁹

¹⁸ As above.

¹⁹ Isaiah 1:18 provides: 'Come let us reason together says your God. Even if your sins are as red as scarlet, I will cleanse them as white as snow' (the King James version). On this basis, Christians maintain that the call of God is one of negotiation rather than sanction of punishment, hence one ought to have effective control over when to join or to leave the faith.

4.2 Freedom of religion in educational institutions

It is important to note that section 19(2) of the Constitution regulates religion in educational facilities such as schools and institutions of tertiary education. This has diverse consequences. In Zimbabwe, religious instruction is given in schools as a standard for discipline, but not necessarily as a legal requirement. Notwithstanding that, religion is not a legal requirement; it is, however, part and parcel of the school curriculum, especially of church-run and public schools from primary level to tertiary education where degrees in theology are offered. It is not entirely correct to say that schools are allowed to include religious instruction in the curriculum.²⁰ My view is that they are in fact required to do so because a primary school examination module known as Content requires pupils to master various humanities and social science-oriented concepts, including religion. One of the components of this module is called Religious and Moral Education, which is predominantly Christian instruction but with reference to basic concepts of Muslim, Judaism and Hinduism as well as traditional and other faiths. In secondary schools, the module is known as Bible Knowledge, and Divinity in advanced secondary schools.

At the level of secondary and advanced secondary school, the content of the curriculum is strictly Christian, without reference to other religions. Zimbabwe practises a centralised examination system such that all senior primary school pupils and secondary school learners in Zimbabwe are required to sit for these exams in order to be eligible to proceed to the next level. Consequently, unless a particular school is expressly exempted, perhaps because it is a Jewish or Muslim school, it should teach Religious and Moral Education, Bible Knowledge and Divinity, and students are expected to sit for these exams.²¹ Notwithstanding the universality of Christian instruction in schools from the secondary level, the module is sometimes taught as an elective, especially in schools that were established and funded by a particular religious formation such as Roman Catholicism or where a school lacks facilities or personnel to instruct on the subject. This gives pupils a chance to pursue a knowledge of their own religions.

Whilst there is no state religion in Zimbabwe, there is a bias towards Christianity. For instance, virtually all Christian ceremonies are public holidays, although no one is required by law to directly observe a

²⁰ See US Department of State (n 14 above).

²¹ The author personally went through all these stages in the Zimbabwean education system, both as a student and teacher, and studied all the variations of religious instructions. Therefore he has first hand appreciation of the content of the curricula and the effect it has on the personality of the recipient of such instruction. Unfortunately, efforts to secure a source of these modules proved futile.

particular day or do any rituals pertaining to a particular religion.²² Sunday is not a business day. Christians attend church services on this day, whilst other Christian denominations, such as the Seventh Day Adventist and some African Apostolic churches, attend church services on Saturday. Saturday is also designated as a non-business day, especially in the public service domain, even though the private sector regards it as a half-working day. The school calendar has nothing much to do with religious holidays, except those designated as public holidays by the state, for instance, Easter and Christmas. To that end, pupils who belong to certain faiths that observe protracted pilgrimage holidays might lose out in school should the pilgrimage take place during the school calendar, unless they are learners at a specialised school.

Perhaps this inexplicable devout national observance of Christianity dates back to the arrival of missionaries in Zimbabwe over a century ago. The missionaries' mission was to propagate and recruit followers. They are the ones who introduced the Christian faith and its values, built schools and hospitals as well as other social centres to serve people in the remote parts of ancient Zimbabwe.²³ It is a matter of record that most political leaders also owe allegiance to missionary schools, which were the only schools that accepted non-white students on bursaries during colonial and post-colonial Zimbabwe. Furthermore, '[i]n the last 50 years Christian mission schools have exercised much influence in the country, and most of the members of the first Cabinet of independent Zimbabwe were graduates of these schools'.²⁴ Perhaps the closest Zimbabwe came to being a Christian state was during the national referendum in 2000, where Pentecostal churches launched an unsuccessful campaign to make Zimbabwe a Christian state during the constitution-making process.²⁵ The consequences of the campaign, should it have succeeded, are still unknown to this day, but the writer is of the view that it could have been the

²² Easter Friday, Sunday and Monday and Christmas Day (25 December) are public holidays, whilst usually no work is done on a Sunday. However, it is not an offence to carry out work on this day. The requirement is that, should workers come to work on a Sunday, employers must pay double the daily rate as they do on public holidays (Labour Act, ch 28; 01 <http://www.parlzim.gov.zw>).

²³ See generally I Linden *The Catholic Church and the struggle for Zimbabwe* (1980).

²⁴ See 'Zimbabwe religions' <http://www.britannica.com/eb/article-44150/Zimbabwe> (accessed 30 September 2008). It is also on record that the former President of Zimbabwe, Robert Mugabe, received education at Kutama Catholic Mission, a secondary school close to his home area, and so did many other elderly politicians and other leaders in society. Missionary schools simply command a majority in the Zimbabwe education system.

²⁵ The proposal was rejected by the Commission tasked to collect views from the people regarding what they wanted to be included in the new Constitution. Whilst it is unlikely that the Draft Constitution was rejected on this basis only, many believe that it was the concentration of political power that led to its rejection by the electorate, who were largely influenced by those against centralisation of political power.

beginning of intertwining religion and politics, a situation that might easily develop into a closed system where followers of a particular religion might find it difficult to change or practise any religion other than Christianity.

4.3 Court jurisprudence around the right to practise religion

Of all fundamental liberties protected in the Constitution, freedom of religion remains one of the least litigated areas in the Zimbabwean constitutional jurisprudence. The reason for this state of affairs is the practice of separating religion from law and politics, which is well accepted as consistent with the values of a free and democratic society. In Zimbabwe, religion and culture are not established or constituted by law. In fact, the law simply requires that those who practise religion and culture should do so with utmost consideration of other peoples' right to practise or not to practise any religion or culture. Had it not been for judicial jurisprudence, the law did not even seek to define what amounted to religion or which beliefs and practices qualify for protection under section 19 of the Constitution or any other law. As shall be demonstrated below, courts do not easily involve themselves in defining religion. It suffices for their purposes to determine whether a particular practice is indeed central to one's religion in order to qualify for constitutional protection.²⁶

The Supreme Court of Zimbabwe sits both as an appeal court and a constitutional court.²⁷ It has heard and adjudicated two landmark cases relating to freedom of conscience or religion. The first case was the 1995 case of *In Re Chikweche*.²⁸ The facts were briefly that the applicant, a qualified lawyer, sought to be admitted to the Zimbabwean Bar, co-ordinated by the Law Society of Zimbabwe. His application for admission was opposed on the basis that the applicant did not satisfy the requirement in terms of the Legal Practitioners Act,²⁹ which provides that one needs to be a 'proper and fit' person to join the 'honourable profession'. The basis of the opposition was that, as a Rastafarian, the dreadlocks worn by the applicant were inconsistent with the etiquette of the legal profession.

²⁶ In the case of *Christian Education SA v Minister of Education* 1998 12 BCLR 951 (CC), the South African Constitutional Court quoted with approval the findings of Gubbay CJ (as then he was) in the Zimbabwean case of *In Re Chikweche* 1995 4 SA 284 (ZSC), where the Supreme Court of Zimbabwe held in paragraph 538F: 'This Court is not concerned with the validity or attraction of the Rastafarian faith or beliefs; only with their sincerity.'

²⁷ In terms of sec 24(3) of the Constitution, complaints regarding the violation of the Bill of Rights shall be referred to the Supreme Court, which in that case sits as a Constitutional Court made up of five judges.

²⁸ *Chikweche* (n 26 above).

²⁹ Legal Practitioners Act, ch 27:07.

The applicant filed a constitutional challenge against the decision to reject his application for admission to the Bar. He argued in the Constitutional Court that, as a Rastafarian, wearing dreadlocks constituted a universal and central practice critical to the full enjoyment of his faith. He further argued that the decision to reject his application for registration as legal practitioner was, accordingly, both discriminatory and a violation of his freedom of conscience protected by section 19 of the Constitution. The Court, having followed the applicant's meticulous narration of the origins of Rastafarianism, concluded that Rastafarianism was indeed a protected religion under section 19 of the Constitution.³⁰ The decision to reject the applicant's application for admission as an 'unfit and improper' person was reversed.

The second case, also dealing with the freedom of Rastafarians to wear dreadlocks, was the case of *Dzvova v Minister of Education and Culture and Others*.³¹ In that case, the complainant was a primary school pupil who had been sent away from school by the school authorities for wearing dreadlocks to school. This prohibition against wearing long hair was provided for in the school's code of conduct. The regulations did not take into account the possibility that certain pupils might be required by their religion or culture to wear their hair long. Accordingly, the applicant challenged the constitutionality of the regulations on the basis that, by failing to provide reasonable accommodation to Rastafarians, the regulations infringed upon the freedom to enjoy and practise religion in public. In what this writer regards as the worst reasoned human rights judgment, despite its favourable conclusion, the Court, after making a rushed superficial definition of religion, concluded that Rastafarianism was a religion. The Court inevitably found the regulations to be in violation of section 19 of the Constitution.

The above case law demonstrates that, whilst it is generally acknowledged that individuals should enjoy freedom of religion and culture, there are certain limitations that are inadvertently imposed on individuals by the authorities in the course of their duties. If individuals do not take action to seek judicial review of those limitations, they might suffer

³⁰ Concurring with the judgment of the full court, Justice McNally dissented in part, expressing his reservations about the notion that Rastafarianism was a religion. He, however, agreed with the full bench that, notwithstanding the lack of clarity as to whether it was a religion, it qualified for protection under sec 19 for the reason that the provision is wide enough to protect such philosophical and cultural expressions as are strongly binding on individuals. The same approach of endorsing Rastafarianism as a religion was taken by the Constitutional Court of South Africa in the case of *Prince v President of Law Society of the Cape & Others* 2000 7 BCLR 823 (CC). In that case the Court quoted with approval the findings of the Supreme Court of Zimbabwe in the *Chikweche* case to the effect that Rastafarianism was a religion and therefore protected as such under the relevant constitutional provisions. The Court further observed that, despite the fact that possessing and smoking *cannabis* is illegal; the illegality did not deprive the practice of its status as a central practice in the Rastafarian religion.

³¹ n 6 above.

unjustified limitations upon their freedoms. However, the state does not easily interfere with the practice of religion and culture, as culture and traditional values are deemed the pillars of society. For this reason, there exists a Ministry of Education and Culture tasked with developing policy and promoting the practice of religion and culture in schools. Save for the Witchcraft Suppression Act,³² a colonial statute that has since been amended, traditional beliefs are always given, but not at the expense of other forms of belief. The state does not interfere with church administration, unless the leaders involved are using the church as a political tool to influence public political opinion, particularly by propagating political ideologies regarded as anti-government.³³

5 The state and spiritual values and practices of indigenous African peoples

Zimbabwe is a society where the belief and practice of traditional customs are fast disappearing, so that secular and syncretistic tendencies have practically taken over in virtually all spheres of life. This is so despite the government's efforts to keep traditional beliefs and values alive in society. The secular-oriented lifestyle is reflected in the way the state regulates the exercise of freedom of conscience. The state has left the belief and practice of religion to spiritual leaders, as well as individuals, as the ultimate determiners of how religion ought to be consummated. Traditional practices which are embodied in customary law are not regulated to the extent that they do not conflict with general law.

With regard to marriage, Zimbabwe maintains three types of marriage, namely, civil marriage,³⁴ registered customary law marriage³⁵ and unregistered customary law union. The civil marriage is a typical monogamy where a party is barred with a criminal sanction from entering into another marriage as long as the civil marriage persists.³⁶

³² Ch 9:19. This Act of Parliament was enacted during colonialism. Its effect was to punish any person who accused another of the act of witchcraft, a practice ordinarily regarded by society as evil, given that the belief is that followers of that practice are involved in killing other people through spells and bad omens.

³³ In March 2007, the opposition political party Movement for Democratic Change organised a prayer for Zimbabwe, a gathering the government interpreted as an attempt to rally people behind the opposition and influence political opinions in view of the approaching general elections in March 2008. The state violently disrupted these meetings, arresting and assaulting opposition leaders in the process. One might read the event not as a violation of freedom of religion because the credibility of the prayer was questionable, but as one of attempting to hide behind religion whilst pushing a political agenda.

³⁴ Administered through the Marriages Act, ch 5:11.

³⁵ This marriage is regulated by the Customary Marriages Act, ch 5:07.

³⁶ Bigamy is a common law offence that is imposed on a party to a civil marriage who contracts another marriage whilst the first civil marriage is still valid.

Perhaps by coincidence, most Christian churches have the competence to solemnise this kind of marriage within the church structures. Such a marriage solemnised by a minister of religion is endowed with rights and privileges similar to the one solemnised by a magistrate in a court of law, and it can only be annulled by an order of the High Court or any other superior court. This, in my view, does not necessarily extend an unfair advantage to Christians over followers of other religions. My view is that it is a mere coincidence that the state confers a civil marriage similar to the one recognised by Christianity. This suggestion should be assessed in view of the fact that catholic Christianity has since times immemorial influenced the type of marriage Christians should contract.

Two other forms of marriage envisage the possibility of polygamy, which is not an offence and is only directly discouraged by activists who think that it is a vehicle for the spread of HIV/AIDS. The only limitation on civil marriage is that it cannot develop into a polygamous marriage. If any other religion confers recognition on a different type of marriage, this is not recognised by the Zimbabwean legal system; hence parties thereto cannot enjoy the rights and privileges inherent or conferred to parties in a legally recognised marriage.

As to traditional practices, female genital mutilation, tribal initiation rituals and compulsory virginity testing are some of the practices that are almost or totally extinct. Their existence is more rooted in oral tradition, rather than as a practice still in force. Proof of the existence of ritual and/or honour killings is difficult to come by. However, the main area of concern is child marriages on the basis of poverty and some religious beliefs. Poor families often 'sell off' girl children in consideration of generous payment in the form of *lobola* or any other payment in kind. This customary practice is called *kuzvarira*.³⁷ More disturbing is the solemnisation of marriage between minor girls and elderly men, especially in the African Apostolic churches, which also practise polygamy. This practice is so synonymous with the lifestyle of followers of this sect that civil society organisations have voiced their concerns,

³⁷ There is yet a customary practice with similar consequences of marrying off girl children to another family as a way of appeasing the dead from the marrying family. This normally occurs where a member of the marrying-off family killed a member of the marrying family. This practice is called *kuripa ngozi* (appeasing the dead). In its concluding observations on the Zimbabwe report, the United Committee on the Rights of the Child (Concluding observations of the Committee on the Rights of the Child: Zimbabwe CRC/C/15/Add.55 [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/514a5359399c3a_88c12563610049128c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/514a5359399c3a_88c12563610049128c?Opendocument)) expressed its disappointment regarding the prevalence of this practice in some sectors of the Zimbabwean society. It accordingly recommended that Zimbabwe should ensure that the practice is terminated forthwith through legal reform as the practice had adverse effects on girls and unduly diminished their choice of the kind of life they would want to lead.

arguing that the practice amounts to statutory rape,³⁸ but nothing much has been done by the state to eradicate the practice, especially because the majority of such cases go unreported to the responsible government authorities. Moreover, an offer to marry a victim by a suspect in a statutory rape case is almost always regarded as conferring immunity from prosecution on the suspect.

6 The state and conflicts between religions, proselytism and religious expression within public schools or at government functions

Indigenous traditions have always been regarded as directly antagonistic to the foundational doctrines of radical or Pentecostal Christianity. This has been the main source of tension between these religions. Coincidentally, or perhaps as a calculated compromise, many mainstream Christian churches accept the possibility of what we call 'dual worship' or syncretism, in which one is allowed to practise both traditional and mainstream Christian values. For instance, the Catholic faith allows its followers to take alcohol and worship spirit mediums (*vadzimu*) alongside Christian rituals.³⁹ This is unheard of in the Pentecostal Christian faith; either one is a Christian or not. There is no middle-of-the-road approach. Scholars have illustrated syncretism in the Zimbabwean context as follows:⁴⁰

An African Christian theology is in the making in the faith and practice of the African Christian. There is always the tendency, not uniquely to African peoples, to understand the new faith in terms of what one already knows. It is not unusual to hear African Christians refer to Jesus as universal *mudzimu*, as *Mudzimu Mukuru* (the great ancestral spirit). He becomes incarnated within African culture and in that way people can understand His role and participation in all aspects of life, rather than being confined to ecclesiastical or to spiritual matters.

However, despite the distinction between Christians and indigenous traditions set out above, the ensuing tension has not yet taken a confrontational dimension, and is very unlikely to do so in future. One of the reasons for this is that, unlike Christian churches and congregations, the practice of traditional rituals lacks the order and structure of administration. An individual or a family unit is sufficient to do a ritual. In such circumstances, it would be extremely difficult to mobilise people

³⁸ In terms of sec 5(1)(a) of the Sexual Offences Act, ch 9:21, a male adult who has sexual intercourse (even consensual) with a girl under the age of 16 years commits the offence of rape.

³⁹ H Arntsen *The battle of the mind: International new media elements of the new religious political right in Zimbabwe* (1997) 47 145 <http://www.scholars.nus.edu.sg/landow/post/zimbabwe/religion/zreligionov.html> (accessed 30 September 2008).

⁴⁰ C Hallencreutz & A Moyo *Church and state in Zimbabwe* (1988) 202.

to rise against another form of religion such as that which obtains between Christians and Muslims in some countries represented in this conference.

Consequently, confrontational or violent conflicts between religions are a practice that never entered the realm of religion in Zimbabwe. It is unheard of that religious congregations would differ on matters of religion to the extent that state intervention becomes necessary in order to broker peace. Accordingly, issues regarding conversion into or out of the faith, access to religious sites and pilgrimage routes do not arise. Perhaps this is attributable to the nature of religions dominant in Zimbabwe, as well as to its religious demography. People are free to proselytise by organising public or open meetings where potential converts are invited to participate and ultimately join the religion. Door-to-door methods are also used, in which followers of particular religions visit potential converts in their homes and attempt to persuade them to join their fellowship. It is uncommon to hear that nefarious methods of proselytism have been utilised.

Zimbabwe follows a quasi-secular lifestyle such that it is one's freedom of conscience to belong or not to belong to a religious group. Despite the dominance of Christianity and traditional beliefs, it cannot be imagined that persons of certain religious opinions would impose their beliefs and practices on other people who are least involved in that form of religion. This obtains in all spheres of life including, but not limited to, dressing, social interaction, marriage, career and education. Dictates enforcing dress codes or lifestyles emanate from the church doctrines of each and every religion as opposed to a universal regime. Such precepts are binding only on followers of that religion with sanctions for non-compliance being internally administered.⁴¹

If we were to make a comparison based on dress codes, the following would be the situation in a group of ten Zimbabweans: Pentecostal Christians would dress modestly; no tight clothing, clothes should cover intimate parts of the body as much as possible, women dressed in fairly long and loose skirts or trousers, women's hair plaited or flowing with modern artificial extensions, and so on. No particular limitations exist for men in Pentecostal Christian churches.⁴² African Apostolic faith followers require that women wear a headscarf and unprinted fabric. With regard to marriage, African Apostolic followers strongly believe in polygamy; whereas Pentecostals regard polygamy as adultery. Muslims would expect the flock to be in flowing clothes, with women's bodies completely covered to the feet. Rastafarians have long hair and

⁴¹ The media regularly publishes stories of religious leaders who have been excommunicated by their congregations for failing to abide by the dictates of Christian values, such as financial mismanagement, sexual immorality, abuse of office, and so on.

⁴² This is a cause of concern that might pose a future problem, since some churches, especially the African Apostolic churches, still perpetuate the oppression of women, thereby countering all efforts directed towards equality and emancipation.

often gather to smoke *cannabis* in fellowship. Zimbabwean traditional leaders, such as chiefs and headmen, who are the default custodians of the traditional beliefs and lifestyle, would expect people to dress in no particular regalia, but one that exudes the decency expected of a person duly instructed according to African customs. It is in the above context that Zimbabwean society ought to be understood. It will be practically impossible to attempt to impose religion on peoples' lifestyles, especially where the state is not involved, because, as already noted, religion and governance have been kept separate.

It is, however, important to note that religious expression in public meetings or government functions has been consistent, in the sense that the business of the day usually begins with a prayer, often with a flavour of Christian doctrine, though this is not a legal requirement. Holders of public office are sworn in holding the Bible; parliamentary business starts with a prayer; school parades start not only with recitation of the Lord's Prayer,⁴³ but a short sermon.⁴⁴ High profile government functions, such as Independence Day celebrations on 18 April and the burial of national heroes, start with prayer before political speeches.⁴⁵ Radio and television broadcasts begin with Christian sermons at five o'clock in the morning. The dominance of Christianity has ostensibly inculcated a sub-consciously held belief that, in whatever people do, they should reverence God, namely the Christian God. The government has tactfully excluded itself from sharing sentiments regarding the determination of the so-called correct way of worshipping God, which is the main source of division even *within* religions and congregations. This approach has worked very well in terms of ensuring that

⁴³ The Bible records that Jesus Christ gave a prayer outline to his disciples that largely covers the main areas of one's life, such as sufficient provision for the day, deliverance from temptation and evil, as well as forgiveness. This prayer is almost like a national anthem. It is recited in many schools, both private and public, but for the reason that it is not a legal requirement and is not recorded, one might not easily find the origin of this practice.

⁴⁴ Most government and church-run schools require students to purchase hymn books and/or prayer pamphlets, eg Victoria High School in Masvingo Province, which is a government-run school, requires all students to own and bring a hymn book to the chapel where a minister of religion preaches a short sermon relevant to the age group and expectations of students.

⁴⁵ The reason why the church is given reverence by political leaders might be ascribed to the role played by the missionary churches and leaders during the liberation struggle. A number of authors have written widely on this subject wherein they attempted to expose the role played by churches and traditional leaders. See generally C Banana *The church in the struggle* (1996); AJ Dachs & W Rea *The Catholic Church and Zimbabwe* (1979); Hallencreutz & Moyo (n 40 above); D Lan *Guns and rain: Guerrillas and spirit mediums in Zimbabwe* (1985); Linden (n 23 above); DJ Maxwell 'The church and democratisation in Africa: The case of Zimbabwe' in P Gifford (ed) *The Christian churches and the democratisation of Africa* (1995) 108; RH Randolph *Dawn in Zimbabwe: The Catholic Church in the new order: A report on the activities of the Catholic Church in Zimbabwe for the five years (1977-1981)* (1985).

competition for membership is the province of religions themselves and the state regards all religions as equally important.

7 Prospective problems

7.1 Freedom of religion versus politics: A boiling pot?

Three issues regarding religion and politics are particularly problematic. First, many reports on religious freedom in Zimbabwe have found it extremely difficult to find information on the direct violation of religious freedom by the government and ended on political harassment of religious leaders who have deliberately ventured into politics.⁴⁶ Second, in an attempt to cast a 'prophetic eye' into the future and to attempt to expose possible problem areas in the interaction of religion, law and human rights, I would argue that, despite differing opinions on whether the harassment of church leaders violates freedom of religion, such harassment does take on a pernicious character when it adversely affects the general populace in the provision of social amenities, given the fact that churches and humanitarian organisations have literally taken over the responsibility of providing basic amenities to the general populace. Third, African indigenous churches still perpetuate discrimination and the oppression of women within their congregations, thereby defeating the efforts of many civil society organisations trying to eradicate inequality and to emancipate women. Children are also affected, especially girls, because it is considered unnecessary to send a girl to school given that she will get married upon reaching puberty. I will deal with these two points separately.

With regard to the first issue, it might be argued that, as a matter of interpretation, the mere fact that church leaders are politically harassed as a consequence of 'diversifying' their role in society by venturing into politics should not easily be interpreted as a violation of freedom of religion.⁴⁷ The reason is that involvement in politics cannot be defined as a belief or an aspect of any religion, such that its limitation would amount to a violation of freedom of religion. A church leader who gets involved in politics should be regarded as a person exercising his freedom of assembly and expression, or participation in the political affairs of his country through electing public officials or assuming candidature for such office. To that end, the activity is outside the parameters of constitutional protection. The normative content of freedom of religion or conscience may be drawn from the African Charter on Human and

⁴⁶ nn 10-14 above.

⁴⁷ In this case we hereby confirm reference to reports by the US Department of State 2007 on Zimbabwe, who have attempted to include the allegations of harassment of church leaders as a violation of religious freedom. There are diverging views regarding this interpretation when inspiration is drawn from international human rights instruments in defining the normative content of the right or freedom of religion.

Peoples' Rights (African Charter),⁴⁸ as well as the International Covenant on Civil and Political Rights (CCPR), both of which are part of domestic law of Zimbabwe. Article 18 of CCPR provides as follows:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 8 of the African Charter provides that '[f]reedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.' Taken together, the authorities cited above have one thing in common; namely, that they restrict the practice, observation and teaching of religion to activities related to religious beliefs as opposed to an endless list of activities. Therefore, the mere fact that a religious figure undertakes an activity does not necessarily make it a religious activity protected by the Constitution. These may be some of the reasons for the lack of clarity in the way religious freedom is reported in Zimbabwe.

However, another school of thought would insist that the above sentiments should not ignore the indisputable role played by churches in the broader functioning of civil society organisations in their quest to influence social transformation.⁴⁹ Perhaps the reason why Zimbabwe's public service delivery system is still functioning is because of the subsidy by faith-based organisation through humanitarian relief programmes. One could also conclude that the role of churches in society entitles them to have a say in the governance of the country, as they equally share the burden with the state. It is also widely acknowledged that conventional Christianity does not separate religion and politics. In fact, research has shown that religions, especially Christianity, have so much to do in the democratisation process.⁵⁰ To that end, harassing church leaders on the basis of their political affiliation ought to be regarded as an unjustified limitation to freedom of religion. Furthermore, assembly is very critical to the exercise of freedom of religion. The requirement by

⁴⁸ Adopted at Nairobi, Kenya in June 1981 and entered into force in October 1986. A copy is available in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

⁴⁹ In fact, the leading case law on the issue of delay in execution of condemned inmates as constituting cruel, inhuman and degrading treatment or punishment were filed by a charity church-run organisation known as the Catholic Commission on Justice and Peace (CCJP). This was in the case of *Catholic Commission on Justice and Peace v Attorney-General & Others* 1993 1 ZLR 242 (S). Furthermore, with the economic melt-down in Zimbabwe, food security of the majority of the population is ensured by church-run relief organisations such as the Catholic Relief Service, World Vision Christian Care, and so on. As already mentioned above, most schools in Zimbabwe are church-run. The church is also supporting the health system of the whole nation by building and running mission hospitals as well as clinics.

⁵⁰ See generally Maxwell (n 45 above).

Public Order Security Act⁵¹ for police clearance to organise a gathering has been construed as a violation of freedom of assembly in countries with similar legislation.⁵² Since freedom of assembly is a cornerstone of freedom of religion, the violation of freedom of assembly translates into a violation of freedom of religion. These are some of the reasons for maintaining that the harassment of church leaders violates freedom of conscience.

As to the second issue, I take harassment of churches as a future problem, given the eagerness of the government to haphazardly enact oppressive laws in order to quell dissent from certain sectors of society, especially civil society.⁵³ If the problem gets to the extent where legislation is enacted to oust churches from politics, then society is bound to suffer in various ways, particularly with respect to the provision of social amenities. The church was involved right from the beginning during the liberation struggle. As such, it should be allowed to participate effectively in the governance of the country. That is its rightful place in the true democracy purported in the Constitution. The harassment of church leaders, therefore, is not just an individual case issue, but a human rights issue, to the extent that church congregations as members or citizens of Zimbabwe share their grievances through established structures, namely the church. Despite representing a substantial part of the population, religion is not specifically represented in parliament, unlike other sectors of society such as women and traditional leaders.⁵⁴

8 Conclusion

I have already mentioned that the subject of religion or religious freedom does not easily feature in either lay or intellectual discussions in Zimbabwe. Despite the population being generally religious, there have been no outstanding issues on this subject so as to elevate it to the status of heated issues. Consequently, political parties do not ordinarily engage in debates on religion in parliament or even mention it in their respective manifestos around the time of general elections. Among the explanations for this is the clear evidence of the dominance

⁵¹ Public Order and Security Act, ch 11:17 requires police clearance for anyone who wishes to convene in a meeting of more than 10 people. This law has been applied in respect of church gatherings as well, especially in urban areas.

⁵² See *New Patriotic Front v Inspector-General of Police* (2001) AHRLR 138 (GhSC 1993).

⁵³ In 2004, the Parliament of Zimbabwe enacted the Non-Governmental Organisation Act, which sought to confer powers on the government to regulate and control the manner in which civil society manages its business, especially by scrutinising financial books. However, the author could not locate an authoritative copy of same.

⁵⁴ Ten of the senate seats are reserved for traditional leaders, who are hand-picked by the President to represent traditional leadership and as preservation of traditional values, especially in the laws enacted by parliament.

of Christianity and traditional beliefs over all other forms of religion in Zimbabwe. Unfair advantages are directly or ostensibly extended to majority religions. For instance, Christianity dominates public gatherings and schools, whilst traditional or indigenous beliefs are safeguarded by nominating representatives to sit in parliament. This advantage is not extended to Muslims, Jews and Buddhists who, by virtue of being religious minorities, need protection. The issue of the political harassment of religious leaders is one of the problematic areas that needs to be addressed as soon as possible before it gets out of hand. The consequences that will ensue if the situation is not closely monitored is a total denial of the church's role in a democracy, namely, that although they are faith-based organisations, churches form part and parcel of civil society and are therefore entitled to participate in democratic debates. Disregarding churches effectively means depriving their members of a chance to be represented in debates of national importance, in flagrant violation of the fundamental pillars of representative democracy. Solutions will certainly be found in the ongoing discourse on the relationship between law, religion and human rights.

Law, religion and human rights in Zambia: The past, present and the practice

*Abraham Mwansa**

Managing Partner of AMC Legal Practitioners; member of the Council of the Law Association of Zambia; Convenor, Human Rights Committee of the Law Association of Zambia

Summary

Zambia, a former British colony, is a unitary state with a population of about 10 million inhabitants. Zambia has a political system that embraces both the presidential and parliamentary systems of government. A member of parliament, once elected as such, may be appointed to cabinet. The religious demography is mostly Christian, with the other religions existing side by side. Zambia has a Bill of Rights enshrined in the Constitution, and amongst the rights guaranteed is the right to religion. The right to religion is therefore justiciable. Apart from the constitutional guarantee, the right to religion is also enforced by the Human Rights Commission, the Police Complaints Authority, the Anti-Corruption Commission, to mention but a few, as well as other institutions put in place by government for the enforcement of human rights. Under the Constitution, African traditional and customary law practices are only recognised to the extent that they do not conflict with written law. Despite this recognition, women and children have remained marginalised. Socio-economic rights are only directives of state principals which are not justiciable. The right to religion is justiciable. The right to religion, coupled with religious scruples and the regulation of the internal affairs of churches, mosques, religious schools and such by the government leaves little to be desired. Christianity is favoured. Zambia was declared a Christian nation by the second republican President, Dr Frederick Chiluba. Practice has shown that, in as much as the Constitution guarantees freedom of religion, Zambian leaders have more often than not favoured those with an inclination towards Christianity.

* LLB (Zambia), LLM (Human Rights and Democratisation in Africa) (Pretoria); abramwa@yahoo.co.uk

1 Introduction

Nearly all nations of the world profess to be democracies, or at least that they abide by the rule of law. One might say that law, religion and human rights are nowhere better defined than in a constitution. In Zambia, like many other countries, the Constitution is the *grundnorm* from which no law may divert.¹ The supremacy of the Constitution, the protection of fundamental human rights, one of which is the right to enjoy one's religion, are all provided for in the Constitution.²

This article takes a closer look at provisions in Zambian law as they relate to religion and human rights. The article considers law, religion and human rights as they relate to African traditional customs and practices obtaining in Zambia. It does not, however, delve into the historical origins of any religious group in Zambia; it would suffice to say that these origins are no different from those of neighbouring countries.

2 Religious demography

Zambia has a landmass of about 752 614 square kilometres and her population is estimated at 10 462 436.³ Of this population, about 98,7% are Africans, 1,1% are Europeans, while about 0,2% are composed of other races.⁴ Zambia is predominantly Christian. Of the population of Zambia, about 50% to 75% are Christian, while Muslims and Hindus account for 24% to 49% and indigenous beliefs account for about 1%.⁵

3 The governmental and legal system

Zambia is a unitary state divided into nine provinces established under the Constitution.⁶ The provincial administrations are subject to the control of the central government and have no legislative or judicial powers. These provinces differ in area, population and economic

¹ Art 1(3) provides that the Constitution is the supreme law of Zambia and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

² Part III of the Zambian Constitution constitutes the Bill of Rights and its enforcement provisions.

³ A Mwansa 'Zambia at a glance' in G Robbers (ed) *Encyclopedia of world constitutions* (2006) 1030.

⁴ As above.

⁵ As above.

⁶ Part VIII of the Constitution establishes the local government system pursuant to which the Local Government Act ch 281 of the Laws of Zambia was enacted. The Act defines the manners and instances upon which a district may be established.

strength. Local authorities or district councils are subject to the authority of provincial administrations.

Zambia has a written Constitution codified in a single document. The Constitution is the supreme law of the land. It takes precedence over all other laws. Other laws are applicable only to the extent that they are not in conflict with the Constitution. Therefore, Zambia ought to enjoy constitutional and not presidential or parliamentary supremacy.

The law-making function is a preserve of parliament. However, by way of delegation, local authorities may pass by-laws with the consent of the responsible Ministers. Most legislation is introduced by members of cabinet, the Ministers and some by the back-benchers.

Zambia is a party to various international and regional human rights instruments. Amongst these are the International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the United Nations (UN) Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (African Charter), as well as the African Charter on the Rights and Welfare of the Rights of the Child (African Children's Charter). These instruments only apply in Zambia upon enactment in domestic law.

3.1 Enforcement of human rights

The Zambian Constitution may be said to be a fountain of hope for the protection and enforcement of human rights in Zambia. Leaning heavily on the enforcement and protective provisions of the Constitution,⁷ any person who alleges an actual or imminent violation of their rights may seek redress through the High Court. No person or authority is above the Constitution. The enforcement of human rights is, therefore, dependent on the sanctity of the Bill of Rights in the Constitution. Other institutions have been established specifically to help in the recognition, promotion, realisation and enforcement of fundamental human rights and freedoms.

3.2 The Human Rights Commission

The Human Rights Commission is an autonomous body established by the Constitution.⁸ The Human Rights Commission Act, chapter 48 of the Laws of Zambia, governs the Human Rights Commission. Section 3 of the Act equally guarantees the autonomy of the Commission and states that the Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.

The functions of the Commission are to:⁹

⁷ Art 28 of the Constitution.

⁸ Art 125 establishes the Human Rights Commission and guarantees its autonomy.

⁹ Sec 9 of the Act.

- (a) investigate human rights violations;
- (b) investigate any maladministration of justice;
- (c) propose effective measures to prevent human rights abuse;
- (d) visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- (e) establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuses to enhance the respect for and protection of human rights;
- (f) do all such things as are incidental or conducive to the attainment of the functions of the Commission.

The Commission's powers are defined under section 10 of the Act and these constitute the powers to investigate any human rights abuses:

- (a) on its own initiative; or
- (b) on receipt of a complaint or allegation under the Act by -
 - (i) an aggrieved person acting in such person's own interest;
 - (ii) an association acting in the interest of its members;
 - (iii) a person acting on behalf of an aggrieved person; or
 - (iv) a person acting on behalf of and in the interest of a group or class of persons.

The Commission also has powers to

- (a) issue summons or orders requiring the attendance of any authority before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission;
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission; and
- (d) recommend the punishment of any officer found by the Commission to have perpetrated an abuse of human rights.

Evident from the foregoing provisions is the fact that the Commission lacks judicial powers to realise its functions. The Commission is limited to making recommendations and nothing more.¹⁰ The Commission also has no powers to entertain any matter which is pending before a court of law.¹¹

¹⁰ Sec 10(4) of the Act provides that, subject to subsec 5, the Commission may, where it considers it necessary, recommend the release of a person from detention; the payment of compensation to a victim of human rights abuse, or to such victim's family; that an aggrieved person seek redress in a court of law; or such other action as it considers necessary to remedy the infringement of a right. This is quite at variance, eg, with what obtains in Uganda where the Human Rights Commission has quasi-judicial powers.

¹¹ Sec 10(5) of the Act.

Further, in as much as the Commission is said to be autonomous, by and large it exists just on paper. First, the President appoints the commissioners, subject to ratification by parliament.¹² Secondly, the funds of the Commission are made available by parliament and through grants and donations from whichever source, but with the approval of the President.¹³ The Commission is equally mandated to submit its annual report to the President, who in turn presents the report to parliament.¹⁴ According to the principle of autonomy, the Commission should sever ties with the appointing authority and the Chairperson of the Commission should be responsible for tabling the annual report before parliament. The receipt of grants and donations by the Commission should equally be governed by the existing law and not be the subject of presidential approval. That said, it is important to note that the Constitution guarantees fundamental human rights and freedoms, and a constitutional body in the name of the Human Rights Commission helps in the recognition, promotion, realisation and enforcement of these rights. It is hoped that the system may be perfected in the near future to make it meaningful.

3.3 Other institutions

Apart from the Human Rights Commission, other institutions have been established that assist in the enforcement of human rights. Such institutions include the Judicial Complaints Authority¹⁵ and the Police Complaints Authority, as well as the Police Victims' Support Unit. These institutions deal with complaints against erring officers from the respective institutions and victims of abuses from the general public respectively. Of these institutions, the Police Victims' Support Unit has been more active.

4 Fundamental rights and freedoms

The Constitution defines and provides for the recognition and enforcement of fundamental human rights and freedoms. Specifically, article 11 of the Constitution provides as follows:

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part, to each and all of the following, namely:

¹² Sec 5(2) of the Act.

¹³ Sec 22 of the Act.

¹⁴ Sec 26 of the Act.

¹⁵ Established by sec 20(1) of the Judicial (Code of Conduct) (Amendment) Act 13 of 2006. There have been complaints, however, from various quarters of society that the authority is equally toothless and lacks the necessary authority to deal with matters presented to it, and therefore another entity to waste national resources.

- (a) life, liberty, security of the person and the protection of the law;
 - (b) freedom of conscience, expression, assembly, movement and association;
 - (c) protection of young persons from exploitation;
 - (d) protection for the privacy of his home and other property and from deprivation of property without compensation;
- and the provisions of this part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Apart from the provisions relating to the right to life, the protection from slavery and forced labour, the protection from inhuman treatment and the provisions to secure the protection of the law, the other fundamental provisions may be derogated from in accordance with the provisions of the law in order to deal with the situation at hand.¹⁶ The enforcement of fundamental rights and freedoms is made possible by article 28 of the Constitution.¹⁷

¹⁶ Art 25 of the Constitution provides that '[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question'.

¹⁷ Art 28 of the Constitution of Zambia provides: '(1) Subject to clause (5), if any person alleges that any of the provisions of articles 11 to 26 inclusive has been (protective provisions), is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall: (a) hear and determine any such application; (b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of articles 11 to 26 inclusive. (2)(a) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious. (b) Any person aggrieved by any determination of the High Court under this Article may appeal therefrom to the Supreme Court: Provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious. (3) An application shall not be brought under clause (1) on the grounds that the provisions of articles 11 to 26 (inclusive) are likely to be contravened by reason of proposals contained in any bill which, at the date of the application, has not become a law. (4) Parliament may confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by this article as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this article or of enabling any application for redress to be more speedily determined.'

4.1 African traditional and customary law

African traditional and customary rights are also guaranteed under Part Three of the Constitution. The Constitution provides that no law shall make any provision that is discriminatory either in itself or in its application to members of a particular race, tribe, or system of customary law.¹⁸ However, African tradition and customary law is only applicable to the extent that such law or tradition is not repugnant to natural justice or inconsistent with written law and the Constitution itself.

The Subordinate Court Act¹⁹ has a much more expanded provision.²⁰ This is probably due to the fact that subordinate courts are more spread out across the country than the High Court and are easily accessible by many litigants. Subordinate courts also handle most cases that hinge on African tradition and customary practices, while the High Court entertains such matters mainly on appeal.

It is important to note here that the test applied to written law and African customary law is applied equally to African traditional beliefs as it is applied to religious practices. The bearing of the test discussed above, that is to say, customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia on traditional beliefs and or religious practices, is discussed in the later part of this paper.

4.2 Women and children

Women and children are a special group deserving of particular mention where law, religion and human rights are concerned. They continue to be vulnerable and marginalised in the community. The vulnerability of women and children permeates a plethora of human rights, including the right to religion. Article 23 of the Zambian Constitution indirectly

¹⁸ Art 23(4)(d) of the Constitution.

¹⁹ Ch 28 of the Laws of Zambia.

²⁰ Sec 16 of the Subordinate Court Act provides: 'Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.'

provides for the protection of women's rights.²¹ The provision relates to nondiscrimination on the basis of sex. The state has not enacted a deliberate policy to protect the rights of women and children, despite being a party to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), CRC and its African counterpart. African customary law continues to disadvantage women and children in its application, especially in matters relating to succession and marriage.²² Violence against women and children prevails in both private and public life.²³ Even though these matters may be reported

²¹ Art 23 of the Constitution provides: '(1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect. (2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. (3) In this article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. (4) Clause (1) shall not apply to any law so far as that law makes provision (a) for the appropriation of the general revenues of the Republic; (b) with respect to persons who are not citizens of Zambia; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application, in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society. (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law. (6) Clause (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision or law as is referred to in clause (4) or (5). (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by articles 17, 19, 20, 21 and 22, being such a restriction as is authorised by clause (2) of article 17, clause (5) of article 19, clause (2) of article 20, clause (2) of article 21 or clause (3) of article 22, as the case may be. (8) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.'

²² Local Courts Act, ch 36 and Intestate Succession Act ch 59 of the Laws of Zambia are not friendly in their provision and application against women and children. The practice has shown that men are favoured above women and children. Eg, long before the enactment of the Intestate Succession Act, and this remains the law, the High Court in the case of *Martha Mwiya v Alex Mwila* (1977) ZR 113 (HC) decided that there was no Lozi custom, one of the tribes in Zambia, which upon divorce compels a husband to share property acquired during the existence of the marriage.

²³ The author's personal experience at Legal Resources Foundation, Zambia, where he served as Principal Advocate.

to the state, perpetrators are rarely prosecuted and law enforcers have encouraged out-of-court settlements.

Provisions relating to the protection of young persons, in particular, are insufficient. Children have become vulnerable, but there exists no proper legislation to protect their rights.²⁴ The number of sexual abuse cases have increased, and barely a week passes without media reports on the sexual abuse of children. Some sectors of society have called for the amendment of the Penal Code to provide for harsher punishment. Some women's groups have even advocated the castration of offenders.²⁵

4.3 Sexual orientation

Sexual orientation is another issue relevant to law, religion and human rights which deserves mention in this paper. Sexual orientation is said to be more than a status, but rather an immutable personal characteristic that forms part of an individual's core identity and encompasses a range of human sexuality, from gay and lesbian to bisexual and heterosexual orientation.²⁶ The Zambian Constitution does not explicitly provide for sexual orientation rights, but these rights may be asserted under the provisions relating to equality and non-discrimination, privacy and assembly and association.²⁷ Despite these constitutional provisions, the rights of gays, lesbians and bisexuals have been denied in Zambia. Moreover, nothing has been done to uphold the supposed constitutional supremacy on the subject, nor has the government provided favourable policy directions.

In 1998 the government refused to recognise the right to a different sexual orientation when some gays and lesbians wanted to register their association.²⁸ The underlying reasoning for the refusal was that the right was un-Christian and also flew in the face of traditional customs and beliefs. The then Vice-President, Lieutenant-General Christon Tembo, told parliament that it was a matter of public knowledge that homosexuality goes against the order of human nature and morality as understood in Zambian society.²⁹ He said that Zambian people have, through parliament, criminalised acts that go against the order of nature, specifically quoting sections 155, 156 and 394 of the Penal Code.³⁰

He observed that the Registrar of Societies is under an obligation to refuse registration of any society if it appears that the terms of the constitution or rules of such a society are in any respect repugnant to

²⁴ Art 26 of the Constitution is currently the only provision that provides for the protection of young persons against child labour.

²⁵ This has mainly been the call by various NGOs, especially women's NGOs.

²⁶ Ontario Human Rights Commission <http://www.ohrc.on.ca/english/publications/> (accessed 15 February 2008).

²⁷ Arts 11 & 21 of the Zambian Constitution.

²⁸ The Lesbians, Gays, Bisexual and Transgender Association (LEGATRA).

²⁹ See <http://www.zamnet.zm/> or <http://www.mask.org.za/sections/africapercountry.htm> (accessed 21 September 2003).

³⁰ These sections in the Penal Code deal with offences against morality.

or inconsistent with the provisions of any law in force at the time in Zambia. President Chiluba agreed. He said that '[h]omosexuality is the deepest level of depravity. It is unbiblical and abnormal. How do you expect my government to accept something that is abnormal?'³¹ The present government led by Mr Mwanawasa has not made any change and no policy exists that favours homosexuals and lesbians.

In practice only heterosexuality, 'man to woman relationships', have been recognised, and any person who indulges in other forms of sexual orientation is penalised. Section 155 of the Penal Code³² provides that

any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for 14 years.

An attempt or conspiracy to commit the above offence renders one liable, and a penalty of up to seven years' imprisonment is imposed upon conviction.³³

It is therefore difficult to assert these rights based on the constitutional provision because homosexuality has been criminalised. This amounts to discrimination, and a denial of the right to equality of those who practise other forms of sexual orientation. This is despite the fact that Zambia is a party to international human rights instruments that prohibit discrimination on the basis of sexual orientation, such as CCPR³⁴ and the African Charter.³⁵

4.4 Socio-economic rights

What obtains in many of the former British colonies also obtains in Zambia. Socio-economic rights are not part of the Bill of Rights. Therefore only civil and political rights are justiciable while economic, social and cultural rights have remained directives of state policy.³⁶ This flies in the face of the much-affirmed principle of progressive realisation of these rights.³⁷ In the case of *Soobramoney v Minister of Health, KwaZulu-Natal*,³⁸ the Constitutional Court held the following:³⁹

³¹ As above.

³² Ch 87 Laws of Zambia.

³³ Secs 156 & 394 Penal Code.

³⁴ In 1993, the United Nations Commission on Human Rights declared that the prohibition against sexual discrimination in CCPR includes discrimination on the basis of sexual preference. See <http://www.pdhre.org/rights/sexualorientation/html> (accessed 21 September 2003).

³⁵ *Afronet Zambia Human Rights Report* (2002) 94.

³⁶ Part IX of the Constitution provides for Directives of the State Policy and duties of a citizen and art 111 particularly states that Directives are not justiciable.

³⁷ A government willing to enforce the socio-economic rights of its citizens has to undertake measures within its available resources to achieve the progressive realisation of the rights and not to postpone their realisation.

³⁸ 1998 1 SA 765 (CC).

³⁹ As above. See also De Waal *et al The Bill of Rights handbook* (2001) 441.

What is apparent from these provisions is that the obligations imposed by sections 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

The principle of progressive realisation of socio-economic rights should be a factor even as Zambia struggles towards the attainment of the Millennium Development Goals. It is hoped that with the current constitutional debate by the National Constitutional Conference, socio-economic rights might find themselves amongst those guaranteed.⁴⁰ Socio-economic rights ought to be justiciable in order to give them the meaning they deserve in the Constitution and in the lives of the citizenry.

4.5 The right to religion

Having considered the various rights guaranteed under Part Three of the Zambian Constitution, we may now consider the right to religion. The right to religion or the protection of the freedom of conscience is enshrined in the Constitution under article 19.⁴¹ The enforcement of the right to religion is the same as for any of the other rights guaranteed under the Bill of Rights. The enforcement provision, article 28 of the Constitution, applies even here.⁴² The court that has jurisdiction to

⁴⁰ The Wila Mung'omba-led Constitutional Review Commission incorporates socio-economic rights under the Bill of Rights of the draft Constitution currently under debate.

⁴¹ Art 19 reads: '(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) Except with his own consent, or, if he is a minor, the consent of his guardian, a person attending any place of education shall not be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own. (3) A religious community or denomination shall not be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination or from establishing and maintaining instructions to provide social services for such persons. (4) A person shall not be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief. (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision which is reasonably required — (a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.'

⁴² See n 17 above.

entertain an application for redress for an alleged violation of human rights is the High Court. Appeals are made to the Supreme Court.

Other provisions exist in other pieces of legislation which protect the right to religion. Under chapter XIV of the Penal Code, chapter 87 of the Laws of Zambia, which provides for offences against religion, offences include the following:⁴³

- (1) destroying, damaging or defiling any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion;⁴⁴
- (2) voluntarily causing disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremony;⁴⁵
- (3) intentionally wounding the feelings of any person or insulting the religion of any person by trespassing on burial places;⁴⁶
- (4) uttering any word, or making any sound in the hearing of a person, or making any gesture in the sight of a person, or placing any object in the sight of a person with the deliberate intention of wounding the religious feelings of a person.

It is, however, worth noting that, despite the law creating such offences, these are misdemeanours for which the punishment is either negligible or difficult to enforce.

The Extradition Act, chapter 94 of the Laws of Zambia, also recognises the right to religion. The law provides that no extradition can be granted if there are substantial grounds for believing that a request for extradition has been made for the purposes of prosecuting or punishing the person claimed on account of his race, religion or nationality or that the position of the person claimed may be prejudiced for any of these reasons.⁴⁷ Therefore, if a person being extradited asserts their right to religion and that such a right would be violated, she may be protected from extradition. Prisoners, including those on death row, are also guaranteed religious rights, despite being denied many other rights, such as the right to vote.⁴⁸ If a prisoner sentenced to death asks to see a minister of religion, arrangements for her access to clergy can be made.⁴⁹

⁴³ Sec 131 Penal Code.

⁴⁴ Sec 128 Penal Code.

⁴⁵ Sec 129 Penal Code.

⁴⁶ Sec 130 Penal Code.

⁴⁷ Sec 32 Extradition Act.

⁴⁸ See art 75(2) of the Constitution; sec 25 of the Electoral Commission. In the case of *Mailoni Mushala & Moses Rindai Chisamba v Electoral Commission of Zambia and the Attorney-General* SCJ 11 of 2008, the Supreme Court of Zambia decided that it was not unconstitutional for the prisoners to be denied the right to vote.

⁴⁹ Sec 200 Prisons Act; ch 97 Laws of Zambia.

5 Preferential treatment of religion

5.1 The 'Christian nation' declaration and its impact

We have seen that the right to religion or freedom of conscience and its enjoyment are fundamental. It is enshrined in the Constitution of Zambia. We have equally seen how the right has made its way into acts of parliament. It cannot therefore be denied that this right is provided for adequately. However, the full enjoyment of the right is not the same as guaranteeing it in legislation.

Similarly, the preferential treatment of one religion may interfere with the rights of another. In Zambia, the Constitution begins with a statement preferring one religion. The Preamble reads: 'We the people of Zambia ... declare the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience and religion.' The National Constitutional Conference has also repeated this Preamble provision in the draft Constitution.⁵⁰ The declaration of Zambia as a Christian nation has been discussed and debated at many gatherings. Many people have argued that the Preamble of the Constitution is not enforceable, and that therefore it does not matter whether the provision remains in the Constitution or not. The Supreme Court has ruled that the Preamble to the Constitution is not a protective provision and can therefore be amended by parliament without much ado.⁵¹ One could argue that the Preamble defines the underlying features, desires and expressions contained in the document. It could further be argued that the contents of the Preamble have a bearing on the entire Constitution and its application. It is therefore not far-fetched to assume that persons subscribing to faiths other than Christianity might feel alienated by the continued presence of the declaration of Zambia as a Christian nation in the Preamble.

In as far as it appears that the right to religion may be enjoyed by all persons in Zambia, public leaders both in government and in the opposition visit congregations of the Christian faith more often than those of any other religion. With respect to media coverage, there is also a bias towards Christianity, both Catholic and Protestant. This trend was seen during the First Republic between 1964 and 1972, the Second Republic between 1972 and 1991, and during the Third Republic from 1991 to date,⁵² but it has been more pronounced during Chiluba's reign.

⁵⁰ The phrasing of the declaration of Zambia as a Christian nation in the Preamble of the draft Constitution is not any different from the current one.

⁵¹ *Zambia Democratic Congress v Attorney SCZ* Judgment 37 of 1999.

⁵² From 1964, when Zambia attained independence, Zambia enjoyed multi-party politics until 1972 when a one-party state was assumed. This period is referred to as the First Republic. The one-party state period from 1972 to 1991, when Zambia reverted to multi-partism, is referred to as the Second Republic and the period from 1991 to date is referred to as the Third Republic.

Before addressing the situation of religious rights on the ground, it is necessary to take a critical look and examine the circumstances surrounding the declaration of Zambia as a Christian nation and what followed thereafter. Admittedly, the population of Zambia is largely Christian, and it would not be surprising to hear such a declaration, especially after a regime change from one-party rule to multi-party politics. One would therefore conclude that the declaration had a political advantage for the ruling party. It worked to woo the requisite support that the ruling party needed at the time from many Zambians. It may not have been expected that the first Republican President, Dr Kenneth Kaunda, would easily accept defeat — let alone his supporters. We have recently seen the difficulties in Kenya and Zimbabwe that have led to the now-popular concept of coalition governments in Africa when an election fails. This defeats the purpose of elections and the tenets of democracy.

However, it would appear that the declaration of Zambia as a Christian nation, coupled with the prayers of the Zambian people for a peaceful regime change across all religious denominations, at the time, constituted the key to avoid violence after regime change. It has been argued that President Chiluba's rationalisation of his declaration was not meant to undermine other religions.⁵³ Seshamani argues that, had Chiluba declared, for instance, that Zambia was a born-again Christian state, there could have been room for misgivings regarding its neutral character or freeness. He argues that the declaration only purports to remind Zambians of the primacy of man as a moral being and hence the imperative for Chiluba to try his best to follow the path prescribed by Jesus.⁵⁴ He states that any such declaration has obviously to be made in a language that the people would understand, and with over 72% of the Zambian population belonging to the Christian faith, at least in the nominal sense, it would readily strike a chord in most people's hearts when the President says that 'every inch of this land belongs to Jesus Christ'.

The greater danger, however, would be a feeling of religious superiority that might degenerate into a bigotry which perceives all non-Christians as lost souls that need to be saved. Soon after Chiluba made this declaration, Islamic programmes were banned on both television and radio. One can also not forget the Livingstone episode in which a Hindu temple and an Islamic mosque were destroyed. These events may not be linked directly to the declaration and may have been caused by other motives, but the danger that all non-Christian religious or spiritual practices may be branded as dangerous or as satanic cults cannot be ruled out.⁵⁵

⁵³ V Seshamani 'A Hindu view of the declaration of Zambia as a Christian nation' <http://www.christianitytoday.com/ct/2000/January> (accessed 6 August 2008).

⁵⁴ As above.

⁵⁵ See n 53 above.

When Zambia was declared a Christian nation, the circumstances could definitely have been different from the time when the declaration was included in the Constitution. The political climate had tilted, the people of Zambia knew who their leaders really were and those who had resigned from active politics, like the first President, Dr Kaunda, made it known that they would run for presidency come 1996. Those who were close allies to Chiluba, like Dean Namulya Mung'omba and Baldwin Nkumbula, left to form their own political parties. In the meantime, Chiluba grew popular amongst Christians, while attempting to amend the Constitution in such a way as to bar Kaunda from contesting the 1996 presidential elections. It would not strike anybody as strange if one were to suggest that the inclusion of the declaration in the Constitution may have been motivated by the incumbent President's desire to win votes from Christians in the name of uniting a nation whose population is largely Christian.

Many people have thus taken advantage of the declaration of Zambia as a Christian nation. As Professor Carlson Anyangwe of the Faculty of Law at the University of Zambia, observes:⁵⁶

Once we have declared Zambia a Christian nation then the government of Zambia also has to be Christian. You cannot have a non-Christian government running the affairs of a Christian nation, the declaration entails having Christian members of parliament, Christian ministers of government and Christian judges and all civil servants would have to be true Christians in order to manage, in Christian fashion, the affairs of the Christian nation.

At the same time, he also maintains:⁵⁷

You cannot favour one religion and at the same time honestly uphold the propagation and exercise of other religious beliefs that are doctrinally and in matters of faith opposed to the state-chosen religion. That is against the nature of any religion, which always seek to convert as many people as possible ... to allow such a situation the laws of Zambia would have to be consistent with Christian doctrines, dogmas and practices. In effect that would mean that the Bible, and not the Constitution, would be the supreme law of Zambia. The Bible will become the linchpin of Zambia's educational system, even as the Holy Koran is in Islamic states.

Since the time of the declaration, we have seen a shift in the behaviour of political leaders. When they visit Christian congregations, they make statements that are in line with the declaration.⁵⁸ They also encour-

⁵⁶ Manja Kamwi, Information Officer MS Zambia, quoting Prof Carlson Anyangwe: 'We should behave like Christians — not proclaim it' MS.dk/sw30785.asp (accessed 6 August 2008).

⁵⁷ As above.

⁵⁸ Speaking in Ndola at the occasion to commemorate the African Methodist Episcopal Church (AMEC) Founder's Day at Chipulukusu congregation, the then Copperbelt Province Minister George Mpombo, now Energy Minister, in a speech read for him by Ndola mayor Zinho Latife, urged the church in Zambia to cultivate a spirit of unity based on the teachings of Jesus Christ. He said that unity with people worshipping God together and asking for Christ's guidance was cardinal to the church holding together.

age people to do things the Christian way. Referring to the denial by the Registrar of Societies to register the Lesbians, Gays, Bisexual and Transgender Association (LEGATRA),⁵⁹ President Chiluba said that '[h]omosexuality is the deepest level of depravity. It is unbiblical and abnormal; how do you expect my government to accept something that is abnormal'.⁶⁰ Therefore, from the foregoing and in referring to the Bible, one would conclude that Chiluba made Christian faith the yardstick of social morality.

It must, however, be pointed out, as may be observed from religious demography, that most Zambian citizens, including those occupying public office, are Christians. In as much as it may be misleading to interpret all actions by leaders as Christian, the declaration has been taken advantage of and it has been used by leaders to gain political mileage. Taking advantage of the declaration is what might endanger the declaration and bring about unwarranted acrimony. Professor Anyangwe observes that the scenario might seem bizarre to someone who takes only a casual or superficial look at the Christian declaration, but it is a real possibility and possesses the potential for conflicts, not only between Christians and other religious groups, but also among the various Christian denominations who might get embroiled in a 'holy war' to ensure that their own brand of Christian teaching gains ascendancy in the state.⁶¹

Zambia's subscription to Christianity should be manifest in the way its citizens conduct themselves, not in a pharisaical Christian nation proclamation. Credible Christians, or countries that espouse Christian virtues, do not go around proclaiming it on rooftops. Their Christianity is immediately apparent in the way they carry and conduct themselves. It is said a tiger does not proclaim its 'tigertude'. When you see a tiger, you know it is a tiger.⁶²

5.2 Particularisation of religious scruples

In light of religious demography, the particularisation of religious scruples may be likened to the preferential treatment of religions. For in as much as Zambia is a secular state and every individual is free to practise his or her religious beliefs, it is equally not hard to see how Christian scruples might be seen to be imposed, given the dominance of Christianity in the country. That is what the citizens are used to seeing and that is what most of them practise.

A good example would be marriage ceremonies. Whereas in customary marriages it is recognised that men are potentially polygamous,

⁵⁹ This was an association that was formed to promote the interests of lesbians, gays and bisexual individuals in Zambia.

⁶⁰ See n 29 above.

⁶¹ See n 56 above.

⁶² As above.

Christian marriages and the Marriage Act recognise the union of one man and one wife, to the exclusion of all others. A Christian marriage cannot be dissolved in the same simple way that a marriage under African customary law may be dissolved. A Christian marriage can only be dissolved by the High Court, because its status is equivalent to that of a marriage under the Marriage Act. Such recognition has not been accorded other religions.

Another example is the designation of public holidays. Even though there is no compulsory imposition of a day of worship, the government practises favouritism toward some groups. For example, the Seventh Day Adventists, though a Christian group, observe and worship the sabbath on Saturdays, while most other Christian groups do so on Sundays. In the event that a public holiday falls on a Sunday, it has been the government's practice to make the Monday following that particular Sunday a public holiday.⁶³ This preferential treatment is not accorded to other religions or religious groupings. It is quite unusual for the government to declare a holiday when a religious group's 'holiday day' falls on a working day.

5.3 Regulation of internal affairs of churches, mosques, religious schools, and such

Churches, like other non-profit organisations and other religious groups, are regulated by the Societies Act.⁶⁴ Unless otherwise exempted, all church organisations are supposed to be registered with the Registrar of Societies. If the provisions of the Act are not adhered to, a church may be de-registered or its registration application denied. A society under the Act means any club, company, partnership or other association of ten or more persons, whatever its nature or object, that is formed or established in Zambia; has its headquarters or chief place of business within Zambia; or which is deemed to be an association established in Zambia under the provisions of section 5; and any branch of such club, company, partnership or association. There are a number of reasons for which the registrar can refuse to register or exempt a society from registration. Denial of registration may occur in cases where it appears that the terms of the constitution or rules of such society are in any respect repugnant to or inconsistent with the provisions of any law in force in Zambia. It may also occur in cases where the Registrar is satisfied that the application does not comply with the provisions of this Act or of any rules made under the Act.⁶⁵ The Registrar has the discretion to cancel at any time the registration of any society, if he is satisfied that the society has among its objects, or is likely to pursue or

⁶³ The Minister responsible has the power to declare any day a public holiday.

⁶⁴ Ch 119 Laws of Zambia.

⁶⁵ Sec 8 of the Act.

to be used for, any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order in Zambia.⁶⁶

Equally, the Registrar may, in his discretion, cancel at any time the registration of any society on the ground that the terms of the constitution or rules of such society are in any respect repugnant to or inconsistent with the provisions of any law currently in force in Zambia. Registration may also be cancelled if the society concerned has, in contravention of the provisions of section 17, altered its objects or pursued objects other than its declared objects.⁶⁷ Finally, registration may be cancelled in cases in which the society concerned has failed to comply in a timely manner with an order made under the provisions of sections 19 or 20,⁶⁸ or where issues of repugnancy to or inconsistency with the provisions of any law currently in force in Zambia arise.⁶⁹

The right to enjoy one's freedom of religion is not absolute, nor is any other fundamental right under the Bill of Rights — there are limitations. Under article 19(5) of the Constitution of Zambia it is provided that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the Article to the extent that it is shown that the law in question makes provision which is reasonably required in the interests of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

More often than not the government has used article 19 of the Constitution and other limitation clauses to control the internal affairs of churches. Many times, the government has interfered in the internal affairs of a religious community, citing the interests of defence, public safety, public order, public morality or public health or the purpose of protecting the rights and freedoms of other persons. This practice dates back to Zambia's early days of independence, when religious sects could be banned on grounds of public safety, public order and public morality. During the First Republic, Kenneth Kaunda's rule in the late 1960s, the Lumpa Church, headed by a woman named Mulenga Lenshina in the Northern District of Chinsali, was disbanded and its adherents sent into exile to the then Zaire, now the Democratic

⁶⁶ Sec 13(1) Societies Act.

⁶⁷ Sec 17 of the Act falls under Part III of the Act that provides for duty of societies to furnish information to the Registrar.

⁶⁸ Under secs 19 & 20 of the Act, the Registrar or an authorised officer may call for certain of the specified documents to be furnished by a society.

⁶⁹ Sec 13(2) Societies Act.

Republic of Congo.⁷⁰ Members of this sect only started coming back to Zambia after the change of government in 1991, and some are still in the Democratic Republic of Congo.

In the case of *Feliya Kachasu v Attorney-General*,⁷¹ the petitioner, who was a pupil at Buyantanshi School in Mufulira, was suspended from school for refusing to salute the Zambian national flag and to sing the Zambian national anthem, both of which were required under regulations made by the Minister of Education pursuant to the Education Act of 1966. It was argued on behalf of the applicant that the suspension from school of the applicant was unconstitutional on the ground that it constituted a hindrance in the enjoyment of her freedom of conscience, which includes freedom of thought and of religion as provided for under chapter III of the Constitution. It was further asserted that Regulation 25 of the Education (Primary and Secondary Schools) Regulations 1966 was invalid, null and void, because it was *ultra vires* section 12 of the Education Act 1966 and therefore in conflict with the guarantee of freedom of conscience in Section 21 of the Constitution. In deciding this case, the court stated first that, for the purposes of section 21 of the Constitution, the test as to what constitutes religious ceremony observance or instruction is a subjective test and not an objective one. The court relied on the judgment of Justice Frankfurter in the American case of *Minersville School District v Gobitis*,⁷² which concerned the refusal of two Jehovah's Witness pupils to participate in the flag salute ceremony at their school. The court focused particularly on Justice Frankfurter's opening remarks that

[a] grave responsibility confronts this court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test ...

The court decided that, if a duty is imposed by a valid law and the breach of that duty is made subject to certain consequences, a person who is charged with such a breach cannot set up as a defence that he has a conscientious objection or religious scruple against performing that duty. The judge stated that, although a subjective test may be used in determining whether one holds a religious opinion, an objective test must be used in determining whether a ceremony or observance is religious in nature. The court thus held that, on the basis of an objective test, the singing of the national anthem and the saluting of the national flag are not religious ceremonies or observances.

⁷⁰ The Lenshina sect was disbanded by UNIP government in 1964 for unlawful religious acts. Mama Lenshina was their spiritual leader from the Chinsali district. The sect came back into the country during the second republican government of former President Chiluba. They have pledged to work with Mwanawasa's government.

⁷¹ (1967) ZR 145 (HC).

⁷² 310 US 686 (1940).

In 2005, at the instigation of the masses, the government banned the Universal Church of the Kingdom of God and deported its two pastors of Brazilian origin on suspicion of practising satanism. Scores of Lusaka residents rioted and threatened to demolish the congregation's church if the government did not take action. It was not until police were deployed to quell the situation that the church was saved from being damaged. The church has remained operational only by virtue of an order of the High Court. At the time, one of the Protestant bishops retorted, in support of the government action to ban the Universal Church, that churches have different teachings but that if some teachings were not godly, they should be stopped with immediate effect. Quoting from the Bible, Bishop John Mambo of the Anglican Church said that many people were coming in the name of God, but that Christians should be careful which church they went to.⁷³

Other controls that may impinge on the internal affairs of churches relate to the application of the State Securities Act and the Immigration and Deportation Act. When imposed, the two Acts would be read together with article 19 of the Constitution alluded to above. Section 22 of the Immigration and Deportation Act grants the Minister of Home Affairs blanket authority to issue a deportation warrant without giving any reasons whatsoever. Also burdensome for churches and religious groups is the requirement that to own land, a church has to satisfy the requirements of the Land Perpetual Succession Act. Trustees are supposed to be registered other than the church owning real property in its own name and right.

5.4 The right to self-determination

Zambia is a unitary state embracing a dual legal system. It recognises both written law and customary law and practices. The constitutional system recognises different practices by religious and cultural communities. These institutions are free to promote and to uphold their cultural heritage, and religious community or practices. Religions spread their religion without constraints imposed by political authorities. However, such practices must conform to written law, natural justice and equity. The practices should equally not jeopardise public safety, public defence, public morality, and public healthy and should not infringe upon other persons' rights.

5.5 Conflicts between religions

As observed earlier in this paper, Zambia is predominantly Christian. This being the case, there is little or no conflict between religions. In fact, it is probably safe to say that Zambia has never been involved in a religious conflict. Since Zambia's independence there has been peace.

⁷³ June Zambia News Agency, Zambia 27 November 2007.

Leaders are therefore reminded not to take advantage of this peace, but to guard it jealously.

5.6 Spiritual values and practices of indigenous African peoples

African customary values and practices are recognised to the extent that they are not repugnant to natural justice and are in conformity with written law. To the extent that they do not endanger the defence of the nation, public safety, public morality, public health and the rights of other individuals and communities, these are allowed to prevail. However, certain of the practices, such as inheritance of widows and ritual cleansing, are slowly fading due to the prevalence of the HIV/AIDS pandemic. Under African customary law, men are potentially polygamous. Polygamous marriages are valid in Zambia and are still being practised. However, as observed, due to the HIV/AIDS pandemic, many people would prefer monogamous marriages and reduce the risk of getting infected by multiple sexual partners.

Traditional healers are free to practise and administer herbs, but only to the extent that such practices are not repugnant to natural justice and good conscience. Most of these have even formed associations such as the Traditional Healers Association of Zambia. Due to the dilapidated health infrastructure and the non-availability of conventional medicines, it is not surprising that a sizeable section of the population of Zambia still administers traditional herbs for most of their ailments. Currently, the government has hidden behind the guise of African or traditional culture not to talk about the illness of President Mwana-wasa, who suffered a stroke in Egypt during the African Union Summit in early July 2008 and was flown to Percy Military Hospital in Paris, France, for medical treatment. The government has repeatedly said that, according to tradition, it is a taboo to speak about someone's illness. The question that confronts us is whether the illness involving a person that holds a constitutional office such as the office of President cannot be discussed. To what extent can constitutional provisions be relegated for the sake of customs or traditions or, indeed, culture?

6 Conclusion

Law, religion and human rights are three areas that may be said to be fused. It may even be difficult to attempt to draw a line between what is law, what is religion and what is human rights. Human rights are inalienable and inherent by virtue of one being human. Law and religion should leave room for human rights, which are universal and recognise no borders. In more instances than not, these three areas correlate.

The practices in Zambia should not be viewed in isolation from those which obtain in other countries, particularly in Central and Southern

Africa, and in those countries that are former British colonies. Even a historic perspective on how religion, especially Christianity, was brought to this region by European missionaries like David Livingstone, is almost the same. In all of these countries, law, religion and human rights depend on the supremacy of the constitutions and written law to thrive.

There is, one might say, a great deal of freedom of conscience in Zambia. Controls exist as would reasonably be expected in a democratic society. But, by and large, law, religion and human rights in Zambia exist side by side with a few marginal incidences of the violation of the right to religion.

Law, religion and human rights in Nigeria

Enyinna S Nwauche

Associate Professor of Law; Director, Centre for African Legal Studies, Port Harcourt, Nigeria

Summary

This paper explores the relationship between law, religion and human rights in Nigeria. The level and intensity of religious strife in Nigeria justify this inquiry, whose aim should be the design of a framework that enables individuals to enjoy the freedom of religion and ensures that religious conflicts are managed in Nigeria's multi-ethnic and multi-religious context. Almost a decade to the introduction of Islamic criminal law in the 12 northern states of Nigeria, there is no longer any doubt that religion is fundamental to the survival of Nigeria. The basic thesis of this paper is that the key to understanding the relationship between law, religion and human rights in Nigeria lies in the unacknowledged dominance of Islam and Christianity, which I characterise as de facto state religions, and the resulting neglect of other religions. It is this reality, its denial and misunderstanding of attendant constitutional obligations that define the relationship between the Nigerian state and religion.

1 Introduction

This paper explores the relationship between law, religion and human rights in Nigeria. The level and intensity of religious strife in Nigeria justify this inquiry, whose aim should be the design of a framework that enables individuals to enjoy freedom of religion and ensures that religious conflicts are managed in Nigeria's multi-ethnic and multi-religious context. Almost a decade since the introduction of Islamic criminal law in the 12 northern states of Nigeria, there is no longer any doubt that religion is fundamental to the survival of Nigeria.

* LLB, LLM (Ife), BL (Lagos); esnwauche@afrilegstudies.com

The basic thesis of this paper is that the key to understanding the relationship between law, religion and human rights in Nigeria lies in the unacknowledged dominance of Islam and Christianity, which I characterise as *de facto* state religions, and the resulting neglect of other religions. It is this reality, its denial and misunderstanding of attendant constitutional obligations that define the relationship between the Nigerian state and religion.

I have organised this paper as follows: In the next section I chart the religious demography of Nigeria. In the third section I sketch a broad overview of the right to freedom of thought, conscience and religion, while in section four I examine the question of a state religion and consider the introduction of Islamic criminal law in the 12 northern states. In the fifth section, I consider the framework within which religious communities can practise and spread their religion. In section six I determine whether there is state interference in the internal affairs of religious organisations. Section seven examines how the Nigerian state treats indigenous religions. I discuss the resolution of religious conflict in section eight and finally make concluding remarks in section nine.

2 The religious demography of Nigeria

The deletion of religion as one of the parameters in the 2006 national census denied the possibility of accurately stating the relative proportion of religious groups in Nigeria. What we are left with are conjectures¹ and projections.² Nigeria's 36 states are made up of 19 states in Northern Nigeria and 17 states in Southern Nigeria. What is generally accepted is that Muslims dominate the northern states of Nigeria and Christians dominate the rest of the country, with the margin being closer in the Middle Belt and southwestern part of the country where there is a significant Muslim population. There seems to be broad agreement that Muslims constitute a slightly larger, if not equal, section of the population than that constituted by Christians,³ and that there are a substantial number of persons who practise traditional indigenous religions as well

¹ Eg, see H Agberemi 'Nigeria beyond secularism and Islamism: Fashioning a reconsidered rights paradigm for a democratic multicultural society' (2005) 2 *Muslim World Journal of Human Rights* <http://www.bepress.com/mwjhr/vol2/iss1/art10> (accessed 30 September 2008).

² The Pew Forum on Religion and Public Life states in its Religious Demographic Profile of Nigeria that according to the most recent Demographic and Health Survey held in 2003, which presents statistics of a nationally representative sample of women between the ages of 15 and 49 and men between 15 and 59, '50,5% of the population is Muslim and 48,2% is Christian. Only 1,4% is associated with other religions' <http://www.pewforum.org/world-affairs/countries/?CountryID=150> (accessed 24 April 2008).

³ The *International Religious Freedom Report 2007* for Nigeria issued by the US Department of States, speaking of the proportion of Christians and Moslems, states that it is 'generally assumed that the numbers are equal'. <http://www.state.gov/g/drl/rls/irf/2007/90114.htm> (accessed 24 April 2008).

as a good number of non-religious believers. It is fair to conclude that Islam and Christianity are the dominant religions in Nigeria.

The predominant form of Islam is Sunni, even though there are Shia adherents. The Christian faith includes the Roman Catholic Church, the Anglican Communion, the Baptist Convention, Seventh Day Adventists, the Methodist Church of Nigeria, the Presbyterian Church of Nigeria, Jehovah's Witnesses and a large number of Evangelical and Pentecostal churches, many of whom are indigenous with no links to the West.

3 An overview of the right to freedom of thought, conscience and religion

In this section I undertake an overview of the right to freedom of thought, conscience and religion as provided for in section 38(1) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution).⁴ The structure of section 38 follows the general pattern of recognised rights in chapter IV of the 1999 Constitution. This is the grant of individual entitlement and permissible derogations based on individual and group considerations. Section 38(1) contains the primary right protecting the freedom of religion. There are a number of secondary rights which reinforce the enjoyment of the freedom of religion. They are freedom of association protected by section 40, the right to private and family life protected by section 37, the right to freedom of expression protected by section 39, and the right to freedom of movement protected by section 41. To reinforce and ensure that the entitlement to this right is meaningful, section 42 of the 1999 Constitution⁵ provides that no person shall be discriminated against on the

⁴ Sec 38 provides: '(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian. (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination. (4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.'

⁵ Sec 42(1) of the 1999 Constitution provides *inter alia*: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.'

basis of his or her religion. While on one hand this ensures that people freely embrace any religion of their choice, it further underscores the equality of all religions. The right to freedom of religion is also to be enjoyed in a context in which no religion is to be preferred. Thus, section 10 of the 1999 Constitution provides that '[t]he government of the federation or of a state shall not adopt any religion as state religion'.

The right to freedom of religion contained in section 38 is not absolute. Section 45(1) of the 1999 Constitution⁶ provides for derogations for individual and group considerations. The scope of the right can be understood by first determining what the individual entitlement is in the context of the circumstances of each case and then proceeding to inquire if factors that are the basis of derogation are present. This framework for understanding the scope of the right to freedom of thought, conscience and religion was set out by the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*.⁷ Ayoola JSC, who read the unanimous judgment of the Court, stated:⁸

The right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one's life, fashioned on what one believes, and the right not to be coerced into acting contrary to one's belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy ... Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.

In *Okonkwo*, the Court upheld the right of a Jehovah's Witness to object to a blood transfusion and held that a medical doctor had no right to overrule the patient's refusal of a blood transfusion on public interest grounds. Even though the Court did not allude to section 45(1), there is no doubt that reference to public interest may be taken to refer to all or any of the grounds mentioned therein. What is also interesting is the Court's interpretation of 'public interest'. The Court agreed that, while an epidemic will qualify as public interest, it is absent when the direct consequence of the right is limited to the competent individual. In the case at hand, the Court held that the refusal of a blood transfusion affected

⁶ Sec 45(1) of the 1999 Constitution provides: 'Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.'

⁷ [2001] FWLR (Pt 44) 542 (*Okonkwo*). For commentary on this case, see N Tijani 'Physicians, patients and blood: Informed consent to medical treatment and fundamental human rights' in E Chianu (ed) *Legal principles and policies: Essays In honour of Justice Chukunweike Idigbe* (2006) 359.

⁸ *Okonkwo* (n 7 above) 588.

only the patient involved and no injustice could be occasioned in giving an individual's right primacy. The interpretation of 'public interest' is questionable, given the statutory obligation of a doctor to protect lives.

It is important to draw attention to the words 'any law' in section 45(1) and what this means. It refers to the standards mentioned in section 45 including 'public interest' to be expressed in a law. While 'any law' will include legislation and the common law, for long the question has been whether 'any law' includes customary law and internal institutional directives.⁹ Recently, the Court of Appeal answered in the affirmative in *Anzaku v Governor of Nassarawa State*¹⁰ that '[a]ny law is so encompassing an expression, not limiting the type of law. It applies to any system, whether statute law, customary law, Islamic Law or common law applicable in Nigeria.'¹¹ We are thus left to wonder whether the principles of Islamic law can be the basis for the derogation of the section 38 right.

4 Nigeria and the question of a state religion

The provisions of section 10 of the 1999 Constitution prohibit any state or federal government from adopting a state religion. It may thus be asserted that no government can explicitly or impliedly take steps or by conduct declare a religion as a state religion in Nigeria. What the implied steps are or the conduct that will not pass constitutional muster is not very clear. For example, it is not very clear what Nigeria's observer status at the Organisation of Islamic Countries (OIC) means. While non-Muslims assert that such membership makes Islam a state religion, Muslims seem to stress that the economic benefits of joining the OIC should be the goal.¹²

Section 10 of the 1999 Constitution has led to two broad opposing conclusions of Nigeria's status as a secular state.¹³ On one hand, it is asserted that Nigeria is a secular state.¹⁴ The other strand of opinion is

⁹ See eg the case of *Onyinyeka M Enoch v Akobi* (1994) 9 ANSLR 338, where the Anambra State High Court relied on a school directive to justify the refusal of the school to register a student on her objection to a directive to cut her hair on religious grounds. See CO Okonkwo 'Religious freedom — *Onyinyeka M Enoch v Mary U Akobi* — A comment' (1994-1997) 6 *The Nigerian Juridical Review* 214.

¹⁰ [2006] All FWLR (Pt 303) 308.

¹¹ n 10 above, 340-341. See also Nasir P in *Uzoukwu v Ezeonu* [1991] 6 NWLR 708.

¹² This seems to be the Islamic response that has caused controversy regarding the allegation that President Yar'Adua led a delegation to the just concluded meeting of the OIC and that Nigeria is now a full member of the OIC because it had paid up all relevant dues during the tenure of President Olusegun Obasanjo. See *Punch* 3 April 2007 8.

¹³ See J Tyus 'Going too far: Extending Shari'a law in Nigeria from personal to public law' (2004) 3 *Washington University Global Studies Law Review* 199.

¹⁴ See BO Nwabueze *Military rule and constitutionalism* (1992) 282; AU Iwobi 'Tiptoeing through a constitutional minefield: The great Shari'a controversy in Nigeria' (2004) 48 *Journal of African Law* 133-135.

that, in spite of section 10, Nigeria is not a secular state and religion has a place in Nigerian public life.¹⁵ The latter opinion seems a better description of the reality in Nigeria. Our religious demography in section 2 shows that the dominant religions in Nigeria are Islam and Christianity. Their dominance is reinforced by the fact that governments in Nigeria actively promote, sponsor and sustain both religions. If we accept, as Peters urges with respect to section 10, that 'it is generally understood to mean that neither the legislative power nor the executive may in any way be used to aid, advance, foster, promote or sponsor a religion',¹⁶ then Nigeria has a state religion(s). Thus, it can be asserted that Nigeria has *de facto* state religions and that, for reasons given below, this is constitutional. This fact is buttressed by a composite interpretation of the relevant provisions of the 1999 Constitution which leave no doubt that a significant role is contemplated for religion in Nigerian public life.

First is section 4(7) of the 1999 Constitution,¹⁷ which permits states to make laws for the peace and good government of their territories. States are asked to legislate their conceptions of the public good. Religion supplies these conceptions of the public good. It is therefore a contradiction of sorts for the argument that the Constitution, on one hand, requires that no state adopts a religion and, on the other hand, provides an enabling framework by which the states can functionally infuse the public good with religious values. It may well be argued that states are not allowed by the tenor of section 10 to use religious values as the basis of the common good. In other words, irreligious values will be welcome as the basis of a common good. There is no such indication in section 4(7), and certainly not in section 10. If the meaning of section 10 is that only irreligious values should undergird the Nigerian conception of good, it is certainly discriminatory of religions. Non-religious values have as much claim to influence public policy as religious values.¹⁸ Secondly, the fact that the Constitution

¹⁵ See eg M Tabiu 'Shari'a federalism and Nigerian Constitution' paper presented at an International Conference on Shari'a, London, 2001, reproduced in Tyus (n 13 above) 205: 'We can see that the section does not establish ... [the] claim that the Constitution describes Nigeria as a secular state. In fact the Constitution does not use the word secularism or any of its derivatives at all. How then can they build an argument, alleging violation of the Constitution, merely on their personal interpretation of such a word of varied and controversial meaning, which is not even in the Constitution?'

¹⁶ See R Peters *Islamic criminal law in Nigeria* (2003) 33.

¹⁷ Sec 4(7) of the 1999 Constitution provides: 'The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say: (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution; (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.'

¹⁸ See IT Benson 'Notes towards a (re)definition of the "secular"' (2000) 33 *UBC Law Review* 519.

recognises religious communities permits them to urge their views on the state. When these religious communities are dominant in any particular state, it would be naïve to imagine that their conception of the public good does not influence public policy. The third example lies in the fact, alluded to above, that the human rights framework in Nigeria is a balance between individual entitlements and communitarian values. In particular, any reference to public morality points inexorably to religious values in a religious society such as Nigeria. Even if there is no consensus on the relevant religious values, the fact remains that the conception of public morality can be influenced heavily by these values.

A combination of sections 10, 38 and 42 of the 1999 Constitution imposes positive obligations on Nigerian governments to ensure that they treat all other religions equally to the way they treat the *de facto* religions. It is in this context that the introduction of Islamic criminal law by the northern states of Nigeria should be understood. It is to this controversial issue that I now turn.

4.1 Islamic criminal law in Nigeria

In 2000, Zamfara State enacted the first Shari'a Penal Code in Northern Nigeria.¹⁹ In due course, 11 other northern states followed this example and at present Islamic criminal law²⁰ is enforced in 12 northern states of Nigeria²¹ by the enactment of new Penal Codes or the amendment of the existing Penal Code. The Shari'a Penal Codes contain provisions on (i) Qur'anic offences (*hudûd*), such as unlawful sexual intercourse (that is, between persons who are not married) (*zinâ*); theft (*sariqa*); robbery (*hirâba*); drinking of alcohol (*shrub al-khamr*); false accusation of unlawful sexual intercourse (*qadhif*); (ii) provisions on homicide and hurt; and (iii) corporal punishment (caning or flogging) as penalty for many offences. The punishments contained in the Shari'a Penal Codes include death, forfeiture and destruction of property, imprisonment, detention in a reformatory, fine, restitution, reprimand, public disclosure, boycott, exhortation, compensation, closure of premises, retaliation, death by stoning, amputation, caning, a blood price, the closure of premises and a warning. The Penal Code also contains a provision to the effect that any act or omission that is not specifically mentioned in the Code, but is otherwise declared to be an offence under the Qur'an, Sunnah and Ijtihad of the Maliki School of Islamic Thought, shall be an offence under the Code and shall be punishable with a term of imprisonment or caning or with a fine or any combi-

¹⁹ See the Shari'a Establishment Law (27 October 1999).

²⁰ Of the four Sunni schools of jurisprudence (Maliki, Hanafi, Shafi'i and Hanbali) the Maliki school prevails in Northern Nigeria. See Peters (n 16 above) 1.

²¹ These are the states of Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbu, Niger, Sokoto, Yobe and Zamfara. The other seven states in Northern Nigeria have no such laws.

nation of any two punishments.²² Non-Muslims are exempt from the enforcement of Islamic criminal law unless they voluntarily accept this jurisdiction in a specific proceeding. One important provision of the Shari'a Penal Codes that affects other religions is the prohibition of the worship and invocation of any *juju*, which is defined to include the worship and invocation of any subject being other than Allah.²³ In addition, there are offences relating to witchcraft and *juju*.²⁴

In the wake of the introduction of Islamic criminal law, there has been controversy regarding the constitutionality of Islamic criminal law in view of the prohibition in section 10 of the 1999 Constitution. It is asserted that the 12 northern states have adopted Islam as a state religion²⁵ and that this is unconstitutional. I am convinced that the introduction is constitutional and that these states have only reaffirmed Islam as a *de facto* state religion for three reasons. First, the criminal law in the northern states of Nigeria before 1999 was largely religiously based.²⁶ Few people seemed willing to argue then that this fact caused these laws to amount to the adoption of a state religion. Secondly, the validity and operation of these laws are within a constitutional scheme. These laws are subject to overriding provisions of the Constitution, including the fundamental human rights found in chapter four. The courts applying Islamic criminal law have recognised that the tenor of the Islamic Penal Codes must be examined with respect to their compliance with constitutionally-recognised human rights.²⁷

²² See sec 92 of the Zamfara Penal Code.

²³ See sec 405 of the Zamfara Penal Code.

²⁴ See secs 406-407 of the Zamfara Penal Code.

²⁵ See the discussion in sec 4.1 above.

²⁶ See eg Peters (n 16 above) ch 1, 12: 'The direct but controlled and restricted application of Islamic criminal law came to an end in 1960 when the new Penal Code Law for Northern Region 1959 was brought into effect. The code remained in force until the recent enactment of Shari'a Penal Codes. The Penal Code of 1959 was based on the Indian (1860) and Sudanese (1999) Penal Codes, and was essentially an English code. However, here and there special provisions were included based on Shari'a criminal law.'

²⁷ See *Safiyatu v Attorney-General of Sokoto State*, unreported judgment of the Sokoto State Shari'a Court of Appeal dated 25 March 2002. In this case, the appellant appealed against a judgment of the Upper Area Court in Gwadabawa which sentenced her to death by stoning for the offence of *zina* (adultery) punishable under sec 129(b) of the Sokoto State Shari'a Penal Code 2000. One of her grounds of appeal was that the penal code law was not in existence at the time of the offence. The Court held that the Shari'a Penal Code itself prohibited retrospective criminal legislation in accordance with sec 36(9) of the 1999 Constitution. The Court further held that the Penal Code was in consonance with sec 36(12) of the 1999 Constitution which provides that 'a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection; a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provisions of a law'.

This fact²⁸ raises serious doubt about whether the Islamic Penal Codes have turned Islam into a state religion. In this regard, other potential conflicts with human rights provisions in the 1999 Constitution include provisions of the Shari'a Penal Codes which criminalise conduct that is not explicitly set out in the Codes, but is a crime under Shari'a, and provisions which discriminate against women.²⁹ The need for the operation of Islamic criminal law within a constitutional context applies to other religions. Thus, if a state in Southern Nigeria decides that section 4(7) of the 1999 Constitution inspires them to enact canon-inspired criminal law, the fact remains that these laws become part of the Nigerian legal system, mediated by the tenets of the 1999 Constitution. The same goes for customary criminal laws which in many instances are religiously based.³⁰ Thirdly, the fact that Islamic criminal law applies only to Muslims reinforces the equality principle contained in section 42 of the Constitution. Whether this is a concession³¹ or the recognition and compliance with Nigeria's constitutional framework, there is no doubt that it has gone a long way in entrenching the fact that the 1999 Constitution recognises the role of religion in the public life of the country mediated by equality guarantees. Fourthly, the recognition by a constitution of certain forms of religious values renders largely meaningless a distinction between what is personal and what is public on the basis, for example, of the deployment of coercive machinery of

²⁸ See also A Yadudu 'Evaluating the implementation of Shari'a in Nigeria: Time for reflection on some challenges and limiting factors' paper presented to the 2006 Nigerian Bar Association General and Delegates Conference (on file with author); BY Ibrahim 'Application of the Shari'a penal law and the justice system in Northern Nigeria: Constitutional issues and implications' in J Ezeilo *et al* (eds) *Shari'a implementation in Nigeria: Issues and challenges in women's rights and access to justice* (2003) <http://www.boellnigeria.org/documents/sharia%20implementation%20in%20Nigeria.pdf> 128 132 (accessed 30 September 2008): 'Being a supreme law, a constitution is endowed with a higher status in some degree over and above other legal rules in the system of government. It is in this light that the 1999 Constitution can be described as the supreme law in Nigeria ... This being so, the Shari'a legislated and practised in some northern states of Nigeria must comply with the provisions of the 1999 Constitution.' See also JM Nasir 'Women's human rights in a secular and religious legal system' 1 28, being part of the a two-day strategic conference on Islamic legal system and women's rights in Northern Nigeria organized by WARDL Lagos and WACOL Enugu (27-30 October 2002) <http://www.boellnigeria.org/documents/sharia%20women%27s%20human%20Rights%20in%20Nigeria%20%20strategies%20for%20Action> (accessed 30 September 2008).

²⁹ See eg sec 68(A)(3)(b) of the Niger State Penal Code which provides that, in the requirement for proving the offence of unlawful sexual intercourse, the testimony of men is of greater value than that of women.

³⁰ See eg FU Okafor *Igbo philosophy of law* (1992); O Adewoye *The judicial system in Southern Nigeria 1854-1954* (1977).

³¹ A Ahmad 'Extension of Shari'a in Northern Nigeria: Human rights implications for non-Muslim minorities' (2005) 2 *Muslim World Journal of Human Rights* <http://www.bepress.com/mwjhr/vol2/iss1/art6> (accessed 30 September 2008).

the state.³² Even though criminal law is a good example of public law that relies on the coercive machinery of the state, all law ultimately does so. Even judgments in civil cases are liable to be enforced by the state. The 1999 Constitution, like its predecessors, recognises Islamic personal law and provides for a judicial structure to protect these laws that are clearly religiously based.³³ It is difficult to urge that these are in the personal realm and that, since criminal law is in the public realm, it should not be subject of legislation. This would be discriminatory to Muslims who view religion as permeating all aspects of their lives.

The recognition of Islam as a *de facto* religion in the 12 northern states of Nigeria enables us to understand, recognise and implement the commensurable constitutional obligations incumbent on state governments.³⁴ These obligations require governments to treat other religions in the same way that they would support and sustain Islam. Thus, non-Muslims must be allowed to practise and spread their religion within the context of the structure of the section 38 right. Accordingly, regulations such as gender segregation in public transport, the ban on the sale of alcohol, and the refusal to grant or the revocation of building permits for non-Muslim places of worship are unconstitutional. It is the pretence that there is no state religion that fuels the nonchalant attitude of all governments in Nigeria towards minority religions, when in reality these governments are actively promoting the *de facto* religions.

4.2 The dominance of Islam and Christianity in the Nigerian legal system: *De facto* state religions?

A combination of the colonial legal legacy of Nigeria and geographic dominance of their adherents in Nigeria ensure that Islam and Christianity dominate the Nigerian legal system. Ultimately, the indigenous religions are in the minority, even though it ought to be noted that the two major religions are also minorities depending on the part of Nigeria in which they are found. A third feature of the dominance of certain religions in Nigeria is the fact that Christianity is dominant to the extent that it is the foundation of English common law which is superior to Islamic law and customary law in Nigeria.

³² See Iwobi (n 14 above) 5. See also Peters (n 16 above) 34: ‘... (t)he recognition of Muslim civil and personal law is sufficient for Muslims to be able to practise their religion. The introduction of criminal law necessitates an intensive involvement of the state and could be regarded as the adoption of Islam as state religion.’

³³ See sec 277 of the 1999 Constitution.

³⁴ See Ahmad (n 31 above) 17, who identifies the inability of the 12 northern state governments to enforce the constitutional obligations to other religions largely to the lack of articulation or justification of the difference between the principles of classical Shari’a and the Islamic Penal Codes with respect to the status of non-Muslims in an Islamic state.

Let us first consider the dominance of English common law in the Nigerian legal system. The first example of this dominance is the preference given to Christianity in the marriage laws of Nigeria. The three types of marriages — under the Marriage Act,³⁵ under customary law and under Islamic law — are not of the same parity. First, section 35 of the Marriage Act prohibits the possibility of any person married under the Act from contracting a subsequent customary law marriage. Indeed, to do this may amount to an offence punishable with a five-year term of imprisonment as stipulated by section 48 of the Marriage Act. Because the prohibition is restricted to customary law, it is thought that a Muslim marriage is exempt from this prohibition. Secondly, according to the provisions of section 33 of the Marriage Act, parties who are married under customary law can subsequently marry under the Act. Because the reverse is not possible, it becomes clear that the customary marriage is of a lesser status than marriage according to the Act, since the latter precludes any subsequent customary marriage. Indeed, there is recognition that the later marriage in terms of the Act is sought for enhanced security because marriage under the Act imports monogamy into the union.³⁶ As a matter of routine, therefore, parties first contract a customary marriage and then enter into marriage according to the Act. Thirdly, the preference given to Christian marriages is evident in the advantages conferred on such spouses as against their customary and Islamic counterparts by the Criminal Code³⁷ and the Evidence Act.³⁸ This is because of the definition of a 'husband' and 'wife' by section 10 of the Criminal Code as meaning respectively the husband and wife of a Christian marriage, while section 1(2) of the Evidence Act defines husband and wife as meaning husband and wife of a monogamous marriage.

Other advantages include the point that the Criminal Code in a number of provisions exculpates the wife of a Christian marriage from liability in certain circumstances. These include section 10, which exculpates a wife for becoming an accessory after the fact for assisting or helping the husband escape punishment, section 33 which provides that a wife of a Christian marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and section 34 which provides that a wife and husband of a Christian marriage are not criminally responsible for a conspiracy between themselves alone. In addition, section 162 of the Evidence Act provides that a husband and wife of a monogamous marriage, including an Islamic marriage, cannot be compelled to disclose any communication made between them in the course of the marriage.

³⁵ Cap M6 Laws of the Federal Republic of Nigeria 2004.

³⁶ See *Jadesinmi v Okoitie--Eboh* [1996] 2 NWLR (Pt 429) 128 147-148.

³⁷ Cap C38 Laws of the Federal Republic of Nigeria 2004.

³⁸ Cap E14 Laws of the Federal Republic of Nigeria 2004.

In effect, the spouses of customary marriages may be so compelled, clearly illustrating the inferior status of customary law marriages.

Other manifestations of Islamic and Christian religious bias in public life include the fact that, at public ceremonies, it is likely that either a Christian or Islamic prayer or both are said, depending on the geographical context of the ceremony. Furthermore, the 1999 Constitution in its Preamble refers to 'God', as do oaths of office in the Seventh Schedule to the 1999 Constitution. This seems to refer to a Christian God, because Muslims are given an alternative of swearing on the Koran. Yet another example is that Islam and Christianity, the two dominant religions in Nigeria, along with Judaism, are favoured in the taking of oaths by section 5 of the Oaths Act.³⁹ Yet another manifestation of the dominance of the two religions is evident in the fact that only Christian and Islamic holidays are mentioned by the Public Holidays Act.⁴⁰

Even more worrisome seems to be a marked judicial bias in favour of Nigeria's *de facto* religions. The bias for the Christian faith is evident in *Registered Trustees of the Rosicrucian Order, AMORC (Nigeria) v Awoniyi*,⁴¹ where Iguh JSC declared as follows:⁴²

It cannot be seriously suggested that there was anything secret in the teachings of Jesus Christ which in my view is entirely public and properly documented in the scriptures. Clearly to assert, as the plaintiff unequivocally did, that Jesus Christ was a member of secret societies and that he was an advocate of occult teaching is speaking for myself satanic, blasphemous and entirely unacceptable.

There is also the hint of the superiority of Islam to customary law evident in the consistent denial that Islamic law is not customary law.⁴³

5 Regulation and interference by the state in the internal affairs of religious organisations in Nigeria

The adoption of *de facto* state religions in Nigeria has not generally led to state interference in the internal affairs of religious organisations beyond the threshold of protecting society. To illustrate this point, I shall consider the formation and registration of religious organisations; the judicial review of internal affairs of religious organisations; and the exemption of religious organisations from the payment of taxes.

³⁹ Ch O1 Laws of the Federation of Nigeria 2004. Sec 8 of the Oaths Act allows persons to affirm rather than swear to an oath.

⁴⁰ Ch P40 Laws of the Federation of Nigeria 2004.

⁴¹ (1994) 7 NWLR (Pt 353) 154.

⁴² n 41 above, 192-193.

⁴³ See generally AA Oba 'Islamic law as customary law: The changing perspective' (2002) 51 *International and Comparative Law Quarterly* 817.

5.1 The formation and registration of religious organisations in Nigeria

In Nigeria, there is an unfettered freedom to form associations, including religious organisations, in accordance with section 40 of the 1999 Constitution. There are no registration requirements,⁴⁴ except in situations where the religious organisation is desirous of adopting a form as prescribed by the Companies and Allied Matters Act.⁴⁵ That form is either that of an incorporated trustee or a company limited by guarantee. A religious organisation is allowed by law to operate and exist in an unincorporated form. To allow or permit the registration of religious organisation *qua* religious organisation will most likely be unconstitutional. This may explain the repeated refusal by the Corporate Affairs Association to allow the Christian Association of Nigeria (CAN) to exercise the power of consenting to the registration of churches. Commenting on the refusal of the Corporate Affairs Commission, Emeka Chianu submits that:⁴⁶

Perhaps CAC perceives that if CAN is obliged, it would introduce biased esoteric conditions precedent to the incorporation of Christendom religious groups to the chagrin of the disfavoured. This may create more problems for government and the society at large than the ones CAN intends to prevent or to solve. To surrender to a religious association the right to determine which religious group to register and which application to reject would involve it in making a judgment as to which religious beliefs deserve protection. Such a judgment would greatly interfere with the religious freedom entrenched in the Constitution and would be dangerous.

It needs to be pointed out, however, that the right to freedom of association and the right to freedom of thought, conscience and religion can be derogated from in the light of section 45 of the 1999 Constitution, as discussed above. The appropriate question is whether any law requiring registration will fit the bill of public safety or public morality, and such. There is already an example in *Osawe v Registrar of Trade Unions*,⁴⁷ where the Trade Unions Act 1986, which sets out conditions for the registration of trade unions in Nigeria, was held as constitutionally justified by the provisions of the 1979 Constitution similar to section 45 of the 1999 Constitution. This was because of the history of the proliferation of trade unions and the havoc this wrought on the movement. It may well be argued that the derogation clause is enough justification for the Companies and Allied Matters Act (CAMA) and its power to register religious organisations. This is even more the

⁴⁴ The assertion in IE Ekwo *Incorporated trustees law for churches and religious associations* (2003) 35 that '[a]pplication for registration by the church is an exhibition of an intention to have its formation and establishment legalised' is therefore wrong.

⁴⁵ Ch C20 Laws of the Federation of Nigeria 2004.

⁴⁶ E Chianu 'Registration of churches in Nigeria — Keeping religious freedom and societal interests on equipoise' (2000) 1 *Nigerian Contemporary Law Journal* 60.

⁴⁷ (1985) 1 NWLR 755.

case when it is clear that, unlike trade unions which are denied the right to operate without registration, religious organisations can operate without registration under part C of CAMA. However, if there is a propensity to register under CAMA, as I argue below, it is well worth observing that the nature of the powers exercised by CAC is important, lest indirectly it is used to choose which religious belief to be registered under or otherwise. Before undertaking an overview of the powers of CAC to register associations and companies, I shall dwell briefly on the forms of incorporation open to religious organisations.

As stated above, a religious organisation can either register as a company limited by guarantee under section 26 of CAMA⁴⁸ or incorporate a number of trustees under part C of CAMA. A company limited by guarantee is one that the liability of its members is limited to the amount, if any, that members undertake at incorporation or joining that they will bear in the event of the company being wound up. In reality, companies limited by guarantee are not profit-oriented. The advantages of incorporation are found in section 37 of CAMA, which provides that the incorporated company becomes a juristic person, capable of suing and being sued and able to hold property in its registered name. The second form a religious organisation may choose is an association with incorporated trustees. Section 673(1) of CAMA provides that one or more trustees appointed by a community of persons bound together by religion or by any body or association of persons established for any religious purpose may, if so authorised by that community body or association, apply to the Corporate Affairs Association to be registered as a corporate body. Upon being so registered, section 679 provides that the trustees shall become a body corporate with perpetual succession, a common seal and power to sue and be sued in its corporate name,⁴⁹ and power to hold and transfer property. Accordingly, an unregistered body of trustees will not enjoy these advantages.⁵⁰ The trustees can enter into legal relations for the religious organisation in their personal status on behalf of the association.⁵¹ The advantages of choosing the form of incorporated trustees are similar to that of a company limited by guarantee.

Most religious organisations seek to register with the CAC to ensure the perpetuity of their association and also the corporate form of the

⁴⁸ Sec 26(1) of CAMA provides that '[w]here a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee'.

⁴⁹ See also *Registered Trustees, Apostolic Church, Ilesha Area, Nigeria v The Attorney-General of the Mid-Western State of Nigeria* (1972) 1 All NLR 359.

⁵⁰ See eg *Anyabunam v Osoka (No 2)* (2000) 5 NWLR (Pt 657) 380.

⁵¹ n 50 above, 389.

association, as distinct from its members. CAC is therefore an important arbiter in the existence of religious bodies. As soon as CAC registers a religious organisation, it is conferred with the power to also annul the organisation. The powers granted to CAC to register and dissolve an association incorporated with trustees are broadly similar. Section 674(b) of CAMA requires that CAC shall register an association whose aims and objectives must be for the advancement of any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose and must be lawful. In the same vein, section 691(2) of CAMA permits the dissolution of an association incorporated with trustees on grounds which include that 'all the aims and objects of the association have become illegal or otherwise contrary to public policy' and that 'it is just and equitable in all circumstances that the corporate body be dissolved'. Similarly, a company limited by guarantee may also be wound up if the court is of the opinion that 'it is just and equitable that the company be wound up'.⁵² Ultimately, what is worrisome about the power of CAC in this regard is the seemingly wide latitude given to the Commission to register or annul a religious organisation. This is largely because there is no definition of the term 'religious' in CAMA in the 1999 Constitution or any other statute. The same comment relates to the concept of 'public policy' and 'just and equitable', even though the term 'just and equitable' has acquired a technical meaning in corporate law. Consequently, the CAC is endowed with wide powers with little guidance. Even though there is scant evidence of a disagreement between her and a prospective applicant, the possibility of abuse looms large in the background. This is more so with a disturbing judicial trend that seems to ascribe to the CAC an absolute discretion in its determination of compliance with registration requirements. Even though decided with respect to disagreements over the choice of names, the cases of *Amasike v Registrar General Corporate Affairs Commission*⁵³ and *Corporate Affairs Commission v Ayedun*,⁵⁴ affirming the absolute discretion of the CAC, are a departure from the detailed scrutiny of the powers of the Commission and its predecessors in the past.⁵⁵ This is clearly dangerous in view of the *de facto* religions in Nigeria and the possibility that they may become the paradigm of what is religious or otherwise. Even at that, it must be remembered that religious organisations do not need to register, so ultimately the power of the CAC may not be as far-reaching as they seem.

⁵² Sec 408(e) of CAMA.

⁵³ [2006] 3 NWLR (Pt 968) 463.

⁵⁴ [2005] 18 NWLR (Pt 957) 391.

⁵⁵ See the cases of *Lasisi v Registrar of Companies* (1976) 7 SC 73 and *Kehinde v Registrar of Companies* (1979) 3 LRN 213.

5.2 Judicial review of the internal affairs of religious organisations

To a large extent, religious organisations enjoy a measure of autonomy in their internal affairs to the extent that political authorities, including the judiciary, do not interfere to ensure favoured outcomes. Where, however, the members of a religious organisation disagree even about matters of faith, doctrine, discipline, and so on, Nigerian courts,⁵⁶ when approached, have consistently assumed jurisdiction, even if reluctantly, over these matters. It is to be remembered that the 1999 Constitution, in section 6(6)(b), extends judicial power to 'all matters'.⁵⁷ Thus, in *Shodeinde v Registered Trustees of the Ahmadiyya Movement in Islam*,⁵⁸ Kayode Eso JSC said:⁵⁹

Now it appears to me that matters of faith are hardly matters for a court of law, but once there the court should deal with them without passion, but only with justice according to the law being a guide.

Recently, the Nigerian Supreme Court engaged in determining whether the Rosicrucian Order is a secret society in the case of *Registered Trustees of the Rosicrucian Order, AMORC (Nigeria) v Awoniyi*.⁶⁰ In assessing the defence of justification in a libel suit brought by the Rosicrucian Order against a publication that it was a secret and satanic society, the Supreme Court and the lower courts engaged in doctrinal assessments of the teachings and practices of the Rosicrucian Order. Even at that, Nigerian courts are most likely to abide by the constitutions of religious associations, especially the ones filed pursuant to applications for incorporation.⁶¹ However, the courts will protect the fundamental rights of members and officers of a religious organisation in the event that there is an allegation of breach.

5.3 Exemption from payment of tax

Sections 19(1)(c) and (d) of the Companies Income Tax Act⁶² exempt the profits of any organisation engaged in ecclesiastical, charitable or

⁵⁶ The original jurisdiction over the CAMA vests in the Federal High Court in Nigeria by virtue of sec 251(e) of the 1999 Constitution.

⁵⁷ See Tobi JCA in *Registered Trustees of the Ifelaju Friendly Union v Kuku* (1991) 5 NWLR (Pt 189) 65: 'In our democracy where the rule of law both in its conservative and contemporary constitutional meaning operates, the doors of the courts should be left wide open and I mean really wide open throughout the day for aggrieved persons and the generality of litigants to enter and seek any form of judicial redress or remedy.'

⁵⁸ (1983) NSCC 523.

⁵⁹ See also *The Registered Trustees of the Apostolic Church v Olowoloni* (1990) 6 NWLR (Pt 158) 514 538: '[A] church organisation ... [is] subject to the rule of law and expected to obey the law.'

⁶⁰ n 41 above.

⁶¹ See the case of *The Registered Trustees of Faith Tabernacle Congregation Church Nigeria v Ikwechegh* (2000) 13 NWLR (Pt 683) 1.

⁶² Cap C21 Laws of the Federation of Nigeria 2004.

educational activities of a public character in so far as such profits are not derived from a trade or business.

6 The right of religious communities to uphold, practise and spread their religion in Nigeria

In this section we explore different ways in which religious communities can practise and spread their religion. In this regard, sections 38(1), (2) and (3) of the 1999 Constitution are critical. Section 38(1) of the 1999 Constitution recognises the right of an individual, either alone or in community with others, in private and public, 'to manifest and propagate his religion or belief in worship, teaching, practice and observance'.⁶³ This may be regarded as a general right that entitles the outward manifestations of the right to religion. More specific entitlements are found in subsections (2) and (3), but are limited to religious education and the establishment of religious educational institutions. The subsections provide as follows:

- (2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.
- (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

As argued above, Nigeria's *de facto* state religions impose constitutional obligations on the relevant governments to ensure that other religions are treated equally. Treating other religions equally is especially important in the manner that the state ensures that all religious communities are able to practise and spread their religion without constraints. It would entail positive action to ensure that minority religious practices are recognised and promoted. In fulfilling these constitutional obligations, the state may be obliged in certain cases to curb the manifestations of a *de facto* religion(s). To appreciate how the Nigerian state has acted in this regard, I shall examine the issue of religious schools, religion in schools, religious proselytism and the balance established by Nigerian courts in the clash between religious beliefs and practices, on the one hand, and communal and statutory duties, on the other.

6.1 Religious schools

As we noted above, section 38(3) of the 1999 Constitution permits the establishment of religious schools in Nigeria, and generally it may

⁶³ See the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief.

be stated that religious organisations are free to establish religious schools. A distinction seems appropriate between schools owned by religious organisations, where normal curricula are taught, albeit from a religious perspective, and doctrinal schools, where clergy and *imams* are prepared. A further distinction rests on the level of education. While primary and post-primary schools are within the competence of state governments, post-primary education, including at universities, is concurrently shared between state and federal governments. Item 27 of the Second Schedule to the 1999 Constitution endows the federal government with the power to regulate university and technological education. Pursuant to this power, the establishment and standards of universities are controlled by the National Universities Commission. In *Ukaegbu v Attorney-General Imo State*,⁶⁴ the Supreme Court recognised the right of individuals to establish private universities by virtue of the right to freedom of expression within the context of any law made to regulate such establishment. Consequently, private universities require the consent of the National Universities Commission to establish universities. Since there is no restriction apparently targeted at religious bodies, many of them have established universities. For a long time public universities have held sway in Nigeria and a cardinal feature of these universities is that they profess no religion, even though they are likely to observe Islam and Christianity on most campuses.⁶⁵ At the lower levels of primary and secondary education, there is also no peculiar restriction in the establishment of religious schools. However, one of the areas of controversy is whether a student in any such religious school or university is entitled to object to any form of religious instruction and practice. Recently, a number of Christian⁶⁶ and Islamic⁶⁷ universities have come under attack for their moral rules. While these universities stress that their moral rules and a certain level of autonomy underlie their origin and context,⁶⁸ other commentators stress the rights of students in the schools, implying that these rights ought to trump the moral rules.

⁶⁴ [1984] 5 NCLR 78.

⁶⁵ See E Obadare 'From students to disciples: Fundamentalism and the structural transformation of university campuses' in A Agbaje *et al Nigeria's struggle for democracy and good governance* (2004) 375.

⁶⁶ One of such universities, the Covenant University, prescribed a virginity test for its graduating students. See 'Religious universities: Campuses of strange happenings' *Newswatch* 24 September 2007 18: 'Not a few Nigerians were shocked at the revelation that Covenant University conducts medical tests which includes HIV and pregnancy tests and that the result of the tests would stand between the students and their educational pursuits.'

⁶⁷ *Newswatch* (n 66 above) 17 alleges that in the Crescent University, Abeokuta Jumat service is compulsory for every student whether you are a Christian or a Muslim.

⁶⁸ As above.

6.2 Religion in schools

As hinted above, there is considerable state involvement in the running of schools in Nigeria. One direct consequence of the end of civil war in Nigeria in 1970 was the take-over of primary and post-primary schools and universities in all parts of Nigeria by state and federal governments. Even with the take-over of schools, *de facto* state religions are taught and promoted in these schools to the detriment of other beliefs and religions.⁶⁹ Thus, in the northern part of the country, Islamic religious knowledge is taught and promoted as opposed to Christian religious knowledge. The reverse is the case in Southern Nigeria. One key issue is whether there is an obligation by state governments to provide and promote all religious knowledge in their schools. This question was raised, but unfortunately sidestepped, in the case of *Adamu v Attorney-General of Borno State*,⁷⁰ where the appellants as plaintiffs instituted an action in the High Court of Borno State, claiming a declaration that the practice whereby they paid for the teaching of Christian religious knowledge to their children in the same school where their local government (the Gwoza Local Government Council) paid teachers of Islamic Religious Knowledge was unconstitutional as such a practice is discriminatory. They also sought an order directing the Gwoza Local Government Council to pay the salaries of teachers of Christian Religious Knowledge. The trial judge dismissed the action on a preliminary motion that the subject matter of the suit is not justiciable, because it fell within chapter two of the 1979 Constitution. The Court decided that the matter was justiciable and that, had the trial judge gone to trial and the facts established, it would have amounted to the appellant's fundamental right of freedom from discrimination based on religion. Consequently the Court of Appeal remitted the case to another High Court judge for trial. Adamu hints at the possibility of the equality provisions being deployed to ensure that all religions are treated equally. In that context, a finding of discrimination against the teaching of Christian Religious Knowledge would also be applicable to the teaching of Traditional Religious Knowledge, so long as the teachers can be found.

6.3 Religious proselytism in Nigeria

It may be stated that religious organisations in Nigeria generally have a right to proselytise in furtherance of their right to religion found in section 38(1), subject, of course, to the maintenance of public order. In this regard, there is a Public Order Act⁷¹ that is potentially directed

⁶⁹ See generally RIJ Hackett 'Conflict in the classroom: Educational institutions as sites of religious tolerance/intolerance in Nigeria' (1999) *Brigham Young University Law Review* 537.

⁷⁰ (1996) 8 NWLR (Pt 465) 248.

⁷¹ Ch P42 Laws of the Federal Republic of Nigeria 2004.

at religious organisations. Furthermore, there are regulations made by media regulators in Nigeria that affect the ability of religious organisations to proselytise. First, section 1 of the Public Order Act enables the governor of each state to regulate public assembly meetings⁷² and processions on public roads and places of public resort in the state by issuing licences in this regard. Subsection (2) of the Act provides that any person desirous of convening an assembly, meeting or procession must apply to the governor of the state not less than 48 hours before the event. Section 2 of the Public Order Act empowers a police officer to stop any assembly, meeting or procession for which no licence has been issued or which violates any condition in an issued licence. Section 4 permits police officers to issue proclamations banning any public assembly meeting or procession for up to a period of 14 days. The constitutionality of the Act was recently challenged with respect to political rallies. In *Inspector-General of Police v All Nigeria Peoples Party*,⁷³ the Court of Appeal considered whether the Public Order Act, requiring a licence to hold assemblies, permits and processions, was constitutional and justifiable under section 45 of the 1999 Constitution. The issue was whether such a law is reasonably justifiable in a democratic society, or an unwarranted substantial conditionality for the exercise of the freedom of assembly and association. The Court held that the requirement of a licence by the Public Order Act was unconstitutional, as it stifles the right of citizens to assemble freely and associate with others. The Court recognised the right of the government to safeguard law and order in a society, but held that the means of doing this should not stifle fundamental personal liberties. Accordingly, religious organisations do not need a police permit to hold proselytising meetings.

As stated earlier, media regulatory bodies in Nigeria are capable of affecting the proselytising the mission of religious organisations. Of note here is the National Broadcasting Commission (NBC), a federal government agency statutorily⁷⁴ charged with the regulation of the broadcasting industry. The Commission is charged with a number of functions which include responsibility for (i) upholding the principles of equity and fairness in broadcasting; (ii) establishing and

⁷² It is to be noted that the Public Order Act defines in sec 12 a 'public meeting' as including any assembly in a place of public resort and any assembly which the public or any section thereof is permitted to attend, whether on payment or otherwise, including any assembly in a place of public resort for the propagation of any religion or belief whatsoever of a religious or anti-religious nature but, notwithstanding any other provision of this Act, does not include (a) any regular religious service conducted in a mosque, church or any building or other structure customarily used for lawful worship of any description; (b) any charitable, social or sporting gatherings; (c) any meeting convened by a department of any government in the Federation or any other body established by law for its own purposes; or (d) any lawful public entertainment.

⁷³ (2007) 18 NWLR (Pt 1066) 457. This decision can be taken to have overruled *Chukwuma v Commissioner of Police* (2005) 7 NWLR (Pt 927) 278.

⁷⁴ Ch N11 Laws of the Federation of Nigeria 2004.

disseminating a national broadcasting code and setting standards with regard to the content and quality of materials for broadcast; and (iii) promoting Nigerian indigenous cultures, moral and community life through broadcasting. Pursuant to the enabling law, the NBC enacted a Broadcasting Code which affects religious organisations. Section 3.4, articles 1 and 3 of the National Broadcasting Code mandate the provision of equitable air-time and appropriate opportunity for all religious groups. The advent of Pentecostal evangelism and its real and perceived benefits has led to a proactive use of the broadcasting institutions to proselytise.⁷⁵ It appears that broadcasting stations routinely flout the above-mentioned article, preferring to air the programmes of paying (rich) religious organisations.⁷⁶ This, of course, is discriminatory with respect to poor religious bodies of the same faith and also privileges Christianity over Islam.⁷⁷ Another section of the Broadcasting Code affecting religious organisations is the allocation of not more than 10% of the air-time of the broadcasting station. Another relevant aspect of the Code is section 3.4, article 6, which prohibits religious broadcasts promoting unverifiable claims. In 2004, the NBC banned miracles on television as they are not provable or believable.⁷⁸ The NBC is a good example of a government agency unable to successfully mediate the spread of religion. Its practice, the designating of religious broadcasts as private and commercial is an example of the folly of pretending that the body is neutral. What the NBC needs to do is to actively support all religions to have equal access by providing facilities for all religions to

⁷⁵ See RII Hackett 'Charismatic/Pentecostal appropriation of media technologies in Nigeria and Ghana' (1998) 28 *Journal of Religion in Africa* 258.

⁷⁶ See W Iherjirika 'Media and fundamentalism in Nigeria' 2005 (2) *Media Development* http://www.wacc.org.uk/wacc/publications/media_development/2005_2/media_fundamentalism_in_Nigeria: 'Before the advent of Pentecostal media, religious broadcasting has been provided as a form of public services by the various media houses. Today, because of the money accruing from the televangelists, none of the stations allocates space for public service religious programmes.'

⁷⁷ See Hackett (n 75 above) 270: 'It is precisely the appeal of these Western Christian programmes that Muslim leaders fear, and their powerful images of health and wealth- directly offered and electronically mediated by the persuasive evangelist in the privacy of one's own home.' See also Ahmed (n 31 above) 3: 'The unprecedented proselytisation, televangelism and deployment of foreign religious personnel and fund into Nigeria is a manifestation of the power of Nigerian Christians, which spawns a siege mentality amongst Muslims, who then perceive the institutionalisation of Shari'a in Muslim states as a kind of safety net.'

⁷⁸ See Iherjirika (n 76 above): 'For instance, on a number of occasions, attempts have been made by the Commission to stop the airing of the programmes of Pastor Chris Oyakilome, the most visible and flamboyant Pentecostal preacher. The allegation is that his programmes carry unsubstantiated claims of miracles and healings ... These attempts have ended in failure because of stiff resistance especially from the private electronic media owners in the country who know how much income they will be losing if the programme is stopped. Despite all the threats and warnings, Oyakilome still appears on both national, state and private radios and televisions with his programme "Atmosphere for Miracle".'

produce broadcast materials. What is observed of the NBC applies to state electronic media bodies in the 12 northern states.

6.4 Upholding religious beliefs and practices in conflict with communal and statutory duties

In this section, I explore the tension between religious beliefs and practices in conflict with statutory and communal duties. One appropriate question is whether the Nigerian legal system accords religious practices and beliefs a unique standing that recognises the objections of adherents. It does appear, however, that the courts are far more likely to hold that the right to religion supersedes communal obligations than statutory duties. In *Nkpa v Nkume*,⁷⁹ members of the Jehovah's Witness sect objected to the paying of levies for development projects and for not participating in the sanitation exercises of a community. The Court of Appeal upheld their objection and overturned the judgment of the lower court, which had held:⁸⁰

[a]ll the levies which the plaintiff objects to are definitely for the well being of his community. Will it be right to allow individuals to ruin development projects in their communities because of religious tenets? My answer is clearly in the negative. The plaintiff is allowed to practice whatever religion he professes but there must be something fundamentally wrong with a tenet which renders its adherents odious before the people.

In overturning the levies, the Court alluded to the freedom of religion of the objector and also dwelt on the power of the community to impose levies and the manner of recovery thereof. The Supreme Court, in the earlier case of *Agbai v Okagbue*,⁸¹ upheld the objection of a Jehovah's Witness to joining an age grade because his religion forbade such an activity. In both cases, the courts stressed the self-help resorted to by the community, implying that, had the community applied to the courts, the levies may have been enforced.⁸² In both cases, the courts drew attention to provisions similar to section 34(2)(e) of the 1999 Constitution which makes an exception to the right of dignity of the human person by excluding normal communal and other civic obligations for the well-being of the community. The import of the cases is that there is a constitutional sanction of communal labour which may override objections based on the right to freedom of thought, conscience and religion. Sadly, this point was not fully considered in the cases discussed above.

⁷⁹ [2001] 6 NWLR (Pt 710) 543.

⁸⁰ Judgment reproduced at 557-8.

⁸¹ (1991) 7 NWLR (Pt 204) 391.

⁸² See ES Nwauche 'A note on the burdens of association and limits of legality in Nigeria' (1994-1997) 6 *The Nigerian Juridical Review* 235.

Another case of objection to communal rites on grounds of religious belief is *Ojonye v Adegbudu*,⁸³ where a widow's religious objection to the custom of an animal sacrifice as part of her late husband's burial rites was upheld by the Benue State High Court. Worried about the 'possibility of people escaping their civic responsibility or civil obligations to other people on the pretext of ... freedom of religion',⁸⁴ the High Court erected a threshold that what is required is not merely the belief of the objector, but what is generally known as permitted by the religion in question. In fact, the Grade II Area Court from where the appeal came from had ruled that the widow could not rely on her religion, because she was not a true Christian, since she had not been baptised and had not taken holy communion in church.⁸⁵ While the threshold erected by the Court seems untenable since the belief of the widow is enough to sustain the section 38(1) right, it underlies a persistent worry about the use of fundamental human rights to undermine customary law.

The extent to which people may object to statutory or public duties on religious grounds is yet to be fully explored by Nigerian courts. An opportunity was missed by the Federal Supreme Court in the case of *Ojueye v Ubani*,⁸⁶ where Seventh Day Adventists complained that their right to religious freedom was violated, because an election held on a Saturday resulted in about 7 000 of them not voting because of their fear of being excommunicated. The Court held that fixing the election on a Saturday did not violate their right. It seems the Court decided the matter on the ground that the margin of loss by the candidate by over 20 000 votes made the loss of the Seventh Day Adventist votes irrelevant.

7 Indigenous spiritual beliefs, values and practices in Nigeria

In this section, I examine four ways through which the Nigerian legal system treats indigenous spiritual beliefs, values and practices. The first way is by criminalising some of these beliefs, values and practices. The second way is by refusing to recognise these beliefs, values and practices and consequently refusing to accord them any legal significance. The third way is to classify these beliefs, values and principles as customary law and to apply them if they pass the validity tests. The fourth way recognises these beliefs, values and principles and applies them. It can be stated that these four ways indicate a legal system that has not been able to properly understand the application of section

⁸³ [1983] 4 NCLR 492.

⁸⁴ n 83 above, 494.

⁸⁵ n 83 above, 493.

⁸⁶ [1961] 1 ALL NLR 277.

38 to indigenous beliefs, values and practices within the context of the colonial hangover of the dominance of Islam and Christianity.

A good example of the first way is the prohibition of the practice of the occult and paranormal, such as witchcraft. Chapter 20 of the Criminal Code is titled 'Ordeal, witchcraft, *juju* and criminal charms' and prohibits all activities related to witchcraft, criminal charms and *juju*.⁸⁷ Secondly, the Nigerian legal system treats indigenous spiritual beliefs, values and practices as unreasonable, superstitious and of no legal consequence.⁸⁸ Consequently, such beliefs do not generally avail defendants of the defences of insanity; self-defence; provocation and the defence of mistake of fact.⁸⁹

Thirdly, the Nigerian legal system treats indigenous beliefs, values and practices as forming part of customary law. It is the definition of customary law as including Islamic law that is particularly relevant here. At the turn of the twentieth century, Islam had become the dominant religion in Northern Nigeria through the *jihads* of the eighteenth and nineteenth century, while indigenous African religions thrived in the south of Nigeria. The English colonial masters introduced English law in Nigeria with the effect that, while it transformed⁹⁰ Islam in the northern part of Nigeria, it supplanted and led to the disappearance of many of the traditional religions in the Southern Nigeria. By the time Nigeria became independent, Islamic criminal law was reduced into

⁸⁷ The said section provides that any person who (a) by his statements or actions represents himself to be a witch or to have the power of witchcraft; or (b) accuses or threatens to accuse any person with being a witch or with having the power of witchcraft; or (c) makes or sells or uses, or assists or takes part in making or selling or using, or has in his possession or represents himself to be in possession of any *juju*, drug or charm which is intended to be used or reported to possess the power to prevent or delay any person from doing an act which such person has a legal right to do, or to compel any person to do an act which such person has a legal right to refrain from doing, or which is alleged or reported to possess the power of causing any natural phenomenon or any disease or epidemic; or (d) directs or controls or presides at or is present at or takes part in the worship or invocation of any *juju* which is prohibited by an order of the state commissioner; or (e) is in possession of or has control over any human remains which are used or are intended to be used in connection with the worship or invocation of any *juju*; or (f) makes or uses or assists in making or using, or has in his possession anything whatsoever the making, use or possession of which has been prohibited by an order as being or believed to be associated with human sacrifice or other unlawful practice; is guilty of a misdemeanour, and is liable to imprisonment for two years.

⁸⁸ See *Gadam v R* (1954) 14 WACA 442. See also Oputa JSC in *Goodluck Oviefus v State* (1984) 10 SC 207 262.

⁸⁹ See LO Aremu 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29 *International and Comparative Law Quarterly* 113.

⁹⁰ See A Yadudu 'Colonialism and the transformation of the substance and form of Islamic law in the northern states of Nigeria' (1992) 32 *Journal of Legal Pluralism and Unofficial Law* 103.

a penal code⁹¹ within the context of an English common law,⁹² while Islamic personal law was recognised as customary law. The recognition of Islamic personal law as customary law began in the colonial period⁹³ and was adopted after independence,⁹⁴ and is achieved essentially by defining 'native law and custom' as including Muslim law, a classification which has been stoutly and strongly resisted by a broad spectrum of the Muslim society,⁹⁵ including the Nigerian judiciary.⁹⁶ The customs of the people of Southern Nigeria, including the religiously-based ones, potentially fall under the rubric of customary law.⁹⁷

As a matter of law, customary law must pass a number of tests before it can be applied in a Nigerian court. These tests are statutorily⁹⁸ and constitutionally based. The statutory test provides that a customary law can be enforced, so long as it is not repugnant to natural justice, equity and good conscience. The repugnancy test, which has been applied in many cases,⁹⁹ is a term without definite contours, making it subjective and open to the understanding and values of different courts. In most cases, the fact that the test is applied by judges trained in English common law often leads to the application of a different value system to customary law.¹⁰⁰ Secondly, customary law must not

⁹¹ See AG Karibi-Whyte *The history and sources of Nigerian criminal law* (1993) 124.

⁹² See C Okonkwo & M Naish *Criminal law in Nigeria* (1980) 9-10; MA Owoade 'Some aspects of criminal law reform in Nigeria' (1980) 16 *Nigerian Bar Journal* 25.

⁹³ See sec 2 Native Courts Ordinance, Cap 142 Revised Edition of Laws of Nigeria 1948.

⁹⁴ See sec 2 of the High Court Law, Cap 42, Laws of Northern Nigeria, 1963 (applicable to the northern states of Nigeria).

⁹⁵ For the views of scholars, see AA Oba (n 43 above); YK Saadu 'Islamic law is NOT customary law' (1997) 6 *Kwara Law Review* 136; M Tilley-Gyado 'A case for the inclusion of African customary law in the curriculum of law faculties in Nigerian universities' (1993-1995) 2 & 3 *Nigerian Current Legal Problems* 246 256-7.

⁹⁶ See the cases of *Umaru v Umaru* (1992) 7 NWLR (Pt 254) 377: '[T]he definition of "customary law" ... is incapable of including "Moslem law".' In *Alkamawa v Bello* [1998] 6 SCNJ 127 136 Wali JSC stated *obiter* that 'Islamic law is not the same as customary law as it does not belong to a particular tribe. It is a complete system of universal law, more certain and permanent and more universal than English common law.'

⁹⁷ See sec 20(1) of the High Court Law of Cross River State which defines customary law as 'a rule or body of rules, regulating rights and improving correlative duties, being a rule or a body of rules which obtains and is fortified by established usage'.

⁹⁸ See eg sec 16(1) of the High Court Law Bayelsa State which provides that '[t]he Court shall observe and enforce the observance of customary law and shall not deprive any person of the benefits thereto except where such customary law is repugnant to natural justice equity and good conscience or incompatible either directly or by its implication with any written law from time to time in force in the state'.

⁹⁹ See eg the cases of *Okonkwo v Okagbue* [1994] 9 NWLR (Pt 368) 301; *Yinusa v Adesubokan* (1968) NNLR 97; *Zaidan v Mohsen* (1971) 1 UILR (Pt.II) 283.

¹⁰⁰ Academic commentary on the repugnancy test is overwhelming. A representative sample is as follows: A Ojo 'Judicial approach to customary law' (1969) 3 *Journal of Islamic and Comparative Law* 44; Y Aboki 'Are some Nigerian customary laws really repugnant' (1991-1992) 9-10 *ABU Law Journal* 1; BO Achimu 'Wanted — A valid criterion of validity for customary law' (1976) 10 *Nigerian Law Journal* 35.

be incompatible either directly or by implication with any law in force. In simple terms it means that any inconsistency between customary law and legislation will be resolved in favour of the latter. The third test is that customary law must not be contrary to public policy.¹⁰¹ There is no definition of public policy in the Evidence Act, even though it is again a matter of value judgment. The Nigerian Supreme Court in *Okonkwo v Okagbue*¹⁰² stated that public policy 'must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share'.¹⁰³ The test is as difficult as it is vague in its application. In this way, it is a potent weapon in the hands of a judicial system whose value system is not rooted in the customary law which is being applied. The effect of the combination of the statutory tests leads to the inescapable conclusion that customary law, including Islamic law, is subordinated to the English common law and ensures that the growth of customary law is stunted. The constitutional test is perhaps the most important validity test. Every law, including customary law, must pass constitutional muster. While the constitutional test encompasses the whole Constitution, there is no doubt that the provisions of chapter four of the Constitution are most appropriate in addressing the validity of customary law.¹⁰⁴

The fourth sense in which the Nigerian legal system treats indigenous beliefs, values and practices is by a wholesale adoption of procedures underpinned by the indigenous phenomena. Thus, Nigerian courts have accepted the validity of customary arbitration conducted through oath-taking and have upheld decisions applicable to persons who have survived oaths.¹⁰⁵ Customary oath-taking rests principally on the belief that surviving an oath is evidence of the truth of an assertion.¹⁰⁶ As I have argued elsewhere, this is a welcome instance of the enforcement of the section 38 right.¹⁰⁷

¹⁰¹ This test is provided for in sec 14(3) of the Evidence Act.

¹⁰² (1994) 9 NWLR (Pt 368) 301 (SC).

¹⁰³ n 102 above, 341.

¹⁰⁴ See *Uke v Iro* [2001] 11 NWLR 196 where a Nnewi custom, by which a woman is precluded from giving evidence, was held unconstitutional as it offended the right to freedom from discrimination. See also *Ukeje v Ukeje* [2001] 27 WRN 142, where the Court of Appeal held that an Igbo custom that disentitles daughters from participating in the sharing of the estate of their deceased father was unconstitutional.

¹⁰⁵ See eg the case of *Onyenge v Ebere* [2004] All FWLR (Pt 219) 981.

¹⁰⁶ See generally AA Oba 'Juju oaths in customary law arbitration and their legal validity in Nigerian courts' (2008) 52 *Journal of African Law* 139.

¹⁰⁷ See ES Nwauche 'The right to freedom of religion and the search for justice through the occult and paranormal in Nigeria' (2008) 16 *African Journal of International and Comparative Law* 35 53.

8 Resolving religious conflicts in Nigeria

Nigeria has been the victim of considerable religious strife. It seems fair to assert that the persistence of religious conflict in Nigeria hints at either a lack of understanding of the causes of the conflict or the failure of a resolution strategy. Understanding and implementing the constitutional obligations to minority religions, as argued above, by different levels of government, will assist in the reduction of religious conflict. Another method is the institutionalisation of the interaction of leaders of all religious groups. Already the federal government is empowered to do this by the Advisory Council on Religious Affairs Act,¹⁰⁸ which establishes an Advisory Council on Religious Affairs and charges the Council in section 3 with serving as an avenue for articulating cordial relationships amongst the various religious groups and between them and the federal government; assisting the federal and state governments and the populace by stressing and accentuating the position and roles religion should play in national development; serving as a forum for harnessing religion to serve national goals towards economic recovery, consolidation of national unity and the promotion of political cohesion and stability; considering and making recommendations to the federal government on matters that may assist in fostering the spiritual development of Nigeria in a manner acceptable to all religious groups. The Council is designated as an autonomous body even though its secretariat is to be located and provisioned by the Federal Ministry of Internal Affairs. The Council is made up of an equal number (12) of Muslims and Christians with the chairmanship and secretarial position rotating between the two religions. It is to be noted that the Council is an advisory body with no enforcement powers. Furthermore, there is the question of the recognition of Islam and Christianity as the basis of its constitution. There is little public evidence of its functions over the years in the area of religious tolerance. All the same, it is easy to identify the body as a possible fulcrum of resolving religious strife in Nigeria and as an example to be emulated at all levels of government in Nigeria.

9 Concluding remarks

A credible path to religious harmony in Nigeria lies in the recognition of Nigeria's *de facto* religions and the attendant constitutional obligations of equality and non-discrimination which entail respect, recognition and promotion of the belief, values and practices of other religions. Many cases of religious intolerance in all parts of Nigeria stem from a lack of understanding of the practical consequences of the constitutional

¹⁰⁸ Ch A8 Laws of the Federation of Nigeria 2008.

obligations. All governments in Nigeria and their organs must understand and implement these obligations. Furthermore, administrative bodies, such as the Advisory Council for Religious Affairs, must be effectively engaged. The role of the judiciary in the balancing of interests in section 38 cannot be overestimated, as is the infusion of religious tolerance into the curricula of schools and universities. Ultimately it is the nuanced determination of inter- and intra-religious disputes that will make the difference. Even though the path seems long and tortuous, there are signs of an understanding of the tasks ahead.

An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child

Benyam D Mezmur^{*}

Researcher and PhD Candidate, Community Law Centre, University of the Western Cape, South Africa

Julia Sloth-Nielsen^{**}

Professor of Law, University of the Western Cape, South Africa

Summary

During its 11th session, the African Committee of Experts on the Rights and Welfare of the Child held its first Pre-Session for the consideration of state party reports. This update highlights the work of the Committee during this session. While little attention is paid to the proceedings of the 11th session, partly as a result of the fact that the session was short-lived (only three days, composed of open and closed sessions), the procedures for the Pre-Session, as well as the substance of the four reports that were discussed during the Pre-Session, occupy centre stage. In conclusion, it is argued that the whole exercise of the Pre-Session was an ice-breaker, and represents progress in its own right. In looking forward, the importance for the African Children's Committee to draw the necessary lessons from the four state party reports and to chart ways of strengthening the reporting regime is underscored. A number of tentative recommendations are made in this regard.

^{*} LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria); benyamdawit@yahoo.com. It is hereby acknowledged that this work is based upon research supported by the National Research Foundation.

^{**} BA, LLB (Stellenbosch), LLM (Cape Town), LLD (Western Cape); juliasn@telkomsa.net

1 Introduction

The 11th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) was held in Addis Ababa, Ethiopia, from 26 to 28 May 2008. The session was attended by eight Committee members, a number which was enough to form a quorum.¹

Amongst others, during the 11th meeting, the Committee discussed the Day of the African Child (DAC), the Committee's budget for 2009, participation of Committee members in international meetings, and a Plan of Action for 2010-2015. New items that have not officially featured on the agenda of the meeting of the Committee in the past, such as a detailed plan for the organisation of the Pre-Session to Consider State Party Reports (Pre-Session) were also discussed.

During the Committee's 10th ordinary session, the issue of holding a Pre-Session was briefly highlighted. As already reported in the previous update:²

[t]he discussions on the preparation of the pre-session for the consideration of state parties' reports revolved around the procedure to be followed and the composition of the teams. As for the procedure to be followed, the members of the African Children's Committee decided to summon the pre-session before the 11th ordinary session of the Committee, more precisely in February 2008.

However, the Pre-Session was held neither in February 2008 nor before the 11th meeting in May 2008. Therefore, there was a need to bring up the issue again during the 11th session.

Accordingly, the Pre-Session was held from 29 to 31 May 2008. This was the first time the Committee held a Pre-Session as it moves towards considering the state party reports it has received. The Pre-Session brought together representatives from the United Nations Children's Fund (UNICEF), Plan International, Word Vision, Save the Children, the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN)-Nigeria Chapter, the Coalition to Stop the Use of Child Soldiers, the Mauritius Centre for the Education and Development of Children (CEDEM), the Community Law Centre (CLC) of the University of the Western Cape (UWC), Common Market for Eastern and Southern Africa (COMESA), and Ms Ouedraogo Awa N'Deye, former member of the UN Committee on the Rights of the Child (CRC Committee). Scheduled to be discussed during the Pre-Session were

¹ Art 38(3) of the African Children's Charter provides that '[s]even committee members shall form the quorum'. Committee member Mrs Pholo Mamosebi has failed to attend two consecutive sessions of the Committee and it was agreed that, in accordance with art 14 of the Rules of Procedure, a reminder would be sent to her.

² J Sloth-Nielsen & B Mezmer 'Win some, lose some: The 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 219.

state party reports from Egypt, Mauritius, Nigeria, and Rwanda (the four state party reports).

In what follows, this update will highlight the work of the Committee during its 11th ordinary session. While little attention is paid to the proceedings of the 11th session, partly as a result of the fact that the session was short-lived (only three days, composed of open and closed sessions), the procedures for the Pre-Session, as well as the substance of the four reports that were discussed during the Pre-Session, will occupy centre stage.

Generally, it is expected that the brief analysis of the four reports against the backdrop of the Guidelines for Initial Reports of State Parties (Guidelines),³ adopted by the African Children's Committee in 2003, will offer information that is valuable for the reporting process to the Committee as well as state parties. In addition, such an appraisal is expected to shed light on whether or not state parties appreciate the added value of some of the substantive provisions of the African Charter on the Rights and Welfare of the Child (African Children's Charter) when compared to the Convention on the Rights of the Child (CRC). After all, the African Children's Charter, while upholding all the universal standards outlined in CRC, speaks to the specific problems that African children confront, for example the impact of armed conflict and harmful traditional practices.

The degree to which the African Children's Charter will improve children's lives in Africa depends greatly on how state parties implement it and adopt domestic measures to comply with their treaty obligations. The state party reports offer an insight into the understanding of states of the provisions of the African Children's Charter, which directly relates to the domestication and subsequent realisation of the rights therein.

2 Procedural matters

During the initial stages of the 11th meeting, a closed session was held among the Committee members following the opening ceremony of the session. During the closed session, the agenda and programme of work were considered and adopted by the Committee.

It was decided that the theme for the DAC in 2009 will be 'Africa fit for children: Call for accelerated action towards their survival'. The call for accelerated action is a reaffirmation of the need to achieve targets set in the 2001 Plan of Action in Cairo, Egypt, in 2001, during the First Pan-African Forum on Children.

The other procedural matter that took place during the 11th session is the election of three new bureau members. Accordingly, the newly elected members are:

³ Cmttee/ACRWC/2 II. Rev2.

Ms Diakhate Seynabou
 Ms Koffi Marie Chantal Appoh
 Ms Boipelo Seiltamo Lucia

Chairperson
 Deputy Chairperson
 Rapporteur

The election of the new bureau members was mainly necessitated as a result of the end of the term of office of four Committee members, including the former Chairperson.

It was argued in previous notes⁴ that the need to extend the term of office of Committee members has become evident through the years. The fact that Committee members are not eligible for re-election after serving one term has been identified as one set-back and continues to potentially affect the smooth operation of the work of the Committee. Trying to address this set-back at the eleventh hour when Committee members' terms of office is about to expire, as the outgoing Committee members attempted, is too little, too late. Rather, it is advisable that a concerted effort is made by the current Committee members to lobby the African Union (AU) Commission to undertake the requested study on measures to renew the terms of office of Committee members.⁵ Nothing to this effect was discussed during the 11th session. The official report of the meeting also testifies to this fact. Nevertheless, the issue remains a worthy one to spend time on and subsequent sessions would fare better if the issue is addressed.

As requested during the 10th meeting,⁶ alternative reports on the four state party reports were submitted by selected non-governmental organisations (NGOs) and intergovernmental organisations working in the respective countries that have submitted state party reports. For instance, UNICEF and Plan International submitted alternative reports on some of the four state party reports. This *ad hoc* arrangement of requesting a selected number of NGOs and intergovernmental organisations to submit alternative reports might have worked for the moment. However, it has also brought into the spotlight the urgent need to facilitate the granting of observer status to civil society organisations in accordance with the Guidelines for the Granting of Observer Status.⁷ Civil society organisations should be central to the general work of the African Children's Committee and their invaluable contribution in the state party reporting and alternative reporting processes should be tapped properly. One

⁴ See, eg, Sloth-Nielsen & Mezmur (n 2 above) 211-212.

⁵ Under Decision EX/CL/233(VII) of 2005, para 8, the Executive Council of the AU has requested the AU Commission to study measures to renew the terms of office of committee members for another term.

⁶ Sloth-Nielsen & Mezmur (n 2 above) 219.

⁷ For further details on these Guidelines, see B Mezmur 'Still an infant or now a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th ordinary session' (2007) 7 *African Human Rights Law Journal* 267-270.

main avenue of achieving this is to formalise their participation in the work of the African Children's Committee by granting them observer status.

The Pre-Session was not generally open to the public, including partner NGOs and intergovernmental organisations. Therefore, the question of who should be allowed to take part in the Pre-Session for the consideration of the state party reports triggered some controversy. This controversy reached its climax when the representative from the regional economic community COMESA was requested to leave the Pre-Session. According to the Committee, it was argued, only representatives 'who had information' on the respective state party reports to be considered were to be allowed. It was not clear what exactly was meant by only representatives 'who had information'. Does it mean that a representative needed to be from the country the report of which was being considered? Are representatives of organisations who have an office in the country the report of which was being considered entitled access to the Pre-Session? No concrete explanation was forthcoming from the Committee that addressed these questions.

In this regard, emulating the practice of the CRC Committee can be of some concrete guidance.⁸ The CRC Committee has developed the CRC Guidelines for the participation of partners (NGOs and individual experts) in the Pre-sessional Working Group of the Committee on the Rights of the Child (CRC Pre-Sessional Guidelines). According to the Guidelines, written contributions are made by NGOs and individual experts.⁹ In addition, as far as participation in the pre-session is concerned, NGOs and individual experts need to submit a request to the Secretariat of the CRC Committee two months before the pre-session.¹⁰ Based on the written information submitted, the Secretariat of the CRC Committee sends out invitations to selected NGOs and individual experts.¹¹ The selection and subsequent invitation is made on the basis of the relevance of the information submitted to the Committee's consideration of state party reports. According to the CRC Pre-Sessional Guidelines, priority is to be given to partners who are working in the

⁸ This has already been suggested in B Mezmur 'Looking back to look ahead: The 9th meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2007) 7 *African Human Rights Law Journal* 552-553.

⁹ NGOs and individual experts should also provide 20 copies of each document submitted to the CRC Secretariat. See CRC Guidelines for the participation of partners (NGOs and individual experts) in the Pre-sessional Working Group of the Committee on the Rights of the Child (CRC Pre-Sessional Guidelines) (UN Doc CRC/C/90, 1999) para 2.

¹⁰ CRC Pre-Sessional Guidelines (n 9 above) paras 2 & 3.

¹¹ CRC Pre-Sessional Guidelines (n 9 above) para 4.

state party concerned and who can provide first-hand information to the CRC Committee.¹² If the Pre-Session of the African Children's Committee is formalised in this manner, there will be certainty about who would be allowed to attend and this will minimise potential disappointment of partners.

3 State party reports

State reporting is the most basic of all strategies adopted internationally to assess and oversee compliance with international human rights standards.¹³ Reporting is found in all the eight core human rights treaties of the UN, including CRC.¹⁴ At the regional level, both the African Charter on Human and Peoples' Rights (African Charter) as well as the African Children's Charter have respective reporting obligations for state parties. In fact, state reporting is regarded as 'the lowest common denominator'¹⁵ of the global and regional human rights protection systems.

It has been observed, in the context of CRC, that, according to article 44, state party reports are expected to contain the following:

Firstly, the states should list the measures they have adopted which give effect to the rights recognised in CRC. At the same time, they also have to give information on the progress made on the real enjoyment of those rights. Secondly, the same article specifies that the reports are to mention the 'factors and the possible difficulties' that have their influence on the compliance with the obligations entailed by CRC. Finally, article 44 mentions that the reports are to contain sufficient information in order to provide the Committee with a comprehensive understanding of the implementation of CRC in the country concerned.¹⁶

¹² As above.

¹³ M Evans *et al* 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 37.

¹⁴ The other seven core UN human rights treaties are the International Covenant on Civil and Political Rights (CCPR); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW); the International Convention for the Protection of All Persons from Enforced Disappearance; and the Convention on the Rights of Persons with Disabilities (CRPD).

¹⁵ As above.

¹⁶ M Verheyde & G Goedertier 'Article 43-45: The UN Committee on the Rights of the Child' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 16.

The wording of article 43 of the African Children's Charter on the 'reporting procedure' is drafted in a similar fashion to CRC.¹⁷ Therefore, it imposes the same level of obligations on state parties, which, in some respects, are considered to be relatively onerous obligations when compared to other human rights instruments, such as the International Covenant on Civil and Political Rights (CCPR),¹⁸ the Convention on the Elimination of Discrimination Against Women (CEDAW)¹⁹ and the Convention on the Elimination of Racial Discrimination (CERD).²⁰

Under the African Children's Charter, the purpose of reporting is reflected in the Guidelines adopted by the African Children's Committee. The Guidelines provide that the African Committee²¹

[b]elieves that the process of preparing a report for submission to the Committee offers an important occasion for conducting a comprehensive review of the various measures undertaken to harmonise national law and policy with the Children's Charter and to monitor progress made in the enjoyment of the rights set forth in the Children's Charter. Additionally, the process should be one that encourages and facilitates popular participation, national introspection and public scrutiny of government policies and programmes, private sector practices and generally the practices of all sectors of society towards children.

The Guidelines further expect that the reporting process 'serves as the essential vehicle for the establishment of a meaningful dialogue between the state parties and the Committee'.²²

¹⁷ Art 43 of the African Children's Charter on Reporting Procedure provides in part that: '1 Every state party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights: ... 2 Every report made under this article shall: (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and (b) shall indicate factors and difficulties, if any, affecting the fulfillment of the obligations contained in the Charter. 3. A state party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (a) of this article, repeat the basic information previously provided.'

¹⁸ It leaves out the express requirement to supply sufficient information to provide the Committee with a comprehensive understanding of the implementation of the treaty. See Verheyde & Goedertier (n 16 above) 17.

¹⁹ State parties 'may indicate' difficulties (art 18(2) of CEDAW) (our emphasis) as opposed to 'shall indicate' under art 43(2)(b) of the African Children's Charter.

²⁰ Only requires state parties to submit a report on the legislative, judicial, administrative or other measures which they have adopted. See art 9(1) of CERD.

²¹ Para 3 of the Guidelines.

²² Para 4 of the Guidelines.

The Guidelines group the articles of the African Children's Charter into nine broad themes or clusters.²³ Therefore, as opposed to the article-by-article reporting followed by some treaty bodies (notably CCPR), state parties to the African Children's Charter are required to report under the following themes:

- 1 general measures of implementation²⁴ (mainly information on necessary steps undertaken to adopt such legislative or other measures as may be necessary to give effect to the provisions of the African Children's Charter);
- 2 definition of the child;²⁵
- 3 general principles²⁶ (on non-discrimination; the best interests of the child, the right to life, survival and development; respect for the views of the child and provision of information to children and promotion of their participation);
- 4 civil rights and freedoms²⁷ (on the right to a name and nationality; preservation of identity; the right to privacy, and so forth);
- 5 family environment and alternative care²⁸ (on adoption, foster care, inter-country adoption and illicit transfer of children);
- 6 health and welfare;²⁹
- 7 education, leisure and cultural activities;³⁰
- 8 special protection measures³¹ (covering a wide range of issues such as children in conflict with the law, children in situations of emergency; child exploitation and children of minority groups); and
- 9 responsibilities of the child.³²

It is in light of these purposes and expectations that the following brief analysis of the four state party reports submitted to the African Children's Committee should be viewed. The effectiveness of the Guidelines as a means to an end (the end being the supervision of the implementation of the provisions of the African Children's Charter at the domestic level) is weighed on the basis of the four reports submitted to the African Children's Committee. In the brief analysis, commendable practices as

²³ Unfortunately, while the other three reports follow these Guidelines, Egypt's report does not. Egypt's report follows an article by article reporting system, which would make it less accessible for the African Children's Committee in its consideration of the state party report.

²⁴ Paras 8-9 of the Guidelines.

²⁵ Para 10 of the Guidelines.

²⁶ Paras 11-12 of the Guidelines.

²⁷ Para 13 of the Guidelines.

²⁸ Paras 14-16 of the Guidelines.

²⁹ Paras 17-18 of the Guidelines.

³⁰ Paras 19-20 of the Guidelines.

³¹ Paras 21-22 of the Guidelines.

³² Para 23 of the Guidelines.

well as areas where there is room for improvement are identified and tentative recommendations are made.

3.1 General measures of implementation

3.1.1 The process of preparing a state party report

Lloyd observed that³³

[t]he Guidelines regard African society as a resource and paragraph 3 states that the process of preparing a report should encourage and facilitate popular participation and public scrutiny of government policies, private sector practices and generally the practices of all sectors of society towards children.

The state party reports from Rwanda,³⁴ Egypt and Mauritius³⁵ fall short of what the Guidelines require of state parties in embarking on the process of preparing a state party report. However, the Nigerian state party report stands out in offering an example of a good practice as to the kind of process that could be followed and the level of participation required in the preparation of a state party report.

In Nigeria, the lead ministry for the preparation of the state party report, the Federal Ministry of Women Affairs (FMWA), envisaged a process that ensured 'the full ownership by the Federal and State Ministries of Women Affairs as the concerned ministries in charge, and real participation of the Ministries of Finance and National Planning'.³⁶ The 'real participation' of the Ministry of Finance in the drafting (and, hopefully, at a later stage, during the 'constructive dialogue' phase of the reporting process) is indeed a laudable move, and is in keeping with the recommendations of the 2007 General Days of Discussion of the CRC Committee on 'Resources for the rights of the child: Responsibility of states'.³⁷ The National Child Rights Implementation Committee (NCRIC), drawn from a cross-section of governmental and sectoral ministries, co-ordinated and gave direction to the whole reporting process. As the Nigerian state party report indicates, newspaper and television advertisements calling for input from the general public

³³ This is despite the fact that Rwanda's report to the CRC Committee in 2002 contains a section entitled 'Preparation of the present report'. Under this section, issues such as the seminars and workshops that have been held for the preparation of the report, the organisations that were involved in the preparation of the report, the designation by the Prime Minister of the lead institution, establishment of the Co-ordination and Monitoring Committee as well as the establishment by the Co-ordination Committee of the programme of consultation and information gathering, and the actual consultations and steps followed in the preparation of the report are highlighted.

³⁴ Rwanda's state party report, 33.

³⁵ Which briefly mentions that '[i]n preparing the present report, consultations were made with all stakeholders and their views/suggestions have, as far as possible, been taken on board'. See Mauritius's state party report, 8.

³⁶ Nigeria's state party report, 19.

³⁷ See 'Recommendations' [http://www2.ohchr.org/english/bodies/crc/docs/discussion/recommendations 2007.doc](http://www2.ohchr.org/english/bodies/crc/docs/discussion/recommendations%202007.doc) (accessed 22 September 2008).

into the report, inputs from youth and children, meetings of the core drafting team, UN and NGOs consultative meetings; as well as the final NCRIC and Stakeholders Validation Workshop have added to the participatory dimension of the report-writing process. In fact, the state party report has an annexure showing the detailed work plan followed from inception of the report writing process to its conclusion.³⁸ The practice of the state party in this regard is worth emulating.

3.1.2 Budgeting for children

One of the conspicuous shortcomings of the state party reports is the lack of appropriate and adequate information on budgeting for children.³⁹ Mauritius's report puts this challenge up front, by stating that '[n]one of the ministries concerned has a specific budget for children or for child development activities ... it is difficult to indicate precisely how much is spent exclusively for children'.⁴⁰

Writing in 1993 in the context of the CRC Committee's initial guidelines, Abramson noted that '[o]ne glaring inadequacy of the guidelines is that they do not ask states for any information on spending. Even the most elementary questions about what percentage of the budget goes to children's health or education are omitted.'⁴¹ Abramson's observation is equally valid to the African Children's Committee Guidelines.

Under the 'General measures of implementation' cluster, it is important to include more detailed questions regarding, *inter alia*, the proportion of the budget devoted to social expenditure for children, such as education, health and social security. This information should be requested at the central, regional and local levels and, where appropriate, at the federal and provincial levels. It is also essential to enquire about the budget trends over the period covered by the report. This shortcoming could be addressed by adopting a recommendation amending the current Guidelines, or at a later stage while drafting the guidelines for periodic reports.

3.2 Definition of a child

The definition of a child is a fundamental provision that basically determines the scope of application of the instrument. Article 2 of the African Children's Charter offers a clear and concise definition of the

³⁸ See Annexure 1 to the state party report.

³⁹ While Nigeria's and Egypt's state party reports provide some detail, those of Rwanda and Mauritius are very much lacking. See Nigeria's state party report, 31-34. See too Egypt's state party report, 9-12.

⁴⁰ Mauritius's state party report, 102.

⁴¹ B Abramson 'First state reports: Sunny and ... cloudy' (1993) 10 *International Children's Rights Monitor* 23.

child as 'every human being under 18 years' and, unlike CRC,⁴² there are no limitations or attached considerations, so that it is able to apply to as wide a number of children as possible.

Despite the fact that paragraph 10 of the Guidelines requires state parties to 'provide information, *in conformity with article 2 of the Children's Charter*, regarding the definition of a child under their laws and regulations',⁴³ it does not provide a detailed and clear guideline as to the level of detail to be included.

It is the practice under CRC that the 'Definition of the child' cluster is also expected to illuminate on the legal minimum ages established for various purposes. Unfortunately, since the Guidelines do not expressly require this information, this shortcoming has led to two scenarios. First, state parties might not provide any information under this cluster on the legal minimum ages established for various purposes. Secondly, similar to the Egypt,⁴⁴ Rwanda,⁴⁵ and Mauritius state party reports, the information provided on the legal minimum ages established for various purposes may be incomplete. For instance, the report of Mauritius provides information only in the areas of minimum ages for juvenile offenders, legal counselling without parental consent, consent to medical treatment, and for appearing in court and participating in administrative and judicial proceedings.⁴⁶

In this regard, the Guidelines would fare better if they are amended to expressly require that state parties should indicate the legal minimum ages established for various purposes including, *inter alia*, legal or medical counselling without parental consent, end of compulsory education, part-time employment, full-time employment, hazardous employment, sexual consent, marriage, voluntary enlistment into the armed forces, conscription into the armed forces, voluntarily giving testimony in court, criminal liability, deprivation of liberty, imprisonment and consumption of alcohol or other controlled substances.⁴⁷

⁴² Art 1 of CRC states that a child is any human being under 18, unless majority is attained earlier under the law applicable to the child. This provision is ambiguous and weak, lacking specific protection within the African context in order to take into account child betrothals, child participation in armed conflict and child labour.

⁴³ Our emphasis.

⁴⁴ Egypt's state party report, 13-14.

⁴⁵ The report provides information under this cluster on capacity to marry, employment, participation in labour unions, and testimony before criminal court. See Rwanda's state party report, 19-24.

⁴⁶ Mauritius's state party report, 23-24.

⁴⁷ CRC Guidelines, art 12, general guidelines regarding the form and content of initial reports to be submitted by state parties under art 44, para(a) of the Convention (30/10/91 CRC/C/5) (basic reference document).

3.3 Protection rights

A number of protection-related rights under the African Children's Charter provide a higher normative standard than CRC. These rights include those pertaining to child soldiers, refugee children, children of imprisoned mothers, the use of children in the form of begging, disabled children, child labour, adoption and harmful social and cultural practices, such as child betrothal and child marriage.⁴⁸ This subsection only highlights the first four and makes an appraisal of the extent to which the four state party reports under investigation have addressed them in their reporting.

3.3.1 Child soldiers

A lack of understanding of paragraph 24 of the Guidelines that explicitly requires that '[t]he report shall, in particular, *highlight the areas of rights that are specific to the Children's Charter*'⁴⁹ is displayed under the section of Egypt's state party report on the use of children in armed conflict. Egypt reports that it 'regulates the military treatment of volunteers in accordance with the provisions stipulated in the Second Protocol'⁵⁰ to CRC, namely the Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol). Accordingly, the Coalition to Stop the Use of Child Soldiers reports that legislation in Egypt allows the voluntary recruitment of children who are 16 years of age and above.⁵¹

Egypt's voluntary recruitment age of 16 is concordant with CRC, if the state party report submitted was to the CRC Committee. This is because article 38(2) of CRC entrenches that state parties must take all feasible measures to ensure children up to the age of 15 are not recruited. In addition, since Egypt is a party to the Optional Protocol,⁵² which allows for voluntary recruitment beginning from the age of 16,⁵³ its minimum

⁴⁸ For a discussion of how these provisions of the African Children's Charter offer better standards than the African Children's Charter, see generally B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 1-28.

⁴⁹ Our emphasis.

⁵⁰ Egypt's state party report, 88. It is to be noted that Egypt reports on the issue of the involvement of children in armed conflict in a very brief three-liner paragraph.

⁵¹ Coalition to Stop the Use of Child Soldiers *Child soldiers: Global report* (2008) 288.

⁵² Acceded to 6 February 2007

⁵³ Art 3(1) of the Optional Protocol. In its declaration on accession, the Egyptian government has stated that 'in accordance with current laws ... the minimum age for voluntary recruitment into the armed forces is 16 years. The Arab Republic of Egypt is committed to ensuring that voluntary recruitment is genuine and entirely willing, with the informed consent of the parents or legal guardians after the volunteers have been fully informed of the duties included in such voluntary military service and based on reliable evidence of the age of the volunteers.' See Egypt's Declaration on accession to the Optional Protocol <http://www2.ohchr.org> as cited in Coalition (n 51 above) 134.

age for voluntary recruitment does not violate the provisions of the Optional Protocol.⁵⁴

However, the same cannot be said of Egypt's minimum age for voluntary recruitment as far as the African Children's Charter is concerned. Article 22(2) of the African Children's Charter provides for a blanket prohibition against the recruitment of children into the armed forces of the parties to the Charter. Although it is only the direct participation of children in hostilities that is prohibited, not their participation *per se*, the prohibition of their recruitment by article 22(2) renders children's participation in hostilities less likely. There is no room for voluntary recruitment for *children* — by definition, persons below the age of 18.⁵⁵ Therefore, Egypt's position that allows for voluntary recruitment beginning from the age of 16 is a clear violation of article 22 of the African Children's Charter, which was hopefully noticed by the African Children's Committee during the Pre-Session.

The section of Mauritius's state party report addressing the issue of child soldiers is even more lamentable. The report under child soldiers is only three lines long and in full provides as follows:⁵⁶

Mauritius not having been directly involved in any armed conflict, has not had the opportunity of *applying articles 38 and 39 of the Convention*, although we abide by these provisions.

Not only does this fail to address the requirements of the African Children's Charter as per article 22 on child soldiers, it also indicates gross negligence on the part of Mauritius's reporting team as it seems to be a cut and paste from its report to the CRC Committee, as it wrongly refers to 'applying articles 38 and 39 of the Convention' as opposed to article 22 of the African Children's Charter.

Rwanda's state party report does not indicate legislative efforts, although it highlights administrative and programme interventions in order to address the problem of child soldiers.⁵⁷ Despite the fact that a number of news and other reports have indicated that children were recruited from Congolese refugee camps in Rwanda by armed units under the command of armed group leader Laurent Nkunda, and deployed in Eastern Democratic Republic of Congo (DRC) in 2007 and before,⁵⁸ Rwanda's report does not highlight this as a challenge. Such an admission would have created an opportunity for the African Chil-

⁵⁴ See ML Hackenberg 'Can the Optional Protocol for the Convention on the Rights of the Child protect the Ugandan child soldier?' (2000) 10 *Indiana International and Comparative Law Review* 417. See also A Leibig 'Girl child soldiers in Northern Uganda: Do current legal frameworks offer sufficient protection?' (2005) 3 *North-western University Journal of International Human Rights* 6.

⁵⁵ Art 1 African Children's Charter.

⁵⁶ Mauritius's state party report, 106 (our emphasis).

⁵⁷ Rwanda's state party report, 59.

⁵⁸ See Coalition (n 51 above) 288-289; Human Rights Watch 'Army should stop use of child soldiers' (April 2007).

dren's Committee to consider questions relating to technical assistance and international co-operation during the 'constructive dialogue' stage of the process.⁵⁹

3.3.2 Refugee children

The peculiar point that transpires under the African Children's Charter in the context of refugee children is that article 23(4) provides that '[t]his provision applies *mutatis mutandis* to internally displaced children whatever the reason for displacement'. In other words, by recognising the problem of internal displacements, the African Children's Charter extends 'its provisions on refugee children to cover internally displaced persons'.⁶⁰

Neither Nigeria's⁶¹ nor Egypt's⁶² state party reports clearly indicate how internally displaced children are protected. Rwanda's report seems to provide a better understanding of the rights of children who are internally displaced, as its section in the report is also entitled 'Refugee and displaced children'.⁶³ However, as far as internally displaced children are concerned, the position of Mauritius is once again more regrettable.

Mauritius's report admits that there is no legislation available for the promotion and protection of the rights of refugee children.⁶⁴ It justifies the lack of such legislation on the absence of refugee children in Mauritius at present.⁶⁵ After reporting to the CRC Committee in a similar manner in 2006, the CRC Committee did not take issue with the lack of legislation addressed towards refugee children,⁶⁶ perhaps as a result of the absence of refugees as conventionally defined under international law as persons who have crossed international borders.

However, since Mauritius is a country where 'disaster management is a regional priority due to the permanent threat of cyclones and floods',⁶⁷ it is not far-fetched to assume the possibility of the occurrence of internally displaced children at some point in time.⁶⁸ It is

⁵⁹ Though the African Children's Committee might still raise it.

⁶⁰ D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 130.

⁶¹ Nigeria's state party report, 133-135.

⁶² Egypt's state party report, 88-89.

⁶³ Rwanda's state party report, 58-59.

⁶⁴ Mauritius's state party report, 106

⁶⁵ As above.

⁶⁶ As neither the list of issues nor the concluding observations allude to the issue of refugee children.

⁶⁷ See UNDP Mauritius http://un.intnet.mu/UNDP/html/mauritius/crisis_prevention_recovery.htm (accessed 23 September 2008).

⁶⁸ Besides, irrespective of the fact whether states have, eg, the problem of refugee children, child soldiers or children in exploitative circumstances, they should have legislative, administrative and other appropriate measures set in place in order to comply with their obligations under the African Children's Charter.

argued, if the government of Mauritius had understood article 23(4) of the African Children's Charter in a correct way (as provided above), it would have realised that the fact that it does not have refugee children that have crossed international boundaries does not absolve it from its obligation to take legislative, administrative and other measures to cater for children who are internally displaced.

3.3.3 Use of children in the form of begging

Still within the protection threshold, one of the added values that the African Children's Charter compared to CRC is its explicit prohibition of the use of children in the form of begging.⁶⁹ It is a clear standard that needs to be reflected in domestic legislation in countries that are state parties to the African Children's Charter and be reported on.

Nigeria's state party report underscores that section 30 of the Child's Rights Act includes the '[p]rohibition of buying, selling, hiring or otherwise dealing in children for the purpose of hawking or begging for alms or prostitution'.⁷⁰ Rwanda's⁷¹ and Egypt's⁷² state party reports also highlight efforts undertaken to address the problem of the use of children in the form of begging. However, Mauritius's report is completely silent on this point. This shortcoming can once again be attributed to the lack of knowledge on the part of the state party of the 'areas of rights that are specific to the Children's Charter',⁷³ as Mauritius's report seems to rely heavily on its report to the CRC Committee.

3.3.4 Children of imprisoned mothers

Article 30 of the African Children's Charter introduces a special provision that aims to protect the infants and young children of imprisoned mothers and the unborn children of expectant imprisoned mothers. This has been described as a unique feature of the African Charter,⁷⁴ which finds no counterpart in CRC, and has been ascribed to the fact that the mother is considered to be the primary caretaker in most parts of Africa.⁷⁵

Egypt's report provides in a detailed manner the legislative efforts set in place to address the problem of children of imprisoned mothers.⁷⁶

⁶⁹ Art 29 African Children's Charter.

⁷⁰ Nigeria's state party report, 84.

⁷¹ Rwanda's state party report, 66.

⁷² Egypt's state party report, 96-97.

⁷³ Para 24 of the Guidelines.

⁷⁴ M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 12 13. See also DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 168.

⁷⁵ Gose (n 74 above) 105-106.

⁷⁶ Egypt's state party report, 97-98. This is despite the fact that Egypt has entered a reservation to this provision. For further details on reservations, see sec 3.5.3 below.

Nigeria's report also refers to sections 221-225 of the Child's Rights Act which entrenches special treatment rights for expectant or nursing mothers.⁷⁷ Rwanda's report under this section admits the lack of legislation⁷⁸ providing for special treatment rights for expectant or nursing mothers, while Mauritius's report does not indicate any legislative effort to address the problem of children of imprisoned mothers. Rather, Mauritius's report highlights that, when passing sentence, courts provide special treatment when dealing with cases that involve expectant mothers, and mothers of infants and young children.⁷⁹

3.4 Responsibilities of the child

All four state party reports highlight the 'responsibilities of the child' (article 31 of the African Children's Charter) under cluster 9 and the line of manner they have followed in implementing the provisions.

The Mauritius and Egypt reports display a lack of basic understanding of their obligations under article 31 of the African Children's Charter on the responsibilities of the child. The Mauritius report, apart from reproducing what article 31 of the African Children's Charter provides, does not indicate any effort towards domesticating the provision.⁸⁰ Egypt's report dealing with article 31 is equally insufficient. Apart from quoting article 7 of the Egyptian Constitution that entrenches that 'society is based on the social solidarity' and article 9 that provides that 'the family is the basis of the society' and that 'its foundation is the religion, good characters and patriotism',⁸¹ it does not highlight any concrete legislative, administrative or any other appropriate measure undertaken to implement article 31.⁸²

The Nigeria report fares better, as it indicates a more clear understanding of what article 31 of the African Children's Charter entails. After highlighting the legislative effort undertaken to domesticate the responsibilities of the child in its Child Rights Act (section 19), the Nigeria report highlights that the Child Rights Act 'mandates parents, guardians, institutions and authorities in whose care children are placed, to provide the necessary guidance, education and training to enable the children live up to these responsibilities'.⁸³ In addition, since children's capacities to undertake their responsibilities can only materialise by creating a conducive environment that empowers them, the establishments of child's rights clubs, children's parliament, children-oriented

⁷⁷ Nigeria's state party report, 145.

⁷⁸ Rwanda's state party report, 62.

⁷⁹ Mauritius's state party report, 114.

⁸⁰ Mauritius's state party report, 126.

⁸¹ The report also quoted art 12 of the Constitution about society's commitment to caring and protecting morality as well as empowering the authentic Egyptian tradition.

⁸² Egypt's state party report, 99.

⁸³ Nigeria's state party report, 154.

print and electronic media programmes and the like have rightly been identified as a crucial element for the realisation of article 31 of the African Children's Charter.⁸⁴

Compared to the other three state party reports, Rwanda reported under 'the responsibilities of the child' cluster in more detail.⁸⁵ Articles 25, 26 and 27 of Decree 27/2001 of 28 April 2001 relating to the Rights and Protection of the Child Against Violence have been identified as entrenching the responsibilities of the Rwandan child. While these provisions seem to be in tandem with article 31 of the African Children's Charter, the general limitation that all these responsibilities should be undertaken by the child by taking into account his or her age and capacity is missing from the report. As observed elsewhere,⁸⁶ one can decipher that⁸⁷

[t]he preambular paragraph, which introduces the specifics of article 31, contains within it two internal limitations. First, the duties of the child are subject to his or her age and ability. Secondly, the child's duties are subject to 'such limitations as may be contained in the present Charter'.

It is argued that the fact that duties are subject to a limitation (the child's age and ability) clearly distinguishes the responsibilities of the child from harmful or hazardous labour which is not appropriate for their development or which interferes with their education.⁸⁸ Indeed, it is on the basis of this limitation that the caution that article 31 opens the way to exploitation of children within the family has been found to be misplaced.⁸⁹ Therefore, the absence of this limitation (the child's age and ability) in domestic legislation while providing for the responsibilities of the child should be a cause for concern to the African Children's Committee while considering state party reports.

3.5 Other related matters

There are few issues that the state party reports and their consideration during the Pre-Session have brought to the fore. What is highlighted below covers the length of the reports, the determination of the status of reports as either 'initial' or 'initial and first periodic' report, and reservations entered to the African Children's Charter.

3.5.1 Length of state party reports

One of the issues that transpired from the state party reports is the fact that either the Guidelines or the Committee's Secretariat need to set

⁸⁴ As above.

⁸⁵ Nigeria's state party report, 70-72.

⁸⁶ J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159.

⁸⁷ Sloth-Nielsen & Mezmur (n 86 above) 170.

⁸⁸ Sloth-Nielsen & Mezmur (n 86 above) 171.

⁸⁹ Sloth-Nielsen & Mezmur (n 86 above) 172.

the maximum page limit for a state party report. The CRC Committee requires that '[s]uch a report should not exceed 120 pages'.⁹⁰ This limitation helps to minimise repetitions, save time spent on translations and facilitate the timely consideration of state party reports.

In the context of the African Children's Committee, the Nigeria report, for example, is 166 pages, while Mauritius's report is 126 pages. Since states can report in any one of the five AU official languages (and not also an additional AU official language), this places a heavy burden on the AU Commission's translations department.⁹¹ The longer the reports are, the more time it takes to have them translated. As a result, the possibility of considering a state party report in a timely manner could be hampered. Therefore, the need to set a maximum page limit for state party reports is evident.

3.5.2 'Initial' report or 'initial and first periodic' reports?

The African Children's Committee has not yet prepared its guidelines for the submission of periodic reports. It is still at the early stages of its first consideration of initial state party reports. However, the reports from Nigeria⁹² and Mauritius⁹³ indicate that the submitted reports combine initial and first periodic reports. The legal implications of this are not clear, and during the Pre-Session of these two reports, the African Children's Committee did not discuss this point.

The submission of combined state party reports is currently possible before the CRC Committee. However, the current attendant situation before the African Children's Committee and the experience of the CRC Committee in requesting and accepting combined reports have to be differentiated. In the context of the CRC Committee, the need to support state parties in an effort to ensure compliance with the strict timeframe established by CRC (article 44(1)) led to the adoption of the 'Recommendation on the Methods of Work: Exceptional Submission of Combined Reports'.⁹⁴ The Recommendation paved the way for the possibility of submitting combined reports to the CRC Committee. In the absence of a similar decision on the part of the African Children's Committee, the state party reports of Nigeria and Mauritius have no legal basis and should not be considered as combined reports. The

⁹⁰ Verheyde & Goedertier (n 16 above) 22. See also the decision of the CRC Committee at its 30th session (2002, CRC/C/118).

⁹¹ Sometimes, a report such as that of Egypt might be submitted in an Arabic version. This means that it needs to be translated both into English and French for the African Children's Committee members and could end up being a very lengthy exercise, especially if the report is too long.

⁹² This is reflected in the cover page as well as the preface of the report at page 11. Furthermore, the heading of sec 3 of the report reads 'Preparatory Process for the Initial and First Periodic Report' (p 19 of the report)

⁹³ This is reflected in the cover page as well as the preface of the report at p vii.

⁹⁴ See CRC Committee (CRC/C/90, 22nd session, September 1999).

African Children's Committee needs to underscore this point to the respective countries and remind them of their obligations to submit a first periodic report to the Committee.

3.5.2 Reservations

In a similar fashion to the African Charter, the African Children's Charter is silent on reservations. This could be interpreted in two contradictory ways — on the one hand that reservations are allowed while on the other, that they are not. One could argue, if reservations were to be disallowed, it is international practice that a specific provision to that effect is explicitly provided.⁹⁵

Fortunately, there are not many reservations entered to the African Children's Charter by state parties. What could be ascertained is that reservations were made by Egypt,⁹⁶ Botswana and Mauritania to specific provisions of the African Children's Charter. In its introduction, Egypt's state party report provided that the state party had expressed reservations to articles 21(2) (which prohibits marriage for boys and girls under 18), article 24 (dealing with adoption), articles 30(a)-(e) (on children of imprisoned mothers), article 44 (a provision that gives the African Children's Committee the mandate to receive communications) and article 45(1) (regarding the African Children's Committee's a mandate to conduct investigations into state parties).⁹⁷

Even though the African Children's Charter itself is silent about its position on reservations, for an appraisal of Egypt's reservations, guidance can be sought from the 1969 Vienna Convention on the Law of Treaties. In particular, article 19 of this Convention provides that any reservation to a treaty must be compatible with the object and purpose of the instrument — in this case, the African Children's Charter. It is argued, while the reservations made to articles 44 and 45(1) of the African Children's Charter might be acceptable, the rest of the reservations seem to hamper the promotion and protection of the best interests of the child principle and appear to be incompatible with the object and purpose of the African Children's Charter.

Even though it does not appear that during the Pre-Session of Egypt's state party report the reservation issue was properly addressed, the African Children's Committee should raise it with the state party. This also presents a good opportunity for the African Children's Committee to deliberate on the position of the African Children's Charter on reservations. It also should serve as a platform to require Egypt to withdraw its reservations as most are not, in these authors' view, compatible with the object and purpose of the African Children's Charter.

⁹⁵ See eg art 40 of The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

⁹⁶ See Egypt's state party report, 6.

⁹⁷ As above.

4 Conclusion

During its 11th session, the African Children's Committee held its first Pre-Session for the consideration of state party reports. The whole exercise was an ice-breaker, and demonstrates progress in its own right. In looking forward, it is important for the Children's Committee to draw the necessary lessons from the four state party reports and to chart ways of strengthening the reporting regime. A number of tentative recommendations can be made in this regard.

Generally speaking, the need to provide state parties with clear reporting guidelines is evident in order to minimise huge varieties in quality, style and length of reports submitted. One of the cornerstones for a successful reporting procedure is 'the willingness of governments to fulfil their reporting obligations in an accurate way, ie in time and submitting a report of good quality'.⁹⁸ Clearly, the quality of the reports determines the quality of the debate between government representatives and the African Children's Committee.

Writing in 2003, Lloyd indicated that one of the strategies that the African Children's Committee had identified to strengthen the state reporting process was to make state parties aware of the differences between the African Children's Charter and CRC for the purpose of reporting under the Charter.⁹⁹ For such purpose, it was agreed, a document on the differences between the African Children's Charter and CRC was to be attached to the Guidelines and sent to state parties, when it is requested.¹⁰⁰ As discussed above, a closer look at the four state party reports strongly suggests that this strategy is even more apposite at the present time in order to strengthen the state reporting procedure.

Even though it could be argued that it is premature to assess the effectiveness or otherwise of the Guidelines, the four state party reports have shed light on some of the gaps that are inherent in the Guidelines. These gaps are understandable, since at the time of drafting (2003-2004), the African Children's Committee did not have a clear view of some of the implications of what the reporting would entail in practice.

Some of the gaps in the Guidelines, such as the absence of a clear requirement on states to report on the legal minimum ages established for various purposes, could be addressed without formally amending the Guidelines. The same is true for the issue of budgeting for children and the length of state party reports. In addition, Rwanda's report has a separate section on 'constraints to the implementation

⁹⁸ Verheyde & Goedertier (n 16 above) 43.

⁹⁹ A Lloyd 'Report of the 2nd ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2003) 3 *African Human Rights Law Journal* 342.

¹⁰⁰ As above.

of the Charter'.¹⁰¹ It is advisable that state parties be requested by the African Children's Committee to provide similar information on the challenges that are hampering the full realisation of children's rights in their respective countries. The African Children's Committee can adopt a recommendation addressing these and similar issues and communicate it to state parties. It is advisable, in order to minimise repetitive amendments to the Guidelines, that specific concerns at this stage be addressed through recommendations.

In due course, if (and when) an amendment of the Guidelines is to be pursued at a later stage, a leaf could be taken from the experience of the sister organisation, the African Commission on Human and Peoples' Rights (African Commission). In 1997, the African Commission amended its Guidelines, based on its own experience as well as the recommendations of two seminars that were specifically organised for such purpose. In this regard, it is important to engage civil society in the process, which in turn reinforces the need to expedite the granting of observer status before the African Children's Committee.

Regarding administrative issues, the very limiting three-day sessions that have come to typify the African Children's Committee sessions have a negative impact. With so much to do, there is a need to seriously consider extending the amount of time the African Children's Committee meets per session. On a positive note, however, since the appointment of a Secretary to the African Children's Committee in the second half of 2007, the flow of information between the Children's Committee and partners has improved significantly. For instance, the availability of the four state party reports on the website of the AU is laudable and should continue to be a practice for forthcoming reports.

¹⁰¹ Rwanda's state party report, 73.

Recent Publications

HJ Steiner, P Alston & R Goodman *International human rights in context — Law, politics, morals — Text and materials*

Oxford University Press (3rd edition, 2008) xxxix, 1 492 pages

Magnus Killander

Researcher and LLD candidate, Centre for Human Rights, Faculty of Law,
University of Pretoria, South Africa

Many students and teachers of human rights will be familiar with the earlier editions of this book. *International human rights in context*, by Henry Steiner and Philip Alston, was first published in 1996. The book has now been published in its third edition with Ryan Goodman, who took over from Henry Steiner as director of the Human Rights Programme at Harvard Law School, as co-author/editor. The third edition by and large follows the structure of the second edition, published in 2000. The book has two subtitles: 'Law, politics, morals' indicates that it is an interdisciplinary book although focusing on law. The second subtitle, 'Text and materials', indicates that it is a reader mainly made up of extracts from the works of other authors, though with extensive editorial comment by Steiner, Alston and Goodman.

International human rights in context is a massive book and may look a bit intimidating to the average student. However, it is an easier read than its 1 500 pages would at first suggest. The book is divided into six parts: introductory notions and background to the international human rights movement; normative foundation of international human rights; rights, duties and dilemmas of universalism; international human rights organisations; states as protectors and enforcers of human rights; and current topics (response to massive human rights violations, non-state actors, development and climate change). Each part is subdivided into chapters consisting of extracts of writings and primary materials held together by comments by the editors. Each section ends with questions and suggestions on further readings.

As a course book it might be most useful for smaller classes where the questions set out at the end of each section can form the basis for class discussions. Throughout the book there are numerous references to the provisions of international instruments. However, the texts of such instruments are not included in the book, but on an accompanying website. Unless students bring a laptop to class, they would also need a compilation of human rights instruments to accompany the book.

In addition to its intended use for teaching, the book may also be useful as a starting point for research on a particular topic covered by the book. However, the structure of the excerpts can make it difficult to find the original source. For example, for those who look for references to a particular statement, the footnotes in the original are not included in the extracts and there is no indication from what page of an article a particular extract is taken.

Since I write this review for the *African Human Rights Law Journal*, it may be relevant to reflect on the extent to which Africa and African views on human rights feature in the book. South African case law features extensively. Extracts from *Makwanyane* is used in the discussion on the death penalty. In the discussion of justiciability of socio-economic rights, *Soobramoney*, *Grootboom* and *TAC* are discussed under the heading 'South Africa: A model social rights constitution?' Extracts of the views of African authors are reprinted in the part on 'rights, duties and dilemmas of universalism' with extracts from the writings of Kenyatta and Mutua included in the discussion on 'duty-based social orders', which also includes a discussion by the editors on rights and duties in the African Charter on Human and Peoples' Rights and in other human rights instruments. The Sudanese scholar Abdullahi Ahmed An-Na'im who, as Mutua, is based in the United States, 'explores cultural relativism from the perspective of Islam'. An extensive discussion on female genital mutilation refers to the situation in Africa, but includes no African voices in the discussion.

The African regional human rights system is called the 'newest, the least developed or effective ... the most distinctive and the most controversial of the three established regional human rights regimes' (p 504). The section on the African system includes comments and extracts dealing with the African Commission on Human and Peoples' Rights and the African Court, but no discussion of other initiatives with a human rights component, such as the African Peer Review Mechanism or the human rights-related developments in the regional economic communities. The section includes an extract from the African Commission's fact-finding mission to Zimbabwe and three recent decisions of the Commission.

The discussion on 'domestic internalisation of human rights treaties' includes extracts from Heyns's and Viljoen's 'The impact of the United Nations human rights treaties on the domestic level' and Adjami's study of international law and comparative case law by African courts. The

section on 'massive human rights tragedies' discusses the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Rwandan *gacaca* courts and the South African Truth and Reconciliation Commission.

In conclusion, *International human rights in context* is an interesting and quite comprehensive book which raises many of the pertinent issues in today's human rights discourse. It offers a good starting point for anyone who wants an overview of any of the many issues covered in the book.

C Maina Peter (ed) *The protectors. Human rights commissions and accountability in East Africa*

Fountain Publishers, Kampala (2008) 432 pages

Solomon T Ebobrah

Researcher, Centre for Human Rights, University of Pretoria, South Africa

The campaign for the diversification of the processes available for the realisation of human rights is particularly significant in the African context, where respect for the rule of law is still in its infancy. Strategically situated between the state and the citizenry, national human rights institutions established along the parameters set by the Paris Principles are invaluable institutions to support and supplement courts and quasi-judicial institutions in the search for a better realisation of human rights in African states. Linking their recognition of the potential of national human rights institutions and the growing move towards a political federation in East Africa, the Kituo Cha Katiba¹ convened two workshops, in 2004 and 2006 respectively, for national human rights institutions in East Africa. This collection of essays is the product of these workshops.

Boasting of contributions from 14 authors and edited by Chris Maina Peter, a professor of law at the University of Dar es Salaam, Tanzania, the book is divided into four parts and contains 15 chapters. Part one is made up of chapters 1 to 6 and essentially covers the first workshop, which centred around economic, social and cultural rights within the constitutions of some of the member states of the East African Community (EAC). Part two begins with chapter 7 and ends with chapter

¹ Also known as the East African Centre for Constitutional Development, Kituo Cha Katiba is a Uganda-based regional non-governmental organisation established in 1997 to promote constitution making and good governance.

12. The essays in part two compare national bills of rights in the constitutions of East African states with a draft bill of rights for East Africa commissioned by the Kitou Cha Katiba. The essays report on the activities of national human rights commissions in the East African region. Part three covers chapters 13 to 15, dealing with the East African Court of Justice (EACJ) as a human rights court. It also concludes the essays with recommendations on how to improve the work of the national human rights institutions in the region. Part four is a compilation of annexures.

Although focused on East Africa as a region, the book begins with a well-written chapter by Pierre de Vos on the challenges of implementing economic, social and cultural rights in Africa. With an emphasis upon the South African experience, he discusses the role of the national human rights institutions. De Vos suggests a greater role for these institutions in the enforcement of economic, social and cultural rights. Thereafter, the actual experience of national human rights institutions in the realisation of this group of rights is outlined. While the essays in this section are mostly shallow in thought and academic content, one essay offers an interesting analysis of the concept of empowerment, its links to the realisation of rights in the Tanzanian context, and the role of national human rights institutions in the empowerment of citizens. This part of the book also reiterates the challenge of enforcing rights relegated to non-justiciable sections of national constitutions.

In dealing with a draft bill of rights for East Africa, some of the essays in part two offer an overview of the bills of rights in the Constitutions of Kenya, Rwanda, Tanzania and Uganda.² Efforts at comparison with the draft bill of rights give the first contact with the latter bill. Generally, this collection of essays presents the reader with some information on the activities of national human rights institutions in the East African region. The overview on the EACJ is basically an insider's view, since both contributors are from that institution.

An important observation about the book relates to its title. Contrary to the expectations raised by the title, namely, that the book will deal with the national human rights institutions and how they have addressed the question of accountability in East Africa, most of the chapters in the book attempt to compare the draft bill of rights for East Africa with the bills of rights of national constitutions. Consequently, the work of these institutions is presented only in passing, while the contributors discussing national human rights institutions attempt to show the challenges their institutions have had with promoting the national bill of rights. As well, part one of the book fails to critically assess the work of national institutions. In linking national human rights institutions to the protection of economic, social and cultural

² Burundi is also a member of the EAC, having acceded to the treaty at the same time with Rwanda in 2006. However, while Zanzibar is included in the discourse, Burundi is not.

rights, some contributions fail to properly address salient issues relating to these institutions.

Another concern is that the book repeats some of its content. By including summaries of the papers presented at the workshop, parts one and two each includes a chapter which reproduces the other chapters in those parts of the book. This increases the size of the book unnecessarily.

Considering that the book relates mostly to a draft bill of rights proposed for the EAC, a regional economic community with no actual human rights competence, it is not clear why the book does not engage with doctrinal and theoretical issues around the exercise of human rights in that framework. Throughout the book there seems to be an assumption that the EACJ is a human rights court and that national human rights commissions need to find their role within the work of the EACJ. Related to this, there is a sense that the EACJ is equated to the European Court of Human Rights which has a clear human rights mandate. Similarly, the book fails to address theoretical issues relating to the draft bill of rights, especially in view of the fact that the draft bill was not commissioned by the EAC or any of its organs.

Despite its shortcomings, the historical overview of national human rights institutions in the region, the discussion of national bills of rights, the identification of challenges faced by these institutions and the recommendations made to enhance the work of various national human rights institutions represented make the book relevant for anyone interested in the work of these institutions. The book's recommendation of greater roles for national human rights institutions in the realisation of economic, social and cultural rights is useful in prompting interest in this regard. The annexure is also an important collation of the national bills of rights of member states of the EAC.

D Ngaruri Kenney & P Schrag *Asylum denied: A refugee's struggle for safety in America*

University of California Press, Berkeley (2008) 352 pages

Kenechukwu C Esom

Legal Officer, Refugee Law Project, Faculty of Law, Makerere University, Kampala, Uganda

Asylum denied: A refugee's struggle for safety in America tells the story of David Ngaruri Kenney, a Kenyan tea farmer who led a boycott by tea farmers during the administration of President Daniel arap Moi. He was

forced to flee to the United States of America (USA) to seek asylum after experiencing torture and other inhuman treatment from Kenyan state operatives. The book narrates the hurdles Kenney had to overcome in his ten-year quest for asylum in the USA in the words of Kenney and Philip G Schrag, a lawyer who worked with him through his asylum process.

The introduction gives the reader insight into the American asylum system, beginning with the story of the denial of entry to seek asylum in the USA to 929 Jews fleeing Hitler's Germany on board the cruise ship *St Louis* and the eventual death of more than half of that group in the Holocaust. It touches on the USA Refugee Act of 1980, which provided a better framework for the granting of asylum in the US to tens of thousands of refugees from around the world, the steady amendment of the asylum legislations until and post-September 11, 2001, and the tightening of the USA asylum procedure to avoid exploitation by potential terrorists.

It introduces the protagonist, David ('Jeff') Ngaruri Kenney and the persecution he suffered at the hands of a human rights-abusing regime before escaping to the USA in search of refuge. It also introduces his relationship with the authors and sets out their decision to write the book which 'chronicles his [Kenney's] long struggle with many of the bureaucracies that regulate immigration' and 'reveals how the asylum system often works in practice and how difficult it is for individuals to obtain refuge through that system' (p 6) with the aim of moving some of their 'readers to insist that the United States improve its laws and institutions that are intended to protect the men and women who are victims of human rights violations throughout the world' (p 8).

The first chapter begins and ends with Kenney's detention in a torture water cell where for about a week he is subjected to exceptionally dehumanising treatment. His offence is that he led a boycott by tea farmers in the Central Province of Kenya against the government's economic oppression. In between, the chapter tells the story of his birth into a family of four siblings, an emotionally unstable mother and a father who was at best indifferent to the dreadful treatment Kenney received constantly from his older siblings and his mother. The story regarding his lack of filial and fraternal love is tempered only by the birth of his twin siblings upon whom he bestowed his devotion (a devotion which is portrayed throughout the book) and the hospitality of an aunt who temporarily gave him and the twins shelter when they were run off their father's land by his older brothers.

The chapter portrays Kenney as a victim, first of his family's ill-treatment and then of the Kenyan government. The second part of the chapter separates these two eras of victimisation with a stint of courage and heroism where, out of frustration from the ill-treatment of tea farmers by the government-controlled Kenya Tea Development Agency (KTDA), Kenney led a boycott by tea growers in his village. The boycott culminated in a 30 000-strong peaceful march of farmers at

which Kenney pressed home the demands for a representative KTDA, an increase in the market price of tea purchased from the farmers or permission to sell their tea in the open market and a call on the government to resign and make room for a democratic government if it could not meet the needs of the people. This speech precipitates problems with the government which leads to his detention, near-execution and eventual consignment to the cold water torture chambers.

After months in solitary confinement and repeated interrogations, Kenney is eventually brought before a judge and charged with treason. The judge ordered his release for want of evidence, but he is re-arraigned a few days later and charged with being a threat to public peace. Kenney is released on a one million Kenyan shilling bond which is posted by a co-operative of tea farmers and which prohibited him, among others, from meeting with more than three Kenyans at a time. Around the time of his release, he met a number of USA Peace Corps volunteers working within and around his region, and who had heard about the boycott. Since the bond condition prohibited him from meeting with 'Kenyans', he found companionship in the company of the American Peace Corps volunteers. The rest of the second chapter tells of their friendship and it is in their company that the idea of going to study in the USA on a basketball scholarship is first discussed. Sheer determination and personal discipline saw Kenney, a secondary school drop-out who had never seen a basketball, study for and pass the USA pre-university assessment test (SAT) as well as acquire enough basketball skills to earn him a scholarship to study in the USA.

His Peace Corps friends and the families of grateful tea farmers arranged for his flight ticket, passport and a student visa. Kenney introduces the issue of bribery in the second chapter, which he encounters while trying to get the necessary official documents to process his visa. He generalises about bribery and 'Africa' throughout the book, while portraying himself as the unfortunate anti-bribery crusader who is left with no choice but to pay bribes while dealing with African government officials. The chapter ends with a farewell dinner in Nairobi with his mother and his favourite siblings, the twins Lucy and Njoka, before he boards an airplane for the first time in his life, heading across the Atlantic Ocean.

Chapter three narrates Kenney's experiences upon his arrival at Chicago airport in the USA; his culture shock as he is introduced to a different way of life; his quest to get an education and basketball scholarships to support his education; as well as his first experiences of racism. Aptly titled 'Temporary safety', the chapter chronicles what seems like the only period of safety that Kenney experiences; a period characterised by the financial generosity of friends, his introduction to a wealthy industrialist who became his benefactor, marked educational progress and financial success at the stock market. However, as seems to be the trend in the book, this moment of bliss is harshly interrupted by the accusation of and detention for rape of Kenney's younger sibling,

the twin Njoka, orchestrated by their older brother. The unjust sentencing of Njoka to an eight-year prison term is more than Kenney can bear. Having experienced the horrors of a Kenyan jail, Kenney is determined that his brother would not suffer as he did and, risking personal harm, he returns to Kenya to intervene in his brother's case. This course of action would subsequently cost him his chance of asylum in the USA. He successfully hires a lawyer, secures his brother's release from jail and returns to his studies in the USA.

Upon the expiry of his student visa, Kenney is faced with the risk of returning to Kenya and to a government whose persecution he had fled. He states in the book that the only alternative at that point was for him to get married to either of two Americans whom he had dated, but whom he 'did not love'. In his words, 'I feared returning to Kenya but marrying for the sake of remaining in America was morally wrong.' Ironically, it is indeed marriage that eventually proved to be the key to his remaining in America. In May 2000, he decided to seek asylum in the USA. Without any legal assistance, he obtained and completed an asylum application and attended an asylum interview. An asylum interview is often a harrowing experience, because the asylum seeker is expected to convince the asylum officer of the persecution he or she fled from and the specific circumstances thereof through a process that seeks more to find reasons to deny asylum than grant it. The consequence is as damaging to the asylum application as having an unprepared key witness cross-examined in court in the absence of his or her lawyer. Not surprisingly, Kenney's asylum application was denied because the asylum officer did not believe his testimony. In her opinion, there were inconsistencies in Kenney's testimony and there was insufficient documentation to support his claim. Subsequently, Kenney visited the Georgetown University Law Centre which ran a clinic that dealt with asylum cases, and it was there that he met Professor Philip Schrag who was the co-ordinator of the clinic.

Subsequent chapters chronicle the efforts of Schrag and his team to appeal the decision to deny Kenney asylum. The journey takes them from the immigration court to the Board of Immigration Appeals, to the US Court of Appeals for the Fourth Circuit, and each time the decision to deny him asylum was affirmed. A major issue that these tribunals dwelt on was Kenney's brief return to Kenya to rescue his younger brother who had been unjustly sentenced to jail and the effect this had on his claim of a well-founded fear of persecution in Kenya if he was denied asylum in the USA and forced to return home. His appeal having failed, Kenney is compelled to leave the USA for Madagascar and then Tanzania, as he could not return to Kenya for fear of persecution. Somewhere in the middle of his appeal, Kenney won the US Diversity Visa lottery, but was denied the visa because he could not produce documents to corroborate his illegal detention in a Kenyan prison. Also during this period he met, fell in love with, dated and married Melissa Kenney, whose surname he took on as she did his. Melissa

is an American and a fellow student at the Catholic University, and their marriage became key to Kenney's return to the USA about ten years after he had first sought safety there. This process was not without the hurdles and challenges that characterised the earlier asylum application processes.

The book ends with 'The lawyer's epilogue' and 'The client's epilogue'. In the former, co-author Schrag outlines some recommendations for improving the American asylum system.

Asylum denied, through the experience of David Ngaruri Kenney and the Herculean task of navigating the USA asylum system, especially after September 11 2001, resonates with the stories of millions of asylum seekers around the world.

Although asylum systems differ from country to country, the effects on the asylum seeker are often similar. The experience of re-living the trauma experienced in their home country during asylum interviews; the effects of cross-cultural communication; the asylum seekers' inability often to accurately recount their story; the dearth of documentary evidence to corroborate the asylum seeker's claim, especially in situations of state-sponsored torture and persecution; the indigence of the asylum seeker and its consequent restriction on obtaining legal representation are aspects of Kenney's experience that most refugees and asylum seekers can identify with.

It is difficult to negatively criticise the book, since it is a narration of an individual experience. However, as an African reader who has travelled the continent, it is difficult not to be offended at the manner in which Kenney generalises corruption and seems to portray it as a solely African malady. Similarly, the treatment he receives from his family is one not many Africans will regard as characteristic. In a subtle way, the book may serve to reinforce negative stereotypes about Africa to a reader who is not familiar with the continent and its diverse cultures. Furthermore, Kenney's experience highlights the paranoia which many victims of state-sponsored torture experience and which, as alluded to in the book, is often the basis of a fear to return than is the actual risk of further persecution in their home country. It is impossible to tell if this was the case with Kenney. This book also highlights the necessity of *pro bono* legal aid to indigent persons, especially asylum seekers for whom this may mean the difference between safety in the country of asylum and return to a country where they face the risk of persecution and torture. Nonetheless, this book is an informative read and certainly will help readers appreciate the plight of one of the most vulnerable groups — asylum seekers. It is also an invaluable tool for practitioners of refugee, asylum and immigration law as it will, hopefully, move some to insist that their jurisdictions (not just the USA, as envisaged by the authors) improve their laws and institutions intended to protect the men and women who are victims of human rights violations throughout the world.

AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

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South Africa
0002

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- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Authors should supply a summary of their contributions of not more than 300 words.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets. The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as ‘article’ and ‘section’ are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; sees. No full stops should be used. Words in a foreign language should be *italicised*. Numbering should be done as follows:
1
2
3.1
3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use ‘&’: eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms ‘constitution’, but when a specific country’s constitution is referred to, capitals are used ‘Constitution’.
- Official titles are capitalised: eg ‘the President of the Constitutional Court’.
- Refer to the *Journal* or www.chr.up.ac.za for additional aspects of house style.

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The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2008

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 October 2008)

	African Charter on Human and Peoples' Rights	AU Con- vention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establish- ment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97			
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00			
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06			
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03		
Democratic Republic of Congo	20/07/87	14/02/73				
Djibouti	11/11/91				02/02/05	
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02			
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			
Gabon	20/02/86	21/03/86	18/05/07	14/08/00		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04	13/06/07	
Guinea	16/02/82	18/10/72	27/05/99			
Guinea-Bissau	04/12/85	27/06/89				
Kenya	23/01/92	23/06/92	25/07/00	04/02/04		
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99		20/05/05	
Mali	21/12/81	10/10/81	03/06/98	10/05/00	13/01/05	
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	
Sahrawi Arab Democratic Rep.	02/05/86					
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02			
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	
Sudan	18/02/86	24/12/72	30/07/05			
Swaziland	15/09/95	16/01/89				
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	12/10/05	
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01		
Zambia	10/01/84	30/07/73			02/05/06	
Zimbabwe	30/05/86	28/09/85	19/01/95			
TOTAL NUMBER OF STATES	53	45	43	24	24	1

* Additional declaration under article 34(6)
Ratifications after 31 December 2007 are indicated in bold