

# 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

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\* LLB (Kinshasa), LLM, LLD (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*.<sup>1</sup>

The first schools and universities established in the country were run by Christian churches, either Catholic or Protestant.<sup>2</sup> The first

<sup>1</sup> *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.

<sup>2</sup> 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*.<sup>3</sup> 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?*,<sup>4</sup> 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.

<sup>3</sup> P Tempels *The Bantu philosophy* (1959).

<sup>4</sup> 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'.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

<sup>5</sup> Workshop held from 10 to 12 July 2007 in Dakar, Senegal.

<sup>6</sup> Trust Africa *Report of the Workshop on Meeting the Challenge of Religion and Pluralism in Africa* (2007) 1.

<sup>7</sup> This CODESRIA Summer Institute was held in Dakar, Senegal, from 4 to 29 September 2008.

population largely practise traditional indigenous religious beliefs.<sup>8</sup> 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.<sup>9</sup> 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

<sup>8</sup> See <http://www.state.gov/g/drl/rls/irf//2007/90091.htm> (accessed 27 March 2008).

<sup>9</sup> 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.<sup>10</sup>

Kimbangu was one of the first and most prominent figures in the struggle for independence.<sup>11</sup> Kimbanguism became the epitome of nationalism and inspired early nationalist groups, particularly the Alliance of the Bakongo (ABAKO).<sup>12</sup> 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,<sup>13</sup> 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-

<sup>10</sup> C Young *Introduction à la politique congolaise* (1979) 143-144.

<sup>11</sup> AMB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 317-318.

<sup>12</sup> Mangu (n 11 above) 318.

<sup>13</sup> 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.<sup>14</sup>

Syncretic religious movements and cultural associations also developed in the DRC.<sup>15</sup> 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.<sup>16</sup> 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.

<sup>14</sup> Trust Africa (n 6 above) 3.

<sup>15</sup> Mangu (n 11 above) 318.

<sup>16</sup> 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*).<sup>17</sup> 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.

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<sup>17</sup> 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.<sup>18</sup> 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

<sup>18</sup> *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.<sup>19</sup> 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,<sup>20</sup> economic, social and cultural rights<sup>21</sup> and collective rights.<sup>22</sup>

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.<sup>23</sup> 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,<sup>24</sup> the right to information,<sup>25</sup> the right to hold peaceful meetings,<sup>26</sup> the right to demonstrate,<sup>27</sup> the right to petition,<sup>28</sup> the right to inviolability of domicile,<sup>29</sup> and the right to respect for private life and communications.<sup>30</sup> There are also socio-economic rights, such as property rights,<sup>31</sup> the right to freedom of association,<sup>32</sup> the right to education,<sup>33</sup> and the right to organise education freely.<sup>34</sup> 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.<sup>35</sup> Despite

<sup>19</sup> Art 1 of the 2006 Constitution.

<sup>20</sup> Arts 11-33 of the Constitution.

<sup>21</sup> Arts 34-49 of the Constitution.

<sup>22</sup> Arts 50-61 of the Constitution.

<sup>23</sup> Art 22 of the Constitution.

<sup>24</sup> Art 23 of the Constitution.

<sup>25</sup> Art 24 of the Constitution.

<sup>26</sup> Art 25 of the Constitution.

<sup>27</sup> Art 26 of the Constitution.

<sup>28</sup> Art 27 of the Constitution.

<sup>29</sup> Art 29 of the Constitution.

<sup>30</sup> Art 31 of the Constitution.

<sup>31</sup> Art 34 of the Constitution.

<sup>32</sup> Art 37 of the Constitution.

<sup>33</sup> Art 43 of the Constitution.

<sup>34</sup> Art 45 of the Constitution.

<sup>35</sup> 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 Code<sup>36</sup> that exclude polygamist marriages from the legal definition of marriage,<sup>37</sup> or that consider married women as minors, incapable persons from whom the marital (husband's) authorisation is required to pose any legal act<sup>38</sup> 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.<sup>39</sup> 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

<sup>36</sup> Act 87-010 of 1 August 1987 on Family Code published in the official journal (Gazette) special issue of August 1987.

<sup>37</sup> Art 330 of the Family Code.

<sup>38</sup> Arts 448-450 of the Family Code.

<sup>39</sup> 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.<sup>40</sup>

As far as the relationship between domestic and international law is concerned,<sup>41</sup> 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.<sup>42</sup> It provides that the President negotiates and ratifies treaties and international agreements.<sup>43</sup> 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.<sup>44</sup> Accordingly, contrary to what the Constitution provides in common law and Anglophone countries, such as South Africa,<sup>45</sup> 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)<sup>46</sup> and other international agreements, such as the African Charter on Human and Peoples' Rights (African Charter),<sup>47</sup> while endorsing the Universal Declaration of Human Rights (Universal Declaration)<sup>48</sup> that promotes the right to freedom of thought, conscience and religion.

<sup>40</sup> J Dugard *International law: A South African perspective* (2000) 43-45.

<sup>41</sup> Dugard (n 40 above) 43.

<sup>42</sup> Arts 213-217 of the Constitution.

<sup>43</sup> Art 213 of the Constitution.

<sup>44</sup> Art 215 of the Constitution.

<sup>45</sup> Sec 231 of the 1996 Constitution of the Republic of South Africa.

<sup>46</sup> Art 18 of CCPR.

<sup>47</sup> Art 8 of the African Charter.

<sup>48</sup> 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.<sup>49</sup> Collective rights only refer to the rights of Congolese citizens living abroad.<sup>50</sup> Surprisingly, they even include the duties of the state<sup>51</sup> and peoples' rights.<sup>52</sup>

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.<sup>53</sup> 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 Constitution<sup>54</sup> and in international instruments such as the Universal Declaration,<sup>55</sup> CCPR<sup>56</sup> and the African Charter.<sup>57</sup> Accordingly, everyone is equal in the exercise of his or her right to freedom of religion. Every religious

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<sup>49</sup> Arts 50–61 of the Constitution.

<sup>50</sup> Art 50 of the Constitution.

<sup>51</sup> 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).

<sup>52</sup> 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).

<sup>53</sup> Art 22 of the Constitution.

<sup>54</sup> Arts 11 & 12 of the Constitution.

<sup>55</sup> Art 18 of the Universal Declaration.

<sup>56</sup> Art 18 of CCPR.

<sup>57</sup> 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,<sup>58</sup> 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.<sup>59</sup> 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.

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<sup>58</sup> Art 18(3) of CCPR.

<sup>59</sup> 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.<sup>60</sup>

In the absence of parliament, a Decree-Law was passed in 2001.<sup>61</sup> 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.<sup>62</sup> 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,<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> The requirements for the granting of such legal personality apply to all three forms of non-profit organisations.<sup>66</sup> 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.<sup>67</sup> 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-

<sup>60</sup> Art 22(3) of the Constitution.

<sup>61</sup> 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.

<sup>62</sup> Art 1 of the 2001 Decree-Law.

<sup>63</sup> Act 04/002 of 15 March 2004 on the Organisation and Functioning of Political Parties.

<sup>64</sup> Art 2 of the 2001 Decree-Law.

<sup>65</sup> Art 3 of the 2001 Decree-Law.

<sup>66</sup> Ch I, arts 4-9 of the 2001 Decree-Law.

<sup>67</sup> Art 4 of the 2001 Decree-Law.



ty.<sup>68</sup> The number of active members of an ASBL cannot be fewer than seven.<sup>69</sup>

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.<sup>70</sup> They are to be published in the official journal (National Gazette).<sup>71</sup> The 2001 Decree-Law makes a further distinction between the organisations created under DRC law and foreign organisations to be recognised under this law.<sup>72</sup> Like any ASBL or non-profit organisation,<sup>73</sup> religious organisations operating in the DRC can be of Congolese or foreign origin.

The Decree-Law contains specific provisions dealing with NGOs,<sup>74</sup> religious organisations and institutions of public utility.<sup>75</sup> As far as religious organisations<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup>

In addition to the requirements for legal personality as any ASBL,<sup>80</sup> religious organisations should comply with the following:<sup>81</sup>

- produce a document detailing the fundamental principles and the main ideas of its religious doctrine;

<sup>68</sup> Art 5 of the 2001 Decree-Law.

<sup>69</sup> Art 6 of the 2001 Decree-Law.

<sup>70</sup> Art 7 of the 2001 Decree-Law.

<sup>71</sup> Art 9 of the 2001 Decree-Law.

<sup>72</sup> Ch II, arts 10-34 of the 2001 Decree-Law.

<sup>73</sup> Ch III, arts 35-37 of the 2001 Decree-Law.

<sup>74</sup> Ch III, arts 35-45 of the 2001 Decree-Law.

<sup>75</sup> Arts 58-73 of the 2001 Decree-Law.

<sup>76</sup> Ch III, arts 46-56 of the 2001 Decree-Law.

<sup>77</sup> Ch III, art 46 of the 2001 Decree-Law.

<sup>78</sup> Ch III, art 47 of the 2001 Decree-Law.

<sup>79</sup> Ch III, art 48 of the 2001 Decree-Law.

<sup>80</sup> Ch I, arts 4, 6 & 7 of the 2001 Decree-Law.

<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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

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<sup>82</sup> Ch III, art 49 of the 2001 Decree-Law.

<sup>83</sup> Ch III, art 50 of the 2001 Decree-Law.

<sup>84</sup> 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.'<sup>85</sup> 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.

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<sup>85</sup> Trust Africa (n 6 above) 14.