



## Law, constitutions and religious organizations / choosing a human rights language

by

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The sweeping constitutional changes brought about by the adoption of the "interim Constitution" in 1993 and the "final Constitution" in 1996 have resulted in a vastly different relationship between the state and Christianity in South Africa to that which existed for most of the 20<sup>th</sup> century, as well as different obligations and rights for all religions in the country. Prior to the interim Constitution, there was a close identification between the state and Christianity in South Africa, as well as little regard for minority religions. Subsequent to 1993, there has been a much greater separation between Christianity and the state, as well as much greater respect for, and inclusion of, other religions. The tone has been set by the Constitutions, which, unlike their predecessors, have not had Preambles containing pledges to "uphold Christian values and civilized norms", or statements that the South African people "are conscious of our responsibility towards God and man" and "acknowledge the sovereignty and guidance of Almighty God". Instead, the Constitutions have been infused by references to the values of equality, dignity and freedom in an open and democratic society and have particularly stressed the importance of equal respect and inclusion for those who were disadvantaged and marginalised under the apartheid order.

It is clearly very important for the churches to possess an understanding of, and sensitivity to, the changes wrought by the new constitutional dispensation in spheres that concern them. This paper will consequently attempt to provide a framework (from a legal perspective) within which the impact of the interim and final Constitutions on Christianity and other religions can be assessed. To this end, three basic questions will be posed:

1. What degree of separation between church and state is imposed by the new Constitutions (and what would be the optimal level of church-state interaction)?
2. What rights and duties (or protections and obligations) are bestowed on Christians and Christian organizations by the final Constitution?
3. Is there still a role for Christian arguments and moral positions in the legislative, executive and judicial domains?

### ***1. What degree of separation of church and state is imposed by the Constitutions (and what would be the optimal relationship)?***

*Legal position pre-1993:* As already mentioned, there was a close relationship between the state and Christianity (or at least a certain kind of Calvinist Christianity) in South Africa from the time of the formation of the Union in 1910 to 1993. This is shown by the number of legal rules prior to 1993 that had an overtly Judaeo-Christian rationale – some of the more prominent of which were the censorship provisions, the rules relating to "Christian national education", the laws restricting shopping, sporting and

entertainment events on Sunday, and the laws punishing gays and lesbians. Also significant of the state's Christian bias (and racism) was the non-recognition of Muslim and Hindu marriages on the basis that they were "contrary to public policy" (something which had consequences for, *inter alia*, spousal benefits, divorce, maintenance and succession).

*Legal position post-1993:* It was clear that such a close degree of co-operation between Christianity and the state – and such a manifest disregard for other religions – was not going to continue under the new Constitutions. What was not so clear, however, was what degree of church-state separation was required by the Bill of Rights. This issue was partially resolved by the Constitutional Court in late 1997 in a case involving a constitutional challenge to legislation dealing with prohibition on sales of wine by supermarkets on Sundays and "religious public holidays". The Constitutional Court rejected, by 6 votes to 3, the supermarket's challenge. Significantly, though, 5 of the 9 judges who heard the case asserted that endorsement of Christianity (or any religion) by the state was not permitted under the freedom of religion clause in the Constitution's Bill of Rights. At the same time, these 5 judges also held that the Constitution did not demand the same degree of church-state separation as required under the United States' Constitution (something demonstrated by the fact that the freedom of religion clause stated that school prayers were allowed, provided that they were "conducted on an equitable basis" and "attendance at them is free and voluntary"). Thus, it is not quite certain whether some form church-state co-operation that does not amount to endorsement (for example, situations in which the state "accommodates" one religion, or works in tandem with it) will be allowed under the majority's viewpoint. *Will it be permissible, for example, for the state to continue to have Good Friday as a national public holiday, on the basis that approximately 75% of South Africa's population are Christians and thus the majority of South Africans would wish to take this day as a holiday?* This remains to be resolved.

*What degree of church-state separation or interaction is optimal?* Because of the open-ended nature of the freedom of religion clause as regards the separation of church and state, as well as the failure of the Constitutional Court to resolve the issue definitively in the Sunday trading case, there is still scope for interested parties to influence the outcome of the constitutional debate. Thus far, there has been some discussion in legal circles on questions like: *what kind of church-state interaction would be best for the state and for society?* and, *what are the ramifications of insisting on a rigid separation of church and state?* In this regard, it has been argued that endorsement of a particular religion undermines freedom of religion (particularly the freedom of adherents of non-mainstream religions) and that close identification between church and state has a deleterious effect on free political discourse. Also, there have been trenchant observations about the links between religious marginalization and racial discrimination, social exclusion and political disempowerment. On the other hand, it has been pointed out how South African society is interwoven with practices that derive from Christian roots, and thus how it could be impractical as well as undesirable to attempt to impose a "wall of separation" between church and state. There has, not, however, been much discussion on the effects on Christianity of a greater divide between the church and the state; nor as to *what degree* of separation/interaction between the church and the state would be optimal for both. In the light of the importance of religious organizations for the functioning of civic society, such considerations deserve to be given greater exposure. Therefore, an important question to be discussed is: *where should South Africa position itself on the church-state identification continuum between the poles of total identification of church and state and complete non-identification with religion on the part of the state?*

## **2. What rights and duties are bestowed on Christians and Christian organizations by the final Constitution?**

*Rights of Christian Organizations:* Prior to 1993 there were significant examples of interference with Christianity by the state, even though Christianity was *de facto* the state religion. Well-known examples include the attempt by the government to restrict inter-racial worship in the 1957 (during Archbishop Geoffrey Clayton's tenure), the banning of Beyers Naude and his Christian Institute in the 1970s, and the

restrictions on travel imposed on Christian leaders like Archbishop Desmond Tutu and Allan Boesak. The latter instances were justified by the government on the basis that church leaders were interfering with politics and moving outside the religious realm.

Such interference would no longer be permissible, nor would the government be able to justify its actions on the basis of its own interpretation of the precepts of a particular faith. This would be primarily because of the freedom of religion clause in the Bill of Rights, which the Constitutional Court has interpreted to entail "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". A further relevant provision is the right of "cultural, religious and linguistic communities", which includes the right of persons belonging to a religious community to practise their religion, and to form, join and maintain religious associations; and the right to freedom of association. The right to freedom of movement, every citizen's right to a passport, and the right to freedom of association would also prevent some of the abuses of the past and give religious communities and leaders greater freedom to follow the dictates of their faith.

It is thus clear that religious organizations are to be given autonomy in their own sphere. *But, what if there is an overlap between the secular and religious spheres: for example, if an activity, necessary to a religion's practice, is outlawed by the state in a generally applicable statute (enacted for the good of society), or if conduct that is forbidden by a particular religion is required by a law for a valid, religiously-neutral reason? What should take precedence: the laws of the state, or the precepts of the religion?* There has thus far been one case before the Cape High Court that dealt with such an issue. In this matter (decided in March 1998), a Rastafarian indirectly challenged the validity of a law criminalizing the smoking of marijuana on the basis that it violated his right to religious freedom. The Rastafarian lost, in an outcome similar to that reached in a 1990 decision of the United States Supreme Court concerning the ingestion of peyote (a banned drug) by Native Americans. But the issue of whether religious precepts should always be trumped by the religious laws of a state is far from being resolved.

*Duties of Christian Organizations:* Perhaps the major challenge for churches and Christian organizations in the new constitutional dispensation is to bring their practices into line with that required by the Bill of Rights. It is not yet obvious whether, or to what extent, churches and Christian organizations will be legally required to conform with all the provisions of the Bill of Rights. But, in any event, it is incumbent on Christians to conform with the culture of rights. It will be deeply ironic if Christian organizations, after being among the leaders of the opposition to apartheid, are now among the most reluctant to implement the protections contained in the Bill of Rights.

The animating value of the new Constitutions is almost certainly that of equality. The equality clause is also the most inclusive of any such provision in a country's constitution, prohibiting unfair discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". Christian bodies will obviously be able to continue to differentiate on the basis of religion or belief – to suggest otherwise would be untenable. *But, what are the ramifications of this clause for the exclusion of women from the priesthood, or of married men, or of the rejection and marginalization of gays and lesbians in church bodies?* Church practice on these questions is based on centuries-old doctrine and theology. But there has to be some cognizance taken of the human rights culture in South Africa and the requirements and values of the Constitution. There would appear to be little doubt, for example, that gays and lesbians could no longer be excluded from employment in Christian businesses (like bookshops) or fired from non-religious posts in a religious institution. On the other hand, to require equality norms to be imposed on churches as regards positions of worship would have a dramatic effect on many denominations. The question therefore is: *where should the line be drawn in the implementation of rights provisions and the marrying of theology and the language of human rights?*

### **3. Is there still a role for Christian arguments and moral positions in the legislative, executive and judicial domains?**

The third question picks up on some of the issues highlighted in response to the earlier questions. This question can perhaps be broken up into two different sub-questions. The first, stemming from the discussion of "duties" in the previous section is: *is there a role for Christian arguments in the government, or in the judicial arena, if such Christian arguments advance positions contrary to those contained in the constitutional Bill of Rights?* This question finds expression quite pointedly in the sphere of equality (where Christian teachings were used to justify a demand for "sexual orientation" to be removed as a protected ground under the equality clause, and where Christianity was used as recently as 1993 to restrict the right of access of a lesbian mother to her children). It also arises very directly in relation to abortion. It seems relatively clear that the Constitution permits legislation sanctioning abortion. Women are, for example, given the right "to make decisions concerning reproduction" and to have "security in and control over their body". Also, the right to life does not appear to have been extended to a foetus. Nevertheless, Christians (the Christian Lawyers Association of SA) recently challenged (unsuccessfully) the Choice on Termination of Pregnancy Act 72 of 1996, clearly motivated by Christian principles.

The second question that arises under this section is a more general one and is one that derives from the earlier discussion concerning the separation of church and state. There it was stated that legislation or government action which has a religious purpose or a predominant religious effect will violate the right to freedom of religion. *But, what about religious arguments, generally, in the political/legal realm? Can religious language still be used by the legislator or executive or individuals elected to public office; and will religious reasons still have a place in political discourse?* Two contrasting positions have already emerged. For example, Professor Denise Meyerson (in her UCT Inaugural Lecture in October 1997) has argued that religious-based justification for legislation will no longer be permissible, because in public debates it is required that use be made only of what John Rawls calls "public reasons". A similar perspective has been advanced in the United States by a Law Professor, Kent Greenawalt, who has asserted that "explicit reliance [by legislators] on any controversial religious or other comprehensive view would be inappropriate", because "[w]hen legislators speak on political issues, they represent all their constituents". On the other hand, John de Gruchy, Barney Pityana and Frank Chikane called (in September 1995) for ANC MPs to be allowed an "open vote" on the 1996 abortion legislation so that they could vote according to conscience; while a political party like the African Christian Democratic Party have, as their name indicates, sought to ensure the presence of a Christian perspective in legislative debates.

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