

Law, religion and human rights in Botswana

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Summary

Religion is universally recognised as a fundamental and inalienable right. It comprises a set of common beliefs and practices generally held by a group of people, codified as prayer, ritual, religious law as well as cultural and ancestral traditions and myths. In Botswana, religion plays a significant part in the lives of the majority of people. The constitutional framework within which religion is practised allows freedom of religion and a number of legal provisions exist to protect this freedom. This article appraises the current state of religious freedom in Botswana in the context of constitutionally guaranteed human rights. It concludes that the basic framework established by the Constitution creates a separation of religion and state and provides the enabling environment for the exercise of freedom of religion. Consequently, it has ensured the requisite social harmony not only for continuous development, but also for continuous enjoyment of freedom of religion.

1 Introduction

Religion is universally recognised as a fundamental and inalienable right of man.¹ It has been defined in a wide variety of ways,² but for

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¹ See eg sec 26 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (UN General Assembly Resolution 36/56 of 25 November 1981; sec 3 of the Universal Declaration of Human Rights (UN General Assembly Resolution 217A of 10 December 1948); sec 21 of the International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200 of 16 December 1966); and art 8 of the African Charter on Human and Peoples' Rights 1981/1986.

² See eg GA Lindbeck *Nature of doctrine* (1984) 33 and L Jones (ed) *Encyclopedia of religion* (2005) 7692-7701. For the problems in defining religion, see JG Platvoet & AL Molendijk (eds) *The pragmatics of defining religion: Contexts, concepts and contests* (1999) especially 260-261; JM Donovan 'God is as God does: Law, anthropology, and the definition of "religion"' (1995) 6 *Seton Hall Constitutional Law Journal* 23 70; GC Freeman 'The misguided search for the constitutional definition of "religion"' (1983) 71 *Georgetown Law*

the purposes of this paper religion will be defined as a set of common beliefs and practices generally held by a group of people, often codified as prayer, ritual and religious law. Religion also encompasses ancestral or cultural traditions, writings, history and mythology, as well as personal faith and mystic experience. Thus, as will be seen below, many Batswana³ blend Christian beliefs with aspects of traditional beliefs such as ancestral worship. Religion in Botswana has been fashioned by a combination of factors, which include the introduction of foreign monotheistic religions such as Christianity and Islam, the activities of foreign missionary groups, such as the London Missionary Society (LMS), the colonial subjugation of the indigenous people and the emergence of the modern state.

Before the advent of colonialism in Bechuanaland⁴ (as Botswana was formerly known before its independence on 30 September 1966), the majority of the people who inhabited the territory, the Tswana, like most Africans believed in a supreme being, Modimo ('the one out there').⁵ This being was described in anthropomorphic terms. He could see, hear, get angry, forgive, answer and so on.⁶ The Tswana also believed in ancestral spirits (*badimo*). The dead were considered to continue to exist in a spiritual form, and they served as mediators between the living and God. Spirits could also neglect or punish the living; they could forgive, protect and come closer to them in times of need. When they were angry, the spirits were able to bring disease, misfortune, or death. Certain rituals had to be performed to make them happy. Some of these practices, such as birth rites to protect a child from disease and bad spirits and marriage rites to ensure that couples do not divorce, live on today.⁷ These beliefs later became a source of conflict with Christian missionaries, who believed, for example, that the worship of the Tswana deity, Modimo, amounted to nothing more than idol worship.⁸

The traditional concept of the supreme being was seriously undermined during the first half of the eighteenth century by missionaries

Journal 1519; and TJ Gunn 'The complexity of religion and the definition of "religion" in international law' (2003) 16 *Harvard Human Rights Journal* 189 191.

³ A name used to describe the people of Botswana.

⁴ For an insight into the establishment of the Bechuanaland Protectorate, see J Ramsay 'The establishment and consolidation of Bechuanaland Protectorate, 1870-1910' in WA Edge & MH Lekorwe (eds) *Botswana, politics and society* (1998) 62.

⁵ Recent archaeological findings of carvings about 70 000 years old on a snake-like rock in a cave in Botswana indicate that Stone Age people developed religious rituals far earlier than previously believed. These carvings are believed to be evidence of the oldest religion in the world; <http://www.namibian.com.na/2006/December/africa/0660AC849A.html> (accessed 30 September 2008).

⁶ See L Nyati-Ramahobo 'The language situation in Botswana' (2000) 1 *Current Issues in Language Planning* 243 254.

⁷ Nyati-Ramahobo (n 6 above) 255.

⁸ See JN Amanze *Ecumenism in Botswana — The story of the Botswana Christian Council* (2006).

from the LMS, notably the Scottish Congregationalist, Robert Moffat, and his son-in-law, Dr David Livingstone, and African missionaries from South Africa who brought Christianity to Bechuanaland.⁹ The LMS's initial task was to convert each of the paramount chiefs of the eight major tribes¹⁰ of Bechuanaland to Christianity. By the last part of the nineteenth century, Christianity was established as the official religion of the Kwena, Ngwaketse, Ngwato and Tawana under the auspices of the LMS and the Kgatla under the auspices of the Dutch Reformed Mission (DRM).¹¹ In the early twentieth century, the allegiance to the 'tribal' state churches was challenged by the advent of other Christian missions, such as Anglican, Roman Catholic, Seventh Day Adventist and the Zion Christian Church, and attendance in the 'tribal' churches rapidly declined. This initial incursion into the 'tribal' state churches was followed by a second wave of incursion by the Apostolic/Pentecostal churches as well as the United Reformed (Congregational and Methodist) churches. There are also predominantly expatriate Muslim, Quaker, Hindu and Baha'i congregations in major towns. Consequently, the contemporary religious outlook of Botswana consists of multi-faith adherents, whose outlook is emphasised by the Constitution's adherence to secularism and the guarantee of fundamental human rights, including freedom of conscience, which embodies freedom of religion.¹²

The relationship between human rights and religion dates back to ancient times. It has been said that the Persian empire of ancient Iran established unprecedented principles of human rights in the sixth century BC under Cyrus the Great. After Cyrus conquered Babylon in 539 BC, he issued the 'Cyrus cylinder', considered by many today to be the first human rights document. The cylinder declared that citizens of the empire would be allowed to practise their religious beliefs freely, with adherents of different religions having the same rights. The cylinder also contained protection of such rights as liberty and security, freedom of movement and economic and social rights.¹³ St Thomas Aquinas, the Catholic philosopher, successfully synthesised Aristotelian teleology and Christian dogma to produce a comprehensive doctrine of natural law which had a great influence on legal thinking in his day and subsequently.¹⁴ In the modern era, further developments on the

⁹ See N Parsons *The Botswana history pages* ch 11 <http://ubh.tripod.com/bhp11.htm> (accessed 5 January 2008); Nyati-Ramahobo (n 6 above) 255.

¹⁰ These were the Ngwato, the Tawana, the Kwena, the Ngwaketse, the Kgatla, the Maletle, the Rolong and the Tlokwa.

¹¹ Parsons (n 9 above). See also SN Parratt 'Religious change among women in urban Botswana' (1995) 25 *Journal of Religion in Africa* 73 74.

¹² See ch II of the 1966 Constitution.

¹³ See AH Robertson & JG Merrills *Human rights in the world: An introduction to the study of the international protection of human rights* (1996).

¹⁴ See his *Summa theologica* (1265-1274).

international plane took place after the two world wars.¹⁵ In Africa, the decolonisation process accelerated the protection of human rights by the inclusion, within the various independence constitutions, of a set of internationally-recognised human rights. The 1966 Botswana Constitution followed this trend and included a chapter on human rights.¹⁶ The Constitution is the supreme law of the country and any law that is judged to be inconsistent with it is void to the extent of such inconsistency.¹⁷ Consequently, by enshrining and entrenching human rights in the Constitution, these rights were elevated to the status of supreme law. This was done to ensure that, irrespective of the nature or predilections of the government in power, the individual is able to assert these rights and freedoms without reliance on the goodwill or courtesy of the government.¹⁸

2 Religious demography

Botswana is approximately 581 730 square kilometres (224 710 square miles in size, about the size of Texas (USA) and slightly larger than France), two-thirds of which is covered by the Kalahari Desert. Botswana's population is currently estimated to be 1 800 000,¹⁹ almost all of whom are indigenous Africans and who live mainly in the east of the country. The country is ethnically more or less homogenous, the majority of the population being Tswana, a southern Bantu people closely related to the Sotho of Lesotho and South Africa.²⁰ A small section of the population consists of Kalanga, Basarwa and Herero people. The non-African population consists of Europeans, mainly of British, Afrikaans and Asian origin. The social and cultural values of the country are embodied in four principles, namely, (1) democracy (*puso ya batho ka batho*); (2) development (*ditiro tsa ditlhabololo*); (3) self-reliance (*boipelego*); and (4) unity (*popagano ya sechaba*). These principles are derived from traditional culture and are designed to promote social harmony (*kagisano*).

Although the Constitution does not advocate a state religion,²¹ statutory observance of Ascension Day, Easter and Christmas makes

¹⁵ Eg, the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly.

¹⁶ See CM Fombad 'The protection of human rights in Botswana: An overview of the regulatory framework' in CM Fombad (ed) *Essays on the law of Botswana* (2007) ch 1.

¹⁷ See *Petrus & Another v The State* [1984] BLR 14 33 and *Attorney-General v Unity Dow* [1992] BLR 119 129 166.

¹⁸ See *Dow* (n 17 above) 148.

¹⁹ See <http://www.prb.org> (accessed 28 February 2008). The 2001 Population Census gave the population as 1 680 863.

²⁰ See <http://strategyleader.org/profiles/tswana.html> (accessed 5 January 2008).

²¹ See DD Nsereko 'Religious liberty and the law in Botswana' (1992) 34 *Journal of Church and State* 843.

Botswana unofficially a Christian country.²² It is said that a total of eight world religions are represented in Botswana, namely, African traditional religions, Christianity, Islam, Hinduism, Buddhism, Baha'i, Sikhism and Judaism.²³ The oldest of these in the context of Botswana is said to be African traditional religions.²⁴ These are as old as the Tswana people themselves. They have no specific founders, no sacred scriptures, no written theologies and no missionaries. They are embodied in the blood stream of the people themselves.²⁵

It is estimated that 70% of the population identify themselves as Christians.²⁶ Christian churches may be grouped into three categories, namely, (1) mission churches, which arrived because of missionary work in Africa; (2) Pentecostal churches; and (3) independent churches, mainly of African or specifically Tswana origin.²⁷ A denominational classification of Christian churches in Botswana includes Roman Catholics, considered to be the largest, Lutheran, Presbyterian, Anglican, Congregational, Methodist, Baptist, Seventh Day Adventist, Pentecostal and independent churches,²⁸ the most prominent being the Zion Christian Church (both Star and Dove branches) based in South Africa. They are called 'independent churches' because they are free from western control and leadership. They also draw their membership predominantly from Africans, especially the working class and the marginalised. Adherents of the Islamic faith are said to number some 5 000 people,²⁹ Hinduism attracts some 3 000 people and the Baha'i faith some 700 adherents. Some 20% of the population does not subscribe to any religion.³⁰

²² See Public Holidays Act (Cap 03:07) and Government Notice 506 of 2007. In 2008, the following Christian days will be observed as public holidays: Good Friday 21 March; Easter Monday 24 March and Ascension Day 1 May.

²³ See Amanze (n 8 above) 229.

²⁴ As above.

²⁵ As above.

²⁶ See *Botswana: International Religious Freedom Report 2007* released by the US Bureau of Democracy, Human Rights and Labour on 14 September 2007. The *World Christian encyclopedia*, OUP, Vol 1 (2001) 126 gives the religious demography as follows: Christians 59,9%; Independent 30,6%; Protestant 11,0%; Roman Catholic 3,7%; Anglican 0,7%; Marginal 0,3%; Ethno religious 38,8%; Bahai 0,8%, Muslim 0,2%; non-religious 9,1% and Hindus 0,1%. The Joshua Project gives the following religious breakdown: Buddhism 0,1%; Christianity 66,3%; Ethnic religion 32,3%; Hinduism 0,1%; Islam 0,2%; non-religious 0,2%; other/small 0,8%. See <http://www.joshuaproject.net> (accessed 28 February 2008). Parsons (n 9 above) cautions about statistics relating to Christian affiliation and church members as membership of independent churches is hard to measure and is often overlooked.

²⁷ See Nyati-Ramahobo (n 6 above) 256 and Amanze (n 8 above) 3-40.

²⁸ See J Amanze *A history of the ecumenical movement in Africa* (1999).

²⁹ For an insight of Muslims in Botswana, see SN Parratt 'Muslims in Botswana' (1989) 48 *African Studies* 71-82.

³⁰ See *International Religious Freedom Report 2007* (n 26 above).

3 Legal and policy framework

3.1 The Constitution

Chapter II of the 1966 Constitution contains a Bill of Rights guaranteeing certain fundamental rights and freedoms of the individual.³¹ Section 3 of the Constitution declares that every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, to enjoy these rights and freedoms whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to the rights and freedoms set out under the Constitution. This section is the key or umbrella provision in chapter II, under which all rights and freedoms protected under that chapter are to be subsumed.³² These rights and freedoms are referred to as fundamental because they are basic to the individual's continued existence as a rational being. They are said to help to distinguish him from other rational beings, animate or inanimate, which have no conscience or power of reason.³³ They are inherent in his very nature. Thus, article 1 of the Universal Declaration of Human Rights (Universal Declaration) proclaims that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'³⁴ It is in this spirit that the enshrined rights in the Constitution are to be viewed.³⁵

However, there is no particular provision in the Constitution dealing with the right to self-determination of cultural communities. This omission may be explicable on the basis that when the Constitution was promulgated, this type of right was not in vogue. It forms part of the so-called third generation human rights; rights that go beyond mere civil political and social rights.³⁶ Although the Constitution has subsequently been amended to take into account certain contemporary issues,³⁷ the right to self-determination has not been a topical issue warranting its consideration as a subject for inclusion in the Constitution. There have been some attempts by some cultural

³¹ See secs 3-19 of the Constitution.

³² See *Dow* (n 17 above) 133.

³³ See *Nsereko* (n 21 above) 844.

³⁴ As above.

³⁵ See *Kamanakao I & Others v Attorney-General & Another* [2001] 2 BLR 654 666.

³⁶ These rights have not been concretised and include an extremely broad spectrum of rights such as the right to self-determination, the right to a healthy environment and the right to participation in cultural heritage. See generally K Vasak 'Human rights: A thirty-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' (1977) *UNESCO Courier* 30:11.

³⁷ See Constitution (Amendment) Act, 2005, dealing with such issues as sex discrimination, reform of the House of Chiefs and the establishment of the office of Director of Public Prosecutions.

communities to assert their rights as a community. In *Kamanakao I and Others v Attorney-General and Another*,³⁸ for example, the applicants (a paramount chief of the Wayeyi tribe, a society which promoted the Shiyeyi culture and language and a senior Wayeyi tribesman) applied to the High Court under the provisions of section 18 of the Constitution³⁹ for the nullification of sections 77 to 79⁴⁰ of the Constitution and section 2 of the Chieftaincy Act⁴¹ as unconstitutional, as they discriminated against their tribe and denied them and their tribe their rights in terms of sections 3 and 15 of the Constitution.⁴² The Court held that it had no power to order that the said sections be amended. To be able to do so, it was its view that the Court needed to have expressed powers from the Constitution enabling it to be a revisionary instrument for the alteration of the Constitution. The Court, however, observed that:⁴³

There is no doubt that under the wide definition of the expression 'discriminatory', the treatment given to the Wayeyi and other tribes by omitting their tribe from having an *ex officio* member in the House of Chiefs under the provisions of section 77(2)(a) amounts to unfairness and discrimination which, if not justified, is intolerable. They are subjected to a disability which the named eight tribes do not suffer; or put in another way these eight tribes have a privilege or advantage which is not accorded to the Wayeyi.

Subsequent to the case, a constitutional amendment has been enacted to address the issues raised in the case.⁴⁴

The controversial resettlement of the Barsarwa (San), who inhabit mainly the Central Kalahari Game Reserve (CKGR) in the Kalahari Desert, has become a topical issue in recent years. It centres on the government's policy of resettling them outside the CKGR in order to preserve the wildlife in the reserve for tourism in spite of criticism by

³⁸ n 34 above.

³⁹ The section provides for a general machinery for the enforcement of fundamental rights and freedoms by providing that any person who alleges that any of the provisions has been, is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress.

⁴⁰ Sec 77 provided for a House of Chiefs consisting of eight *ex officio* members, four elected members and three specially elected members (now see sec 11 Constitution (Amendment) Act 2005). Sec 78 made it clear that the *ex officio* members shall come only from those who are acting as chiefs in the eight 'principal tribes' of the majority Tswana ethnic group and sec 79 provided for the four elected members to be drawn from some smaller specified tribes (now see secs 12 & 13 Constitution (Amendment) Act 2005).

⁴¹ This section defines a 'chief' as a chief of one of the principal Tswana tribes.

⁴² This section provides for the protection from discrimination on the grounds of race, tribe or place of origin.

⁴³ 671.

⁴⁴ See n 37 above.

national and international non-governmental organisations (NGOs).⁴⁵ This culminated in the case of *Sesana and Others v Attorney-General*,⁴⁶ in which the Barsarwa won a right to return to the CKGR. The Barsarwa are an indigenous group whose numbers are not only rapidly declining, but their language, culture and way of life risk extinction with all the consequences that this entails for the cultural diversity of the country, yet no positive measures have been taken to arrest the situation.⁴⁷

3.1.1 Freedom of conscience

The right or freedom germane to the discussion in this paper is that of freedom of conscience. This right is enshrined in the Constitution and machinery is provided for its enforcement.⁴⁸ Freedom of conscience entails the freedom to hold or consider a fact, viewpoint or thought regardless of anyone else's view. Freedom of thought hinges on the freedom of the individual to believe whatever he or she thinks is best and freedom of religion is closely related and inextricably bound up with these. Section 11 of the Constitution guarantees freedom of religion in the following terms:

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.
- (2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which it wholly maintains or in the course of any education which it otherwise provides.
- (3) Except with his own consent (or, if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.
- (4) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.
- (5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the

⁴⁵ On the resettlement policy, see DG Boko 'Integrating the Basarwa under Botswana's Remote Area Development Programme: Empowerment or marginalisation?' (2002) *Australian Journal of Human Rights* 19.

⁴⁶ [2006] 2 BLR 633.

⁴⁷ See CM Fombad 'The constitutional protection against discrimination in Botswana (2004) 53 *International and Comparative Law Quarterly* 139 160.

⁴⁸ See n 33 above.

extent that the law in question makes provision which is reasonably required -

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Although religious freedom is defined in the negative, the provisions clearly demonstrate not only its multi-faceted nature, but also the non-preference of any particular religion over others. There is no state religion;⁴⁹ rather the provisions provide a framework within which all and sundry may practise whatever religion they profess subject only to considerations of the protection of freedoms of others, and in the interest of defence and public morality. Freedom of religion includes the right to have a religion or not to have one at all and the right to change one's religion. It also includes the right to manifest one's religion. As aptly observed by one writer:⁵⁰

It is quite one thing to say that in the solitude of one's own mind there is freedom of belief. It is quite another — and for our purposes a much more important — thing to acknowledge a right to act out the tenets of one's belief, particularly in the company of others.

It further recognises one's right to propagate his or her religion.

Proselytising or converting other people to one's own religion is permissible. Such conversion must be voluntary without any force, duress or undue influence being exercised on the convert. In this regard, the right of a religious community to establish and maintain educational facilities is recognised. Three of the prominent senior secondary schools in Botswana, Moeding and Moeng Colleges and Maun Secondary School, were built by the LMS. Educational institutions set up by religious bodies do not only teach their religion but teach secular subjects as well. This serves to assist adherents to relate secular knowledge to their religion.⁵¹

It must be noted that there has been no recorded conflict between religious communities over the years.⁵² Consequently, one can assert

⁴⁹ There is some evidence, however, of Christian preference by the statutory observance of Christian events as public holidays. See n 18 above.

⁵⁰ See RS Clarke 'The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (1983) 31 *Chitty's Law Journal and Family Law Review* 23.

⁵¹ See Nsereko (n 21 above) 847.

⁵² In 2004, however, there was reported to have been a minor controversy over some stores' practice of buying halal products, particularly chicken, which was alleged to unfairly favour Muslims at the expense of others. This led to public comments in newspapers, but this did not translate into any discrimination or antagonistic attitudes towards Muslims. See US Department of State's *International Religious Freedom Report 2005* released on 8 November 2005.

that there exists an amicable relationship among religious communities in Botswana.

3.1.2 Protection of freedom of religion

A number of provisions are in place to protect freedom of religion. The Constitution forbids discrimination on the basis of religion although this is not expressly stated. Section 15(3) of the Constitution prohibits discrimination on the basis of one's creed. What constitutes creed is not defined, but a variety of dictionaries define creed almost exclusively in terms of religious beliefs.⁵³ It is therefore conceivable that the courts will interpret creed broadly to include religious beliefs in order to afford protection against discrimination on the basis of one's religion. It must be pointed out, though, that in *Attorney-General v Unity Dow*⁵⁴ it was said, in terms of section 15(3) of the Constitution, that '[a]rguably religion is different from creed'. This statement notwithstanding, it is submitted that the essence of the *dicta* in which this statement was made is not that creed should be protected under the Constitution whilst religion should be excluded, but that, even though religion was not specifically mentioned, it might nevertheless be considered a right protected from discrimination under section 15 of the Constitution.⁵⁵

The Penal Code 1964 (as amended) makes it an offence for any person to destroy, damage or defile any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons.⁵⁶ It is also an offence under the Code for any person to cause disturbance to any religious assembly,⁵⁷ trespass on burial places,⁵⁸ hinder the burial of the dead,⁵⁹ and write or utter words with intent to wound religious feelings.⁶⁰ Conviction for any of these offences may attract a term of imprisonment not exceeding two years with or without a fine, or both.⁶¹ It is a measure of the maturity and tolerance of Botswana that these laws have remained largely paper tigers. A search in the law reports reveals no reported

⁵³ See eg *Oxford dictionary of current English* which defines creed as '[system of] beliefs or opinions, especially on religious doctrine'.

⁵⁴ n 17 above, 147 *per* Amisshah JP.

⁵⁵ See RC Blake & L Litchfield 'Religious freedom in Southern Africa: The developing jurisprudence' (1998) *Brigham Young University Law Review* 515-562.

⁵⁶ See sec 136.

⁵⁷ Sec 137.

⁵⁸ Sec 138.

⁵⁹ Sec 139.

⁶⁰ Sec 140.

⁶¹ See sec 33 of the Penal Code which provides general punishment for offences for which no punishment is prescribed. Of the offences created by secs 136-140, only sec 140 provides a specific punishment for the infringement of the offence created by that section. The rest do not specify the punishment for their infringement, hence the general provision in sec 33 applies.

case in which a prosecution for infringement of these offences had been brought before the courts.

3.1.3 Constitutional limitation on religious freedom

The religious freedom guaranteed under the Constitution is not expressed in absolute terms. The proviso to section 3 of the Constitution provides that the enjoyment of the rights and freedoms is subject to such limitations as are designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.⁶² This proviso complies with article 29(2) of the Universal Declaration, which provides as follows:

In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are deemed by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

Furthermore, as seen from the provisions of section 11(5) of the Constitution set out above, it is permissible to limit the enjoyment of freedom of religion in the interest of national defence, public safety, public order, public morality, public health, or for the protection of the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion. However, such limitations must be deemed reasonably justifiable in a democratic society.

In the light of the above, there are in place some limitations on freedom of religion. For example, under section 66(2)(b) of the Penal Code 1964, the President is empowered to declare any society which is dangerous to the peace and order of Botswana to be unlawful. Any person who assists in the management of such a society will be guilty of a criminal offence. This provision may be used to declare a religious society engaged in subversive activities under the guise of propagating their religion dangerous and thus be prohibited from carrying on its activities. Section 47 of the Code further empowers the President, in his absolute discretion, to declare any publication he considers to be 'contrary to the public interest' to be a prohibited publication. Furthermore, under the Code, the police have the power to declare any meeting, which will include a religious meeting, to be an 'unlawful assembly' or 'a riot'.⁶³ Once again, like the laws geared towards the enhancement of freedom of religion, these possible limitations on freedom of religion have remained largely unused due to the relative tolerance of religious opinions in the country.

⁶² See *Kamanakao* (n 34 above) 669.

⁶³ See secs 74-79 of the Penal Code.

Another possible area in which the law may intervene to limit one's freedom of religion to protect the freedom of other persons is in the area of parental rights *vis-à-vis* their children. There are religious sects in Botswana, notably, the Jehovah's Witnesses, which advocate abstinence from any or specific forms of medication or hospitalisation for their adherents. They fervently believe in spiritual healing without the intervention of medical science. There is bound to be a conflict between this stand and the requirement of the law that any person who omits to do any act which it is his duty to do by which omission harm is caused to any person is guilty of an offence.⁶⁴ In *State v Motlogelwa*,⁶⁵ the failure of a parent to provide health care to his child was the subject of the prosecution of the accused. Two of his children contracted measles. A community health nurse, a public health inspector, a counselling nursing matron and the police repeatedly advised him to take the children to the hospital, but he refused to do so on account of his religious beliefs. He simply prayed and gave them water. The children eventually died and he was charged with failing to provide them with health care and consequently endangering their lives. The accused was a member of the Immanuel Church of God in Zion. He testified:

I am a believer in God and his son Jesus Christ. I used to attend hospital but since God converted me, he gave me power on the book of Isaiah where my spirit was warned that God's spirit is in me that I was chosen to preach to the whole world the Good News, to tell the oppressed of liberation, that prisons are open, to order that those who are not happy be clothed with happiness ... There is no other God that I obey. No medicine enters my mouth or any of my children.

The court rejected his religious belief as a lawful excuse for omitting to take his critically ill children to hospital for treatment. The court held that the Constitution does not provide 'wholesale religious rights for anybody to practise or propagate their religion in complete disregard of the rights of others or the laws of this country'. The court was also of the view that 'the accused's religious belief in the instant case is subordinate to the law that imposes a duty on him to provide the necessities of life to his children ...' The accused was convicted and sentenced to three years' imprisonment and a fine of P600 (approximately US \$101) or six months' imprisonment in default of payment. Commenting on the case, a learned writer opines that, while adults are entitled to make decisions which may adversely affect their health or life, the state has a right to ensure that such decisions do not cover their minor children.⁶⁶ Support for the court's decision can be found

⁶⁴ See sec 240 of the Penal Code. A similar offence is created by sec 11(2) (b) of the Children's Act 1981.

⁶⁵ Criminal case KN17/1990, Kanye Magistrate's Court (unreported) confirmed by the High Court in Review Case 155/1990 (unreported) but set out in Nsereko (n 21 above) 854-855.

⁶⁶ See Nsereko (n 21 above) 855.

in article 5(5) of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.⁶⁷ The said article provides that '[p]ractices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development', taking into account that freedom to manifest one's religion or belief may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Apart from the above there are no legal impediments in the way of African indigenous religions. Most Batswana are as likely, in time of crisis or ill health, to seek help from a traditional healer as they are likely to visit a priest or a hospital. As stated above, traditional rituals are invoked at naming ceremonies of children and at marriages to ask for the intervention and approval of ancestors.

3.2 State policy

As indicated above, the Constitution does not prefer one religion over others and this is reflected in official policy towards religious communities. Although it is common at government functions to begin with a Christian prayer, members of other religious groups are not excluded from offering non-Christian prayers at such occasions. On such occasions, such as Independence Day celebrations, it is common practice to have prayers from a wide variety of faiths, time and circumstances permitting. However, the statutory observance of certain Christian events as public holidays is indicative of the preference given to Christianity.⁶⁸ This notwithstanding, other religious groups are allowed to commemorate their religious holidays without state interference. Despite this apparent preference for Christianity, the state does not impose the tenets of Christianity on the country. Thus, commercial activities are allowed on Sundays,⁶⁹ the acknowledged day of rest for Christians, and marriages (be it polygamous or otherwise) contracted in accordance with Muslim, Hindu and other religious rites are recognised and given legal validity.⁷⁰ Other religions are allowed to establish schools and to teach their religions. The national policy on culture encourages tradi-

⁶⁷ See n 1 above. See also DJ Sullivan 'Advancing the freedom of religion or belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 487.

⁶⁸ See n 22 above. Other evidence of preference for Christianity is found in the introduction to the Ministry of Education's Religious Education Syllabus for Senior Secondary Schools. It states: 'The syllabus takes cognisance of the religious pluralism of the society of Botswana. All learners are expected to do Christianity and then they can choose any other two religions.' See http://www.moe.gov.bw/downloads/BGCSE_RE.pdf (accessed 30 September 2009).

⁶⁹ See Shop Hours (Extended Hours) Order 1990 (as amended).

⁷⁰ See part II of the Marriage Act 2000.

tional beliefs that are not in conflict with modern religion and social ethics.⁷¹

The overall state policy on religion is that it provides the requisite legal framework within which multi-faceted religious practices may be undertaken. This is in compliance with its constitutional obligation to ensure that no person shall be hindered in the enjoyment of his freedom of conscience. As noted earlier, many legal provisions are in place to ensure the enjoyment of this freedom with the minimum of state interference.

There is, however, a legal requirement that all societies, including religious organisations, register under the Societies Act of 1972.⁷² No legal benefits, such as conferment of body corporate status, are derived from registration.⁷³ However, a society must be registered before it can conduct business, sign contracts or open a bank account. Any society that is not a registered society or an exempted society⁷⁴ is deemed to be an illegal society.⁷⁵ It has been reported that between July 2006 and May 2007, 69 religious groups registered under the Act and a further 256 applications were automatically terminated after their failure to submit the requisite forms, fees or constitution within the stipulated 90 days under the Act.⁷⁶ The Registrar of Societies has the power to refuse registration or to strike off the register any society on a number of grounds where 'it appears to him that the objects of the society are, or are likely to be used for any unlawful purpose or any purpose prejudicial to or incompatible with the peace, welfare or good order of Botswana'.⁷⁷ The available evidence indicates that this power has been used sparingly. In 1984, for example, the Unification Church was denied registration on public order grounds. The government perceived the church as anti-Semitic.⁷⁸

⁷¹ See para 6.10 National Policy on Culture http://www.gov.bw/docs/national_policy_on_culture_v2.pdf (accessed 28 February 2008).

⁷² Under sec 3 of the Act, 'society' is defined to include any club, company, partnership or association of 10 or more persons, whatever its nature or objects. It excludes certain bodies such as political parties, companies as defined under the Companies Act 2003 and any society or class of society which may be declared not to be a society for the purpose of the Act. See Registration of Societies Regulations 1973 (as amended) and Societies (Declaration of Non-Societies) Regulations 1977.

⁷³ See *The Evangelical Lutheran Church in Southern Africa v Phillip Jeremiah Robinson & Another* [1982] 1 BLR 215 (CA) 219.

⁷⁴ In terms of sec 3 and the schedule to the Act, certain societies such as political parties are exempted from registering under the Act.

⁷⁵ See sec 20 of the Societies Act 1972.

⁷⁶ See *Botswana: International Religious Freedom Report 2007* (n 26 above). Under sec 7(1) (b) of the Act, the Registrar may refuse to register a society where the society, within 90 days immediately after being required to provide information to the Registrar, fails to provide the requisite information.

⁷⁷ See sec 7 of the Act.

⁷⁸ See US Department of State *International Religious Freedom Report 2002* released on 7 October 2002.

Registration under the Act does not give a licence to the government to interfere in the internal workings of religious organisations. Rather, it ensures that the registered constitution or by-laws of the society are strictly followed in the administration of the affairs of societies so as 'to minimise the chances of citizens being dealt with fraudulently by unscrupulous persons masquerading as leaders of what may basically be doubtful organisations'.⁷⁹ Thus, where there is a dispute among members with regard to the affairs of the society, the first reference point will be the constitution or by-laws to ascertain whether they have been complied with. An example of this can be seen from the decision of the Court of Appeal in *Seboni v Twelve Apostles' Church of Africa and Another*.⁸⁰ In this case, the constitution of the respondent with regard to the succession to the first apostle, the head of the church, provided as follows:

- (d) The successor of the apostle shall be the person who shall be revealed through the apostle as his successor. Such revelation shall be in writing under the hand of the apostle or shall be revealed by the apostle to a notary public.
- (e) In the event of the apostle dying without revealing his successor, the overseers shall in consultation appoint the successor.

The first apostle, Jim Scotch Ndlovu, died without appointing a successor as stipulated by the above provision. After his death, his widow called a meeting of the overseers at which she revealed that the first apostle had wished that he be succeeded by two brother apostles, Abel Makgale and Harry Mkhonza. The meeting accepted the first apostle's wish and endorsed the appointment. The appellant disputed the decision and the matter was referred to the High Court, which held in favour of the respondents, on the grounds that the case was one where the court should have accepted the *de facto* situation and exercised its inherent jurisdiction and that the *status quo* ought not to be disturbed but regularised. The appellant appealed to the Court of Appeal contending that the appointment of Makgale and Mkhonza was *ultra vires* the church's constitution. The Court held that the wording of the church's constitution was clear in that it referred to a successor and not successors and to the successor as being a person and not persons. The wording was unambiguous and had been meant to mean that any successor to the first apostle should be one person and not two or more persons. Accordingly, the appointment of two persons had been *ultra vires* the church's constitution. The Court said:⁸¹

⁷⁹ Remarks made by Hon M Ngwako, the then Minister of Health, Labour and Home Affairs when introducing the Societies Bill in parliament. See *National Assembly Official Record (Hansard-39)*, 3rd session of the Second Parliament 3-16 December 1971 151.

⁸⁰ [1995] BLR 161.

⁸¹ Tebbutt JA 165.

In construing the constitution, therefore, the Court must have regard to the intention of the contracting parties as expressed in the wording of the contract. Where the wording is clear and unequivocal the court must give effect to that wording.

The Court further held that regularising the *de facto* situation had not been an issue before the trial court and as such the court should not have regularised the situation. The above decision clearly demonstrates that religious organisations are left to administer their affairs in accordance with the constitution or by-laws that they have voluntarily registered as the foundational document of the organisation.

Various penalties are imposed on officials and members of unregistered societies for non-registration of their society.⁸² Recently, there has been disquiet about the proliferation of churches which prompted the Minister of Labour and Home Affairs, under whose ministry the registration of societies falls, to indicate that the provisions of the Societies Act may be looked at to see if measures can be taken to curb the trend.⁸³ No such measures have since been taken.

4 Future developments

It is clear from the preceding discussion that religious pluralism exists in Botswana. The legal framework is such that it encourages the promotion of autonomy and ongoing development of diverse religions within the country. The evidence of the number of religious bodies registering under the Societies Act indicates substantial growth in religious pluralism. The question that has to be asked is about the future prospects of religious pluralism in Botswana. Despite the multi-faceted religious outlook of the country, how much co-operation exists between the different faiths? To answer these questions, a brief look will be taken at attempts at church unity and interfaith co-operation. In this regard, the work of the Botswana Christian Council requires a brief mention.

The Botswana Christian Council was inaugurated in 1966 with a membership of five churches, namely, the Anglican Church, the London Missionary Society (now UCCSA), the Lutheran Church, the Methodist Church and the United Free Church of Scotland.⁸⁴ The Council was the successor of the Northern Botswana Christian Council (NBCC), which was set up to give relief to the victims of the severe drought that affected the northern parts of the country in the 1964. Its constitution was based on the World Council of Churches' constitution, which defined itself as 'a fellowship of churches which confess the Lord Jesus Christ as God and Saviour according to the Scriptures and therefore seek to fulfil together their common calling to the glory of one God'. The stated

⁸² See secs 21-23 of the Act.

⁸³ See the *Daily News* of 4 September 2002 and 5 September 2003.

⁸⁴ See Amanze (n 8 above) 76.

objectives of the Council are (a) to draw the churches represented on the Council into greater understanding of one another; (b) to enable the churches more fully to share in the ecumenical movement; (c) to give such expressions to their common faith and devotion as may from time to time be found desirable; and (d) to enable the churches to bear a more united witness in all Botswana, to serve its people, and to make its evangelising work more effective.⁸⁵ The establishment of the Council was a bold step towards breaking down the early missionaries' policy during the colonial period, which encouraged Christianity along tribal lines, eventually resulting in tribal churches.⁸⁶

The principal aim of the Council from its inception was to foster growth and unity between Christians. Thus, the Council has become a forum where members express their feelings, provide advice, constructive criticism and exchange ideas about their Christian life. It has further encouraged religious dialogue with other religions, as can be seen from the following excerpt from the minutes of its 33rd Annual Assembly:⁸⁷

The church today has to recognise that it is living in a multi-religious context. The other religions, especially Islam, should not be perceived as a threat but rather as an unavoidable reality which is part of the African religious setting while preserving the specificity and originality of the Christian faith, Christians at all levels must advocate and work for tolerance and above all, for dialogue. Dialogue with other religions has the objective of ensuring that each citizen can freely practise his/her faith.

In line with the above expression, the Council in 2003 appointed an interfaith committee tasked with the organising of workshops to sensitise the population on the need for dialogue among different religions in the country. One of such workshops, organised in 2003, observed that there was a need to come up with strategies and develop an action plan that will help the interfaith committee develop activities that promote interfaith dialogue and co-operation.⁸⁸ Admittedly, not much progress has been made in this regard, but the mere fact that an attempt has been made towards dialogue and mutual understanding of the different faiths augur well for the future continuance of religious pluralism in Botswana. This is evident from the co-operation exhibited between the church leadership in the Evangelical/Pentecostal churches, on the one hand, and the mainline churches, on the other, in the fight against the HIV/AIDS scourge by the creation of the 'Faith Sector' to combat the pandemic.⁸⁹ One can therefore conclude that, despite doctrinal differences between churches in Botswana, there is a genuine attempt to work together and foster co-operation on national

⁸⁵ See Council's Constitution adopted on 21 May 1966 1.

⁸⁶ Amanze (n 8 above) 79.

⁸⁷ Amanze (n 8 above) 235.

⁸⁸ Amanze (n 8 above) 245.

⁸⁹ Amanze (n 8 above) 369-374.

issues and concerns. If this trend is to continue, and there is no reason it should not, the various faiths must strive to accommodate each other in the quest for the spiritual fulfilment of their adherents and be open-minded in their doctrinal approach to each other.

A possible challenge to religious freedom which may confront the Christian churches in the immediate future is the admission of homosexual persons to their congregations. The Anglican Province of Central Africa, to which Botswana belongs,⁹⁰ supports Resolution 1.10 passed at the 1998 Lambeth Conference of Anglican Bishops which rejects homosexual practices as incompatible with scriptures and calls upon the faithful to minister pastorally and sensitively to all irrespective of sexual orientation. In November 2007, seven priests of the Anglican Church in Botswana were suspended for having a meeting with the dismissed Bishop Kunonga of Harare, who was expelled by the Province of Central Africa for unilaterally withdrawing the diocese of Harare from the province and alleging widespread homosexuality among the Anglican churches in the province. He particularly alleged that Bishop Mwamba of Botswana had made a number of public statements since June 2006 sympathetic to homosexuality and the Diocese of Harare had 'refused to be represented by him and will not accept him as a diocese'.⁹¹ These allegations have been strenuously denied by the province. Meanwhile, the seven priests who were suspended have filed a suit in the High Court challenging their suspension.⁹² The suit may give rise to human rights issues such as freedom of association, and it will be interesting to see how the Court will react to such right (if contended by the plaintiffs) in the light of section 13 of the Constitution, which protects freedom of association.

The issue of homosexuality in Botswana society as a whole is a contentious one. Currently, the law prohibits homosexual practices between consenting adults,⁹³ and the courts have held that the time has not yet come to decriminalise homosexual practices between consenting adults even in private.⁹⁴ Unlike the South African Constitution, which outlaws discrimination on the ground of sexual orientation,⁹⁵ the Botswana Constitution does not specifically prohibit such discrimination. The challenge facing the Anglican Church in Botswana is how to reconcile the condemnation of homosexuality and the call to minister to all, irrespective of sexual orientation contained in the Lambeth Resolution.

⁹⁰ The other countries are Malawi, Zambia and Zimbabwe.

⁹¹ See *The Zimbabwean Independent* of 19 October 2007.

⁹² See the Botswana newspaper, *Mmegi/Reporter* of 25 January 2008.

⁹³ See secs 164, 165 & 167 of the Penal Code.

⁹⁴ See *Kanane v The State* [2003] 2 BLR 67 (CA) and EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201.

⁹⁵ See sec 9(3) of the South African Constitution 1996.

In terms of legislative prognosis, there is neither an indication from government of any imminent legislation to curb religious freedom, nor is there a desire to curb the perceived proliferation of churches, although there have been some rumblings to that effect. With a large percentage of the population adhering to one religion or the other, it is going to be increasingly difficult to keep religion in the private domain as religious people and bodies will continue to form a large public constituency. The interests of this constituency cannot be ignored.

5 Conclusion

Law, religion and human rights are intertwined in the legal framework within which freedom of religion is practised in Botswana. The basic framework established by the Constitution creates a separation of religion and state and provides the enabling environment for the exercise of freedom of religion. This has created a tolerance of all types of religions leading to a peaceful coexistence among adherents. The state has so far steered clear of religious affairs and has allowed religious bodies to operate without interference. On the face of it, the requirement of registration under the Societies Act would seem to be an attempt to interfere with the administration of religious bodies, but the empirical evidence is to the contrary. There is substantial co-operation between the various religions despite doctrinal differences and challenges. This has contributed in no small measure to the peace and tranquillity that Botswana enjoys in this context. By entrenching the right of religious freedom in her Constitution and putting in place mechanisms for its protection and enjoyment, Botswana has demonstrated that law, religion and human rights can be a very happy mixture if the right political will is exercised. The future challenge facing the state is to find an answer to the question of how, in the era of globalisation and cultural transformation, to maintain the delicate balance between the private interests of religious adherents and the overall public interests to ensure the continuous enjoyment of freedom of religion in a manner that will be fair to all religions. One can prophesy an answer to the effect that with her long democratic credentials, political realism and adherence to the rule of law, it will come to pass that the trinity — law, religion and human rights — will continue to thrive in the spirit of tolerance and mutual respect which Botswana have so far accorded to the religious opinions and affiliations of one another. This will undoubtedly ensure the requisite social harmony, not only for continuous development, but also for the continuous enjoyment of freedom of religion which seems to play a significant part in the lives of the majority of the population.