

**RELIGION AND HUMAN RIGHTS:
ISSUES, IMPACT, CONFLICT AND DEVELOPMENTS IN SOUTH AFRICA**

1. Prior to 1990, South Africa was ruled by a Westminster-style Parliament dominated by the National Party. The white-ruled State regularly referred to itself as 'Christian'. The biggest Calvinist church, the Dutch Reformed Church, occupied a position of not inconsiderable influence as a result of the fact that most of the NP leaders were members of this denomination. The close association between State and this church had a very negative effect upon its present standing, and generally affected the opinion that many South Africans have of Christianity generally. The failure to speak out forcefully about the discriminatory practices of the previous political dispensation is still regarded as a mark of shame on the DRC and some other Christian denominations.
2. In 1993, South Africa adopted a transitional Constitution which was replaced by the current Constitution 108 of 1996. Both these instruments created an avowedly secular State under the Constitution as the Supreme Law. Both contained a Bill of Rights which *inter alia* guarantees freedom of religion.
3. The current Bill of Rights is contained in Chapter 2 of the South African Constitution and is annexed hereto as Annexure "1". There is no hierarchy of human rights other than the fact that some are protected from limitation in a state of emergency.
4. Because democracy and a human rights culture came to the country only recently, South Africa found itself in the fortunate position to be able to

benefit from the experience of other countries that had established democracies many years or centuries earlier. In the South African Constitution one can detect influences of the Canadian, United States and the German Federal Constitutions. This has naturally resulted in the South African courts looking to the courts of these countries for guidance while finding their way in a new human rights regime. In the Annexures to this summary many references will be found to decisions of the Canadian and United States' courts. Generally speaking, the South African Constitution and the legislation and jurisprudence spawned by it have been described as among the most liberal in the world in the manner in which fundamental rights have been given effect to.

5. In *S v Lawrence* 1997 (4) SA 1176 (CC), the then President of the Constitutional Court, Arthur Chaskalson, quoted with approval from *R v Big M Drug Mart* [1985] 1 SCR 295 at 336, to define freedom of religion also for South African Society thus:

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

6. South Africa is a country of diverse cultures, languages and religions. There are many identifiable minority groups defined by religion, language, descent and culture. This diversity presents unique challenges to the human rights regime introduced by the democratic dispensation after 1994. Not all religious practices can be regarded as being in accordance with the Bill of Rights, or conflict with national or provincial legislation but

are *prima facie* protected by the Bill of Rights. The clash of rights and the duty to respect the dignity of others are sometimes difficult to reconcile and some religious practices have had to yield before the demand that equal treatment be accorded to all.

7. Some cultural practices are not restricted to the enjoyment of a common heritage and social practice, but have a decided tinge of religious significance, further complicating the application of human rights. The Bill of Rights protects the practice of religion, the expression of religious beliefs, the freedom to associate in religious organizations and congregations, it allows the establishment of private religious schools provided that they do not discriminate and maintain appropriate standards.
8. Religion may be practiced as long as it does not offend the principles of the Constitution and does not interfere with the legitimate exercise of the rights of other individuals and groups.
9. The Interim Constitution, which preceded the current Constitution, laid down a range of constitutional principles with which the Final Constitution had to comply. The Constitutional Court had to certify that the final Constitution did – and does - in fact comply with these principles. The constitutional principles are Annexure “2”, the first certification judgment by the Constitutional Court is Annexure “3”.
10. One of the issues raised by an objector during the certification process before the Constitutional Court (“CC”) was that the proposed Bill of Rights would open the door to abortion. The CC held that abortion was not dealt with as such in the principles enshrining the right to bodily integrity and the right to take decisions relating to one’s own body and declined to engage

the objection. As will appear later, abortion is now allowed under a very liberal termination of pregnancy act.

11. Together with abortion there is a whole range of articles of faith that are important for different religions for a variety of reasons which are impacted by human rights, including gender, corporal punishment, religious education, gay and lesbian lifestyles, freedom of expression, the use of prohibited herbs or drugs, polygamy and male succession or primogeniture.

12. A range of the consequences of the adoption of the Bill of Rights does at first blush run counter to the tenets of some religious beliefs, views or practices, while others that were challenged by non-adherents to the respective faiths have survived constitutional challenges.

13. In what follows, some of the more important religious issues that raised their head since the advent of democracy are listed. Within the context of a panel presentation little more can be done other than to refer thereto, but all may be expanded upon in subsequent discussions. Wherever possible, the report of the court decision or a copy of an article or relevant statute will be provided as an Annexure. The Annexures will be sent by separate e-mails, numbered sequentially and headed "E Bertelsmann presentation".

Education

14. The right of a private school partially funded by the German Government to insist on religious education on a supra-denominational basis for learners admitted to the institution was upheld by the High Court – see the judgment Annexure "4" - , in part because the contract signed by the

school and the learner's parent contained a clause in which the parent agreed to submit her child to such instruction. The constitutional challenge based upon the basic right to freedom of religion was dismissed on this ground. The Wittmann – decision contains the important phrase “*Freedom of association entails the right with others to exclude non-conformists*”. This phrase was quoted with approval in Taylor v Kurtstag which is referred to below in the context of the fundamental right to freedom of association in a religious context.

15. The post-apartheid National Schools Act outlaws corporal punishment in schools on the grounds that the practice is incompatible with the foundational constitutional value of human dignity. A private Christian Education Foundation challenged the abrogation of the school's right to chastise male children with their parents' prior consent. The challenge was dismissed by the court of first instance and on appeal by the CC – see the decisions Annexures “5” and “6” – on the basis that the infliction of corporal punishment was in conflict with the constitutionally protected right of the child to personal and bodily integrity and to protection of his or her dignity. (Anecdotal evidence does suggest, however, that the practice is still widespread, in spite of some teachers having been prosecuted for assault and other offences for imposing such punishment.)

16. In 2003, the then Minister of National Education published the government's policy for religious education in public schools – Annexure “7” – which foresees a non-proselytizing approach to informative religious instruction. Outcomes-based education as teaching model has recently been abandoned because of its failure to produce the desired results, but

that change will have little impact on the policy itself. It is clear that it envisages education on the basis of information concerning, and inculcating respect for, all religions from a neutral stance.

17. In *Pillay*, the wearing of a nose stud by a learner based upon cultural traditions – with some religious overlay - in conflict with the school's dress code, was overruled on the basis that the right to respect cultural traditions was part and parcel of the right not to be discriminated against. A copy of the decision is Annexure "8".

Rastafarians

18. The rationale in *Pillay* is reflected in the decision of *Department of Correctional Services and another v Popcru and others* - Annexure "9" - which overruled a disciplinary tribunal's sanction of warders displaying Rastafarian dreadlocks as part of their religious beliefs, in conflict with the prison dress code, and upheld the right of the employees to practice their religion in the workplace, even though the dress code was transgressed thereby and prison discipline might be undermined to a certain extent. See also the comment by Prof Pierre de Vos in 'Constitutionally speaking', Annexure "10".

19. The Rastafarian challenge was less successful in *Prince v President of the Cape Law Society and Others*. Annexure "11". The applicant sought admission as an attorney even though he had been convicted of the possession of Cannabis and freely admitted that he would continue to use the 'sacred herb' even though it is regarded as a habit-forming drug and possession, use thereof and trade therein is prohibited by law. The court

held that the rationale of preventing drug abuse by the population was reasonable and the resultant limitation of the right to practice religion by smoking a prohibited drug was justifiable in a free and democratic society. Following further arrests and prosecution, Prince is now launching a constitutional challenge against the legislative enactments that criminalize the possession and use of cannabis on a number of grounds, including the right to practice the Rastafarian religion. The case is still pending.

Gay and lesbian rights

20. Gay and lesbian rights cannot be ignored in a discussion of the interaction and tension between religion and human rights. Most mainstream religions experience a significant internal debate about the acceptance or otherwise of gay and lesbian relationships, the ordination of gay and lesbian priests and pastors and the employment of gay organists or other staff in congregations and administrative positions.
21. South Africa has taken great strides in the liberation of gays and lesbians, and cities like Cape Town and Johannesburg are known as pink centres and enjoy world – wide renown for their gay parades. On the other hand there is fierce opposition to gays and lesbians in many quarters of a more traditional ilk and attacks on gays and lesbians, including corrective rape and murder, are not uncommon.
22. A raft of decisions establishing the gay and lesbian communities' fundamental rights to equal treatment in the workplace, to freedom from criminal sanction against intimacy and prosecution for the practice thereof;

the right to have the life partners share in the other partner's pension; the right to enter into civil unions and raise children lead to the passing of the Civil Union Act which sanctions both marriage and civil unions: See Annexure "12" for some of the decisions. Prominent South Africans have identified themselves as belonging to this community, among them a very well-known member of the Constitutional Court.

23. Churches and congregations have not always welcomed the presence of gay office bearers. A lesbian priest in an Anglican congregation in the Western Cape openly lived with her lover in the church manse without sanction. When she announced her intention to marry her partner, however, the church disciplined her and terminated her employment. She lost a court challenge on the grounds that she should have submitted to arbitration first (presumably in terms of her employment contract), while the church opposed the application for re-instatement on the grounds that knowingly acted in conflict with the church's present instruction that no-one may take positive steps toward a same-sex marriage. The priest has not been divorced from her then partner but has entered into a new relationship, intends to marry again and, according to the media, still plans to obtain relief against the church. As is often the case in these matters, the church has been severely criticized by some commentators – see Prof Pierre de Vos; 'Constitutionally speaking' – Annexure "13".

24. In 2008, a Pretoria Dutch Reformed Church congregation fared less well in court after terminating the employment of a gay organist who had not disclosed his lifestyle when seeking employment. The court ruled that the

termination of his employment was discriminatory and transgressed the right to equal treatment and awarded him damages.

25. There is, however, still wide-spread public disapproval of gay and lesbian relationships. There have been repeated instances of privately-owned wedding chapels and similar venues refusing to allow gays or lesbian the use of such facilities, with resultant complaints to the Equality Courts and fines being imposed upon the offending business.

Freedom of choice of religion

26. It is clear that the Constitution protects the right to choose a religion and to practice the same. This freedom of choice was taken to the extreme by a court in an unopposed divorce matter, *Kotze v Kotze*, Annexure "14", when the presiding judge refused to make a clause in the parties' settlement agreement part of the court order that both parents would ensure that their child enjoyed a full education in their church. The boy was three years old at the time. The judge opined that the child would be deprived of his freedom to choose a religion if he were to be subjected to such an education and upbringing. (Ordinarily a court should call for argument by interested parties and churches and appoint a *curator ad litem* to the child before interfering to this extent in the parents' choice without further enquiry. The decision has not, to my knowledge, been followed by other courts).

27. In *Taylor v Kurtstag and Others* – Annexure "15" - the right of a Jewish community congregated in a particular synagogue to exclude a member

who had manifestly transgressed fundamental principles of the community's faith and was not prepared to abandon his position was upheld by the Johannesburg High Court, quoting the Wittmann decision among many others in respect of the right to exclude dissidents.

Abortion

28. The South African Choice on Termination of Pregnancy Act 92 of 1996 is among the most liberal in the world, if not the most liberal. It allows abortion on demand, by any female person of any age, without the consent of any parent or guardian, albeit after counseling that must be given to minors seeking an abortion. If counseling is refused, the abortion may not be denied.

29. This Act was challenged twice in the High Court by the Christian Lawyers Association of South Africa. In the first, *Christian Lawyers' Association of South Africa & Others v Minister of Health & Others* 1998 (4) SA 1113 (T), - Annexure "16" - the applicant argued that the fundamental right to life was transgressed by placing the Act on the Statute book. This approach was premised upon the fact that a fetus is already alive and imbued with a soul. (I had the privilege of leading the applicants' legal team). The second challenge proceeded on the basis that the failure to ensure proper counseling of a minor before allowing an abortion to be performed was in conflict with the mother's right to bodily integrity and failed to protect minor's against rash and ill-informed decisions to have an abortion: *Christian Lawyers Association v Minister of Health & Others (Reproductive*

Health Alliance as amicus curiae) 2005 (1) SA 509 (T). Annexure “17”.

Both challenges foundered at the exception stage.

30. Since the introduction of the Act at least 250 000 abortions have been performed legally in South Africa per year. In a twist of irony, and at the very moment of writing this summary, the authorities issued a statement complaining that young people were abusing the system as a birth control measure. It is a worrisome picture indeed.

Children

31. The South African Constitution decrees in section 28 (2) thereof that the interests of children are paramount under all circumstances, although this right is not unlimited and may be overridden by the need to comply with international covenants such as the Hague Convention: *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) – Annexure “18”. In this matter the court held that the short – term best interests of the child might have to yield to the long – term interest of surrendering it to the requesting State and thereby prevent child abduction for all children. The limitation of the paramountcy of the rights of the child was therefore justified.

32. In a further extension of the protection of a child’s dignity and physical integrity, the Parliament is at present considering a statute that would prohibit all corporal punishment of minors, including a reasonable chastisement by a parent in the privacy of the home administered on reasonable grounds. It is likely that all arguments to the contrary will be overridden. The enforcement of such an Act will be highly problematical,

though, as South Africa has many communities that regard corporal punishment as appropriate and, indeed, an article of faith.

33. At common law in South Africa, stepparents were not obliged to support stepchildren, nor was the reverse applicable, a situation that was terminated by the court in *Heystek v Heystek* 2002 (2) SA 754 (T) – Annexure “19”. Stepparents and –children have a duty to mutual support, at the very least during the subsistence of the marriage of the stepparent to the natural parent.

34. Also at common law children born out of wedlock were punished for the sins of the fathers by being denied the right to inherit intestate from their father. This was changed in a series of decisions: *Bhe & Others v Magistrate Khayelitsha, & Others (Commission for Gender Equality as amicus curiae)* and 2 other similar cases 2005 (1) SA 580 (CC) – Annexure “20”.

Prostitution (Sex workers)

35. Prostitution remains illegal in South Africa - for the time being at least. There are strong moves to decriminalize the practice, which is prevalent and conducted openly in the larger towns and cities. The South African Law Commission is considering proposals to regulate and possibly permit the oldest profession to be followed without criminal sanction. The ruling party's Women's League has recently added its voice to the range of calls to this effect.

36. But while prostitution is still illegal, the Labour Appeal Court has ruled that sex workers are entitled to fair labour practices in the event of dismissal

and similar issues arising in the workplace: *Kylie v Commission for Conciliation, Mediation and Arbitration* 2010 (4) SA 383 (LAC) – Annexure “21”. The right to fair treatment may be slightly curtailed because of the illegality of the work itself.

37. Sex workers have – not unlike the gay and lesbian community – strong advocacy groups that engage on their behalf and keep their issues in the limelight. The police were interdicted from arresting sex workers in Cape Town while canvassing in the streets because the police knew that it was highly unlikely that a prosecution would follow such arrest, rendering the arrest illegal and an invasion of the prostitutes’ rights to dignity and freedom: *Sex Workers’ Education & Advocacy Task Force v Minister of Safety and Security* 2007 (6) SA 613 (WCC) – Annexure “22”.

Right to protection against insults suggesting Christian minister standing in Satan’s service

38. A Christian minister embroiled in a dispute with another pastor over the sale of a church building is entitled to an interdict preventing the offending pastor from posting insults on his face book page accusing the former of standing in Satan’ service: *Dutch Reformed Church Vergesig & Another v Sooknunan* 2010 (^) SA 209 (GSJ) – Annexure “23”.

Muslim marriages

39. In traditional Muslim law, women in a polygamous union are not entitled to maintenance from their predeceased husband, nor are they entitled to inherit intestate. The CC allowed inroads into this dispensation by awarding maintenance to a surviving spouse to be claimed from the deceased husband's estate in *Daniels v Campbell* 2004 (5) SA331 (CC); - Annexure "24"; and by allowing two surviving women from a polygamous union to inherit: *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) – Annexure "25".

Customary African polygamous marriages

40. In customary law, a second and further marriage may traditionally entered into without the consent or even the knowledge of the first spouse or previous spouses. The Recognition of Customary Marriages Act 120 of 1998 now demands that written consent be obtained from the first or other spouses before a further union can be entered into, which was applied to the particular traditional legal system (of which there are many) by the CC in *MM v MN & Another* 2013 (4) SA 415 (CC) – Annexure "25".

South African Charter of Religious Rights and Freedoms

41. Many of the developments sketched above have alarmed Christians and members of other religions. The active and sometimes aggressive advancement of activities that are abhorrent to traditional religious communities, who feel beleaguered and deeply concerned about the effect the advancement of human rights in some areas has on family life and

children's moral integrity and safety, has led to the preparation of the South African Charter of Religious Rights and Freedoms. This Charter may be recognized by Parliament in terms of the Constitution, but so far the draft Charter has not so been adopted. The drafting committee, of which Mr Shawn Boshoff of the Church of Jesus Christ of Latter Day Saints is a member, continues to lobby for its acceptance as a response to some of the concerns expressed above.

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