

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 *Tenteh 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 Pentecostalised’.

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, Hifikipunye 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.